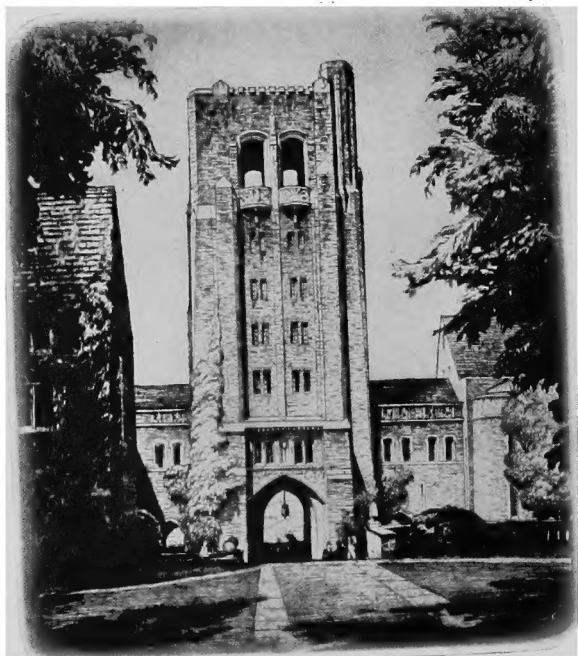


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# Business Corporations In New York

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A Treatise on all the law of the  
State of New York relating to  
all private business corporations,  
domestic and foreign

*With Forms and Text of Statutes  
as Amended to January 1st, 1919*

*by*

FRANK HUBBARD TWYEFFORT

Author of "NEW YORK ESTATES AND SURROGATES"  
of the New York State Bar

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*To*  
***C. L. K. T.***  
*'and*  
*the memory of*  
***L. P. T.***



## PREFACE

---

With the completion of the present volume the author accomplishes the task he set himself, when he determined to specialize in the law of decedents' estates and corporations, of writing a text-book on each of these subjects. The plan of this book is like that of his work on "New York Estates and Surrogates," that is, to begin at the logical starting-point (in the present treatise with a discussion of the law affecting "Promoters"), and to carry on consecutively to the final chapter on "Foreign Corporations." The author's endeavor in his prior book to make its contents speedily accessible to the busy practitioner by preparing a cyclopedic analysis as well as the usual index has not only been continued in the following pages but has been supplemented by a thumb index.

The law of corporations is so largely statutory that the author has printed the text of the various statutes affecting corporations at the end of the book in the alphabetical order in which they are found in the Consolidated Laws. He has also, in his citations, referred by section, chapter and year of enactment to the particular statute expounded in the apposite text, so that the careful lawyer might compare its wording with that of the statute as it stands when a concrete question is presented to him for answer.

The author acknowledges with thanks the permission of John N. Blair, Esq., Charles F. Bostwick, Esq., William H. Harkness, Esq., Donald Harper, Esq., and William Mason Smith, Esq., all of the New York Bar, to use various forms; and of Dean Chase, The Banks Law Publishing Company, The J. B. Lyon Company, and The Edward Thompson Company, to use various statutes; as well as the kindness of his publishers during the progress of his labors. He solicits suggestions for improvements in the book; and trusts it may be of help to his brother-lawyers.

FRANK H. TWYEFFORT.

128 Broadway, New York City, September, 1918.



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# CYCLOPÆDIC ANALYSES

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- II. INCORPORATION AND NAME.
- III. ORGANIZATION, BY-LAWS, SEAL AND BOOKS.
- IV. STOCK.
- V. STOCKHOLDERS.
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# BUSINESS CORPORATIONS IN NEW YORK

## CHAPTER I.

### PROMOTERS AND CORPORATORS.

#### I. *Promoters:*

A. *Definitions and Distinctions*, § 1.

B. *Powers and Liabilities:*

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4. *In Binding Corporation by Agreements*, § 5.

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#### II. *Corporators*, § 6.

**§ 1. Promoters: Definitions and Distinctions.**—A promoter is one who, before the incorporation or organization of a company has started, works to bring about such incorporation. He is distinguished from a corporator in that the latter does not exist until the incorporation has begun.

**§ 2. Id.: Powers and Liabilities; Under Agreements in General.**—While it is true that “ whenever a contract to form a corporation contemplates as a necessary feature or concomitant of the scheme of organization that the directors of the corporation when formed are to be deprived of their judgment and discretion in matters which come within the scope of their duty it will be declared void,” yet an agreement to form a corporation will be construed as meaning its formation on a lawful and honest basis, and “ it will not be assumed as matter of law that it was within the intention of the parties to organize a corporation, and have its stock issued in exchange for the property and rights of the plaintiff unless the directors or stockholders of the corporation should approve and ratify, after inquiry, the scheme as detailed in the contract.”<sup>1</sup> Equity will not compel specific performance of a contract to form a corporation if the parties to the contract are unable to agree upon the terms for the formation of the company and are unfriendly.<sup>2</sup> The evidence admissible

<sup>1</sup> *Electric Fireproofing Co. v. Smith*, 113 A. D. 615, 99 Supp. 37 (1906).

On the liability of promoters to the corporation and its members,

generally, see notes in 25 L.R.A. 90; 18 L.R.A.(N.S.) 1106; L.R.A.1916C, 1000.

<sup>2</sup> *Rudiger v. Coleman*, 112 A. D. 279, 98 Supp. 461 (1906).

to prove an agreement by one interested in the formation of a corporation to pay an attorney in its stock for services in launching it is discussed in the note case.<sup>3</sup>

§ 3. *Id.*: **Under Agreements Inter Sese.**—There is “no objection on the score of public policy, to an agreement between parties about to form a corporation, agreeing upon the general plan, upon which it is to be organized and conducted, so long as nothing is provided for inconsistent with the provisions of the statute, or immoral in itself;” *e. g.* an agreement vesting the management of the corporation in a firm, selling part of the consideration for the issue of stock to the corporation, “might not be binding upon the trustees of the corporation when organized, but such an agreement is not illegal.”<sup>4</sup> There is “no principle of public policy, which condemns an agreement between parties about to form a corporation, because by the arrangement, the capital stock is to be represented by property which they severally contribute, at a valuation agreed upon between themselves.”<sup>5</sup> A contract by which two people agree with a third to assist him in forming a corporation and to preclude any one from becoming a stockholder who would not agree in advance, in addition to paying cash for his holdings, that such third person should be employed as the corporation’s sole general agent so long as it lasted, subject to termination on six months’ notice, and should receive one third its gross receipts, is unenforceable as against public policy.<sup>6</sup> Individuals who, under their copartnership name, promote the organization of a corporation, are severally liable for each others’ misrepresentations and concealments made or done while engaged in such promotion.<sup>7</sup> An agreement by one promoter to take, own and hold one thousand shares, by another to take, own and hold nine hundred and ninety-eight shares, and by a third to take, own and hold two shares, and by the first, “if he shall at any time sell or assign nine hundred and ninety-eight shares,” to transfer the other two shares to the second, does not mean that the first must sell the nine hundred and ninety-eight

<sup>3</sup> Freeman v. Hartfield, 172 A. D. 164, 158 Supp. 350 (1916).

<sup>4</sup> Lorillard v. Clyde, 86 N. Y. 384 (1881).

<sup>5</sup> Lorillard v. Clyde, 86 N. Y. 384 (1881). “If it had appeared, that the organization of the corporation in this way was a device to defraud the public by putting valueless stock on the market, having an apparent

basis only, a different question would be presented.”

On liability of promoters *inter se*, see note in 18 L.R.A.(N.S.) 1121.

<sup>6</sup> Flaherty v. Cary, 62 A. D. 116, 70 Supp. 951 (1901); *aff’d* 174 N. Y. 550, 67 N. E. 1082.

<sup>7</sup> Walker v. Anglo-American Mortgage & Trust Co., 72 Hun, 334, 25 Supp. 432 (1893).

shares, if at all, at one time, but that when the first, by one sale or many, had disposed in the aggregate of nine hundred and ninety-eight shares, then he would transfer the remaining two shares to the second.<sup>8</sup>

**§ 4. Id.: Under Secret Agreements for Personal Profit.**—A secret agreement whereby promoters of a corporation, on surrender of their right to receive certain preferred stock for their efforts as such, are to get a percentage of the corporation's annual profits, will not be enforced after stock of the corporation has been bought by third parties without notice of the secret arrangement.<sup>9</sup> "Neither law nor equity countenances the making of secret profits by a promoter or a director of a corporation on the sale of property to the corporation. . . . It is only where the promoter informs every subscriber or the director informs every fellow director and stockholder that he is personally interested, and of the amount of profit he expects to make on a sale to the corporation, that the promoter or director will be permitted to make or retain a profit on such a sale. . . . The burden is on the promoter or director to show that his dealings were fair and that no undue advantage has been taken of his fellow subscribers or stockholders."<sup>10</sup> A corporation itself may sue to make a promoter account for secret profits made by him through a sale of land to it.<sup>11</sup>

**§ 5. Id.: In Binding Corporation by Agreements.**—" . . . the promoters of a corporation are not the corporation. The legal body is distinct from the individuals who compose it. The statute confers no authority upon the promoters of a corporation to enter into preliminary contracts binding the corporation when it shall come into existence. . . . But the corporation is at liberty to refuse to sanction them, and if its sanction is obtained by the act or co-operation of directors who have a private interest, . . . the corporation may . . . resist an action for specific performance, at

<sup>8</sup> *Burden v. Burden*, 159 N. Y. 287, 54 N. E. 17 (1899).

<sup>9</sup> *Dillon v. Commercial Cable Co.*, 87 Hun, 444, 34 Supp. 370 (1895).

<sup>10</sup> *Colton Improvement Co. v. Richter*, 26 Misc. 26, 55 Supp. 486 (1899). The fact that some of the stockholders and directors believed and had some knowledge that the promoter was profiting by the sale of land to it does not prevent the company from holding him to account.

<sup>11</sup> *Colton Improvement Company v. Richter*, 26 Misc. 26, 55 Supp. 486, (1899).

On liability of promoters for secret profits, see notes in 25 L.R.A. 92; 18 L.R.A.(N.S.) 1119.

Authorities discussing the question of secret dealings between vendor and one who promoted the organization of a corporate purchaser as a ground for rescission of contract are collated in a note in L.R.A.1916C, 1000.

least in a case where it has not accepted the consideration and taken the benefit.”<sup>12</sup> “A subsequently formed corporation is not bound by an agreement between its promoters (*citations*). It is only where such an agreement is ratified by the corporation that it becomes binding upon it.”<sup>13</sup> Promoters can fetter the corporation they foster with no contracts, such as the number of directors who shall manage the corporation’s affairs.<sup>14</sup> A promotion agreement resulting in fraud on the corporation formed in connection therewith may be set aside by it upon discovery of the fraud.<sup>15</sup> One giving his note to promoters of a corporation pursuant to a proposal made by them is not liable thereon to the corporation formed fifteen months thereafter, if, long before incorporation, he rescinded the proposal, sought to get back his note, and was unable to do so solely because of false representations as to its being misplaced or lost.<sup>16</sup> Voluntary surrender by promoters of their right to receive corporate stock for their services precludes specific performance of a contract theretofore made by the corporation with them to issue to them preferred stock receiving a stipulated dividend from net earnings.<sup>17</sup> “While a corporation is not bound by the engagements made on its behalf by its promoters before its organization, it may, after it is organized, make such engagements its contracts by adopting them as its own. Less evidence tending to show adoption will be required to establish it where the officers were also the promoters, than where the officers and promoters were different persons.”<sup>18</sup> “. . . an agreement made in behalf of a corporation about to be formed, although not initially binding upon it, may, by the company’s acts, after it attains a legal existence, be so ratified as to become a corporate obligation. This ratification may be effected by the person who entered into the original agreement, if that person, at the time of the ratification, has become an executive officer of the company, entitled in that capacity to bind it

<sup>12</sup> *Murison v. Syracuse, Geneva & Corning R. R. Co.*, 103 N. Y. 58, 8 N. E. 355 (1886).

<sup>13</sup> *Martin v. Remington-Martin Co.*, 95 A. D. 18, 88 Supp. 573 (1904).

<sup>14</sup> *Bond v. Atlantic Terra Cotta Co.*, 137 A. D. 671, 122 Supp. 425 (1910).

<sup>15</sup> *Finck v. Canadaway Fertilizer Co.*, 152 A. D. 391, 136 Supp. 914 (1912); mod. 208 N. Y. 607, 102 N. E. 1102.

<sup>16</sup> *Raegener v. Brockway*, 58 A. D. 166, 68 Supp. 712 (1901); aff’d 171 N. Y. 629, 63 N. E. 1121.

<sup>17</sup> *Dillon v. Commercial Cable Co.*, 87 Hun, 444, 34 Supp. 370 (1895).

<sup>18</sup> *Hall v. Herter Brothers*, 83 Hun, 19, 31 Supp. 692 (1894). “. . . when there are so few [five] interested in the management of a corporation, ordinary business may be transacted without the formality of resolutions. It may be done by conversation without formal votes.”

by such agreement.”<sup>19</sup> A contract made by one individual with another cannot be considered that of a corporation thereafter formed because the former individual became its president and stated to the latter that he was such corporation.<sup>20</sup> One seeking to recover from a corporation the value of services rendered partly at least before its incorporation should be permitted to prove his contract with the promoter of the corporation and its subsequent ratification thereof, and the services rendered thereunder.<sup>1</sup> One engaged to procure subscriptions to a corporation’s capital stock, which is to be organized, cannot bind the corporation by his agreement to take from a subscriber in payment of part of his subscription a check on a bank in which the subscriber had no funds, so as to preclude the corporation from suing on the check.<sup>2</sup> One accepting only as an officer of, and subscriber to stock of a corporation, the work of another in organizing the company, and this without knowledge that the latter claimed that he was personally responsible for the value of such work, cannot be held individually liable therefor.<sup>3</sup> Payments made by a company after incorporation in excess of a liability to an individual incurred after incorporation constitute ratification of a contract made with him prior to incorporation by the person who became the corporation’s president and treasurer.<sup>4</sup>

**§ 5a. Id.: Toward Subscribers for False Representations.—** Individuals promoting a corporation who make or conceal material facts are liable to those subscribers who are damaged by reliance thereon, whether such reliance is induced directly by the promoters or the latter’s agents.<sup>5</sup> “The promoter of a company, whether he be a director or not, who knowingly issues or sanctions the circulation of a false prospectus containing untrue statements of material facts naturally tending to mislead and to induce the public to purchase its stock or

<sup>19</sup> *Mesinger v. Mesinger Bicycle Saddle Co.*, 44 A. D. 26, 60 Supp. 431 (1899). A promoter made an agreement to hire plaintiff and pay him while away on a certain vacation as well as while actually working. When the promoter became president he accepted plaintiff’s services pursuant to the agreement. Held, an implied ratification binding the corporation.

<sup>20</sup> *Horowitz v. Broads Manufacturing Co.*, 54 Misc. 569, 104 Supp. 988 (1907).

<sup>1</sup> *Gordon v. House of Childhood,*

*Inc.*, 83 Misc. 74, 144 Supp. 685 (1913).

<sup>2</sup> *Syracuse, Phoenix & Oswego R. Co. v. Gere*, 4 Hun, 392 (1875).

<sup>3</sup> *Hepner v. Maybury*, 23 Misc. 262, 51 Supp. 170 (1898).

<sup>4</sup> *Galdieri & Co., Inc. v. Waist Co.*, 98 Misc. 612, 163 Supp. 154 (1917).

On liability of corporation on contracts of promoters, see notes in 26 L.R.A. 544; 50 L.R.A. (N.S.) 979.

<sup>5</sup> *Walker v. Anglo-American Mortgage & Trust Co.*, 72 Hun, 334, 25 Supp. 432 (1893).

other securities is unquestionably responsible to those who are injured thereby (*citation*). Where there are a number of such promoters all the co-adventurers are held liable in damages for the fraud of an agent employed by them to effect the sale of the corporate securities without reference to their own moral guilt or innocence.”<sup>6</sup> Promoters of a corporation occupy, before its organization, a position of trust and confidence towards those whom they induce to invest in the enterprise, and if they do not disclose to such investors the price they are to pay for the subject-matter of the incorporation, or that they do not intend to exercise their options to purchase such matter unless sufficient funds are furnished by others to pay for the property and all the corporate organization expenses, leaving for distribution among themselves a majority of the stock, they are liable in damages for the loss sustained by those whom they induce to invest in the shares.<sup>7</sup> A statement by a promoter to one subscribing to a syndicate agreement without solicitation that the former’s subscription of \$500,000 then appearing on the agreement, would be paid in cash does not amount to a fraudulent misrepresentation entitling the latter to rescind the agreement, if the subscription was paid by turning in stock instead of cash, provided the purchase by the syndicate managers of such stock was proper.<sup>8</sup> One buying stock and receiving certificates therefor pursuant to and in reliance upon circulars generally distributed reciting the organization of the corporation may recover the amount paid for such certificates from the one responsible for the purchase, certificates and circulars, if the corporation was not in fact organized.<sup>9</sup> Persons devising a fraudulent scheme for the consolidation of certain railroads owned and controlled by them and issuing bonds upon false representations as to the timber lands to be furnished as added security under the mortgage to make the bonds secure and salable, may be made liable to one injured thereby; and the corporation, too, if it was the instrumentality employed by them.<sup>10</sup>

**§ 6. Corporators.**—“Corporators exist before stockholders, and do not exist with them. When stockholders come in, corporators cease to be.”<sup>11</sup> Incorporators are liable from

<sup>6</sup> Downey v. Finucane, 205 N. Y. 251, 40 L.R.A.(N.S.) 307, 98 N. E. (1912).

<sup>7</sup> Brewster v. Hatch, 122 N. Y. 349, 25 N. E. 505 (1890).

<sup>8</sup> Heckscher v. Edenborn, 203 N. Y. 210, 96 N. E. 441 (1911).

<sup>9</sup> Fenn v. Curtis, 23 Hun, 384 (1881).

<sup>10</sup> O’Beirne v. Bullis, 158 N. Y. 466, 53 N. E. 211 (1899).

<sup>11</sup> Chase v. Lord, 77 N. Y. 1 (1879).

the time of the granting of a charter to their corporation for all acts whether it had a president or other officer, because from that time it becomes a corporation for all intents and purposes; and, as the officers are the only medium through which it may act, the incorporators may delegate its power to any of its members or require all to act together.<sup>12</sup> A corporator is a *competent* witness in an action to which the corporation is a party.<sup>13</sup> A corporation which has obtained from the Legislature the single right of being a corporation and all the powers of which might be exercised by individuals may determine for itself who shall be admitted to be incorporators.<sup>14</sup> The Attorney-General may maintain an action upon either his own information or the complaint of a private person against one or more persons who act as a corporation within the State without being duly incorporated, or exercise within the State any corporate rights, privileges or franchises not granted to them by the law of the State.<sup>15</sup> The statute, hereinafter quoted, provides that the action is triable as of right by a jury, and that the final judgment may do certain things.<sup>16</sup>

<sup>12</sup> *Harrison v. Vermont Mangane Co.*, 1 Misc. 402, 20 Supp. 894 (1892).

<sup>13</sup> *Couro v. Port Henry Iron Co.*, 12 Barb. 27 (1851); Code of 1849, §§ 397-8. See present C. C. P. § 839.

<sup>14</sup> *People v. Holstein-Friesian Assn.*, 41 Hun, 439 (1886).

<sup>15</sup> C. C. P. § 1948.

<sup>16</sup> C. C. P. §§ 1950, 1956.

## CHAPTER II.

### INCORPORATION AND NAME.

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**§ 7. Incorporation: Definitions, Distinctions and Nature of, In General.**—The term corporation as used in the New York State Constitution must be construed to include all associations and joint stock companies having any of the powers or privileges of corporations not possessed by individuals or

partnerships.<sup>1</sup> "A corporation shall be either, (1) a municipal corporation; (2) a stock corporation, or (3) a non-stock corporation. A stock corporation shall be either, (1) a moneyed corporation; (2) a railroad or other transportation corporation, or (3) a business corporation. A non-stock corporation shall be either, (1) a religious corporation; (2) a membership corporation, or (3) any corporation other than a stock corporation."<sup>2</sup> The present treatise has to do with business stock corporations. "A 'stock corporation' is a corporation having a capital stock divided into shares, and which is authorized by law to distribute to the holders thereof dividends on shares of the surplus profits of the corporation. A corporation is not a stock corporation because of having issued certificates called certificates of stock, but which are in fact merely certificates of membership, and which is not authorized by law to distribute to its members any dividends on shares of profits arising from the operations of the corporation."<sup>3</sup> "A 'domestic corporation' is a corporation incorporated by or under the laws of the State or colony of New York. Every corporation which is not a domestic corporation is a foreign corporation, except as provided by the code of civil procedure for the purpose of construing such code."<sup>4</sup> "A corporation is somewhat like a partnership, if one were possible, conducted wholly by agents where the copartners have power to appoint the agents, but are not responsible for their acts. The power to manage its affairs resides in the directors, who are its agents, but the power to elect directors resides in the stockholders. The right to vote for directors and upon propositions to increase the stock or mortgage the assets, is about all the power the stockholder has. So long as the management is honest, within the corporate powers and involves no

<sup>1</sup> N. Y. Const. of 1894, art. 8, § 53. A corporation authorized to act as administrator is to be considered a "person" in the statutes prescribing who shall be entitled to letters of administration. C. C. P. §§ 2588, 2603. The term "person" used in the provisions of the Code of Civil Procedure relating to proceedings for the condemnation of real property includes a corporation. C. C. P. § 3358.

<sup>2</sup> Gen. Corp. L. § 2 (L. 1909, c. 28), which adds: "A reference in a general law to a class of cor-

porations described in accordance with this classification shall include all corporations theretofore formed belonging to such class."

<sup>3</sup> Gen. Corp. L. § 3 (L. 1909, c. 28).

<sup>4</sup> Gen. Corp. L. § 3 (L. 1909, c. 28). See Code of Civil Procedure, § 3343, subd. 18, which defines a "domestic corporation" as one created by or under the laws of New York State; or located in New York State, and created by or under the laws of the United States, or by or pursuant to the laws in

waste, the stockholders cannot interfere, even if the administration is feeble and unsatisfactory, but must correct such evils through their power to elect other directors.”<sup>5</sup> “The title to the property of a company is in the fictitious entity called the corporation, and if all the stock were owned by a single person he could not by his conveyance affect the legal title.”<sup>6</sup> That officers of a corporation own about all its stock does not permit them to appropriate its property as their own; and if they do, they are as liable as if they took the property of an individual.<sup>7</sup>

§ 8. **Id.: Partnership and Joint Venture.**—“It is said . . . that the corporation here is in effect nothing more than an incorporated partnership. This is true to a limited extent, but I do not assent to that doctrine in its full scope and entirety. Persons forming a corporation thereby gain many immunities and privileges of which they are not possessed as members of a partnership. Their liability for the debts and obligations of the business is limited and the death of one of the members does not work a dissolution of the corporation, as it does in the case of a partnership. For these privileges the parties have to pay a price. They have not the same unrestricted control and management of their enterprise as they would have as partners, nor is the right of a single party to the joint enterprise safeguarded either as against the State or against the other parties in the case of a corporation as in the case of a partnership.”<sup>8</sup> “. . . parties assuming to act in a corporate capacity without a legal organization as a corporate body, are liable as partners to those with whom they contract . . . ; but when it is sought to charge any one of them as a corporator or as a partner, the same rule applies to each. If as a corporator, he must be shown to have been such when the contract sued upon was made (*citation*). If as a partner he must be shown to have been a member of the firm when the contract sued upon was made.”<sup>9</sup> Persons receiving goods are liable as partners therefor if it develop that the company through which they bought them was not a

force in the colony of New York before the 19th day of April, in the year 1775.

<sup>5</sup> *Stokes v. Continental Trust Co.*, 186 N. Y. 285, 12 L.R.A.(N.S.) 969, 78 N. E. 1090 (1906).

<sup>6</sup> *Buffalo L., T. & S. D. Co. v. Medina Gas Co.*, 162 N. Y. 67, 56 N. E. 505 (1900).

<sup>7</sup> *Saranac & L. P. R. Co. v.*

*Arnold*, 167 N. Y. 368, 60 N. E. 647 (1901).

At what stage in the proceeding is an organization deemed to be organized, see note in 18 L.R.A.(N.S.) 748.

<sup>8</sup> *Drucklieb v. Harris*, 209 N. Y. 211, 102 N. E. 599 (1913).

<sup>9</sup> *Fuller v. Rowe*, 57 N. Y. 23 (1874).

corporation (though they thought it was) because of defects in organization.<sup>10</sup> "A joint adventure between persons for the business of purchasing or selling property may create a quasi partnership relation, which will subject him to the responsibility to account to whom, or by whom, property has been intrusted, or received. Those, however, who engage in the formation of a company or corporation, are not partners, whatever their relations in the event of a successful termination. If the scheme prove abortive, the parties to it, certainly, are remitted to their former situation."<sup>11</sup> A syndicate agreement by which a particular railroad is to be acquired, extended, another road built, coal properties along such roads' routes acquired, and the sale or transfer thereof to a corporation and the division of the money or securities received therefor among the syndicate subscribers accomplished, is not strictly a partnership, though it has many of a partnership's features, but is what is now generally known as a joint venture.<sup>12</sup> A syndicate agreement under which the subscribers have no right, title or interest as such in properties to be acquired, but only the right upon the termination or closing out of the syndicate to their respective shares of the securities or moneys received by the syndicate managers for the properties does not constitute the parties thereto partners as between themselves.<sup>13</sup>

**§ 9. Id.: De Facto and De Jure Corporations.**—"When it has fully complied with the law under which it is organized, it is a corporation *de jure*; but where the persons desiring to form such a corporation have made the attempt to comply with the law and have failed in some essential matter, and afterwards have done business under such defective organization, then it is known as a corporation *de facto*. But it will be observed in cases of *de facto* corporations there must have been at least an attempt made to organize under some law. If no such attempt has been made, and yet parties assume to act as if there had, the concern is not even a *de facto* corporation, but a sham and a fraud, and all the parties connected with it will be held liable as copartners and not as members of a corporation. Thus it will be seen that two things are necessary to be shown in order to establish the existence of a

<sup>10</sup> Perrine v. Levin, 68 Misc. 327, 123 Supp. 1007 (1910).

<sup>11</sup> Schantz v. Oakman, 163 N. Y. 148, 57 N. E. 288 (1900).

<sup>12</sup> Jones v. Gould, 209 N. Y. 419, 103 N. E. 720 (1913).

<sup>13</sup> Jones v. Gould, 209 N. Y. 419, 103 N. E. 720 (1913).

As to partnership liability of stockholders in case of corporations *de facto*, see note in 17 L.R.A. 551.

corporation *de facto*: *First*, the existence of a charter or some law under which a corporation with the powers assumed might lawfully be created; *second*, a user by the party to the action of the rights claimed to be conferred by such charter or law.”<sup>14</sup> “. . . as against all persons who have entered into contracts with bodies assuming to act in a corporate capacity, it is sufficient for such bodies to show themselves to be corporations *de facto*. This cannot be done by simply showing that they have acted as corporations for any period of time, however long. Two things are necessary to be shown, in order to establish the existence of a corporation *de facto*, viz.: 1, The existence of a charter, or some law under which a corporation with the powers assumed might be lawfully created; and, 2, a user by the party to the suit, of the rights claimed to be conferred by such charter or law. . . . parties recognizing the existence of corporations by dealing with them, have no right to object to any irregularity in their organization or any subsequent abuse of their powers, not connected with such dealing. As long as these are overlooked or tolerated by the State, it is not for individuals to call them in question.”<sup>15</sup> “. . . so long as upon the face of the certificate [of incorporation] a corporation was apparently organized, as to persons dealing in good faith upon the strength of such organization it should be held that such incorporation was valid, and that until impeached in a direct proceeding, or at least in some action where the fact was alleged and an opportunity given to meet the issue, such certificate would be conclusive.”<sup>16</sup> “. . . under . . . general acts for the formation of corporations, if the papers filed, by which the corporation is sought to be created, are colorable, but so defective that, in a proceeding on the part of the State against it, it would for that reason be dissolved, yet by acts of user under such an organization it becomes a corporation *de facto*, and no advantage can be taken of such defect in its constitution, collaterally, by any person.”<sup>17</sup> A corporation organized by filing the requisite certificate in the offices of the Secretary of State and County Clerk, which has exercised its franchise, made calls on its stockholders,

<sup>14</sup> Bradley Fertilizer Co. v. South Publishing Co., 4 Misc. 172, 23 Supp. 675 (1893).

<sup>15</sup> Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482 (1859).

<sup>16</sup> Green v. Grigg, 98 A. D. 445,

90 Supp. 565 (1904).

<sup>17</sup> The Buffalo and Allegheny R. R. Co. v. Cary, 26 N. Y. 75 (1862). The quotation is from the opinion below, printed in the Court of Appeals, because no opinion was given by the latter.

erected a building and done other acts in exercise of corporate rights is a valid *de facto* and *de jure* corporation as between its stockholders and all third persons until the State shall question its existence.<sup>18</sup> When the proceedings for the incorporation of a company are regular upon their face and it, while in the actual exercise of all its corporate functions, is recognized by the law-making power of the State as a corporation, it becomes by such recognition, *ipso facto*, a legal corporation.<sup>19</sup> A corporation organized under a legislative enactment later found void and which has exercised corporate powers under the act is a corporation *de facto*, if not *de jure*, and its existence can be terminated only by the judgment of a competent court or an express act of the legislature.<sup>20</sup> The mere execution of a certificate of incorporation without any action taken towards filing it or any statutory step taken to comply with the law does not make the corporation a *de facto* corporation, but at most merely constitutes an agreement by the signers of the certificate *inter sese*, probably rendering them liable as partners in doing business in the corporate name.<sup>1</sup> The filing of a certificate of incorporation signed by the incorporators above the attestation clause, the execution of which is acknowledged by them, and to which a certificate of acknowledgment is subjoined, when followed by action by the incorporators as though the corporation were duly formed, is at least sufficient to constitute a *de facto* corporation.<sup>2</sup>

**§ 10. Id.: Certificate of Incorporation, Definitions and Distinctions.**—"The term 'certificate of incorporation' shall include articles of association or any other written instrument required by law to be filed, to effect the incorporation of a corporation, including a certified copy of an original certificate of incorporation filed for such purpose in pursuance of law."<sup>3</sup> "The charter of a corporation is the law which gives it existence as such. That is its general franchise, which can be repealed at the will of the legislature. A special franchise is the right, granted by the public, to use public property for a public use, but with private profit, such as the right to

<sup>18</sup> *Dorris v. Sweeney*, 64 Barb. 636 (1873); Act of 1848.

<sup>19</sup> *Black River & Utica R. R. Co. v. Barnerd*, 31 Barb. 258 (1859).

<sup>20</sup> *Coxe v. State*, 144 N. Y. 396, 39 N. E. 400 (1895).

<sup>1</sup> *Stevens v. Episcopal Church History Co.*, 140 A. D. 570, 125 Supp. 573 (1910).

On right of *de facto* corporation to exercise power of eminent domain, see notes in 2 L.R.A.(N.S.) 144; 50 L.R.A.(N.S.) 236.

<sup>2</sup> *Lyell Avenue Lumber Co. v. Lighthouse*, 137 A. D. 422, 121 Supp. 802 (1910).

<sup>3</sup> Gen. Corp. L. § 3 (L. 1909, c. 28).

build and operate a railroad in the streets of a city. Such a franchise, when acted upon, becomes property and cannot be repealed, unless power to do so is reserved in the grant, although it may be condemned upon making compensation.”<sup>4</sup>

**§ 11. Id.: Governing Statutes, In General.**—The statute (hereinafter given in full) permits three or more persons to become a stock corporation, by making, signing, acknowledging and filing a prescribed certificate, for any lawful business purpose except that of a moneyed corporation, of a corporation provided by the banking, insurance, railroad and transportation corporations’ laws, of an educational institution or of a corporation which may be incorporated as provided in the education law, or of conducting the practice of law.<sup>5</sup> The certificate of incorporation of any corporation may contain any provision for the regulation of the business and the conduct of the affairs of the corporation, and any limitation upon its powers, which does not exempt its directors and stockholders from the performance of any obligation or the performance of any duty imposed by law.<sup>6</sup> If authorized so to do by a provision in its certificate of incorporation, a domestic or foreign stock corporation may purchase, acquire, hold and dispose of the stocks, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor its stock, bonds or other obligations.<sup>7</sup> “A corporation organized under a general law is upon precisely the same footing as one constitutionally organized under a special law which contains all the provisions of the general law.”<sup>8</sup> “Every act incorporating a company for private gain and generally all acts relating to a single corporation are private acts, while an act relating to all corporations would be a public act. So far as we have been able to discover it has never before been seriously contended that an act incorporating a company with private capital to be solely controlled by a board of directors selected from the stockholders and the profits of which are to be divided upon the capital stock is not a private corporation.”<sup>9</sup> A corporation having charter

<sup>4</sup>Lord v. Equitable Life Assurance Soc., 194 N. Y. 212, 22 L.R.A. (N.S.) 420, 87 N. E. 443 (1909).

<sup>5</sup>Bus. Corps. L. § 2 (L. 1909, c. 12), and § 2-a (L. 1909, c. 484). The text of these sections will be found in the back of this book where all the sections of Business Corporations Law are printed in full and consecutively.

<sup>6</sup>Gen. Corp. L. § 10 (L. 1909, c. 28).

<sup>7</sup>St. Corp. L. § 52 (L. 1909, c. 61).

<sup>8</sup>Brooklyn Steam Transit Co. v. City of Brooklyn, 78 N. Y. 524 (1879).

<sup>9</sup>Economic P. & C. Co. v. City of Buffalo, 195 N. Y. 286, 88 N. E. 389 (1909).

power to contract with a merchant that it would investigate the financial condition of his customers, guaranteeing the accuracy of its statements in material respects and providing for liquidated damages, but not guaranteeing the solvency of anyone, is not confined to incorporation under the Insurance Law, but is entitled to incorporate under the Business Corporations Law.<sup>10</sup>

**§ 12. Id.: Constitutional Limitations.**—"No private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title."<sup>11</sup> "The legislature shall not pass a private or local bill . . . granting to any corporation . . . the right to lay down railroad tracks, granting to any private corporation . . . any exclusive privilege, immunity or franchise whatever, granting to any . . . corporation, an exemption from taxation on real or personal property, providing for building bridges, and chartering companies for such purposes, except on the Hudson River below Waterford, and on the East River, or over waters forming a part of the boundaries of the State. The legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which in its judgment, may be provided for by general laws."<sup>12</sup> "Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."<sup>13</sup> "Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law."<sup>14</sup> "The term corporations as used in this article [of the State Constitution] shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons."<sup>15</sup>

<sup>10</sup> *People ex rel. Daily Credit Service Corp. v. May*, 162 A. D. 215, 147 Supp. 487 (1914); *aff'd* 212 N. Y. 561, 106 N. E. 1039; *Ins. L. § 170, subd. 2.*

<sup>11</sup> N. Y. Const. of 1894, art. 3, § 16.

<sup>12</sup> N. Y. Const. of 1894, art. 3, § 18.

<sup>13</sup> N. Y. Const. of 1894, art. 8, § 1.

<sup>14</sup> N. Y. Const. of 1894, art. 8, § 2.

<sup>15</sup> N. Y. Const. of 1894, art. 8, § 3.

A construction will be given to a statute incorporating a company so as to make it constitutional, if possible, so that if an original legislative enactment does not contravene the constitutional mandates that only one subject be embraced in legislative acts which must be expressed in the title and that no private bill shall provide for building bridges, amendments thereto violating such constitutional provisions will be divorced from the original act which will be permitted to stand.<sup>16</sup> "A title purporting that an act provides for pneumatic transportation would not be sufficient for an act authorizing the construction and operation of a horse railway or a steam railway;" and a title indicating only the transportation of passengers and property through pneumatic tubes by atmospheric pressure is not sufficient for an act permitting the creation of a railroad.<sup>17</sup> The title "An act to incorporate the Economic Power and Construction Company" to a legislative statute is not sufficiently specific to permit the insertion in it of power to the company to use highways for the creation, transmission and utilization of power, under the constitutional prohibition that "no private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title."<sup>18</sup> "Persons, or corporations even, may waive in some matters, and upon some occasions, a constitutional or statutory provision in their favor. . . . Although the provision as to a local act containing but one subject, which shall be expressed in its title, is of a public nature and was placed in the Constitution for the purpose of preventing surprises as to the object and purpose of any proposed legislation, yet when an act has been so passed, and its enactments bear upon the private rights of an individual, the constitutional provision then becomes as to him, one which is, within the meaning of the expression, enacted for his benefit, and it is then a matter which such individual may, as to his private rights, waive the benefit of, and consent to perform or submit to the requirements of the act, the same as if the constitutional provision had not been violated. And when once such waiver has been made and such consent been given, the party so waiving and consenting

<sup>16</sup> Matter of New York & Long Island Bridge Co., 148 N. Y. 540, 42 N. E. 1088 (1896); N. Y. Const., art. 3, § 16.

<sup>17</sup> Astor v. Arcade Ry. Co., 113 N. Y. 93, 2 L.R.A. 789, 20 N. E.

594 (1889); N. Y. Const., art. 3, § 16.

<sup>18</sup> Economic P. & C. Co. v. City of Buffalo, 195 N. Y. 286, 88 N. E. 389 (1909); N. Y. Const., art. 3, § 6.

is forever concluded thereby. Especially should this be so where the party takes benefits granted by the act.”<sup>19</sup>

**§ 13. Id.: Legislative Control over Charters.**—The State Constitution provides that all general laws and special acts passed pursuant to its authorization to corporations to incorporate under general laws and special acts may be altered from time to time or repealed.<sup>20</sup> The Constitutional right to alter or repeal general laws and special acts forming corporations applies also to the charters of corporations organized under such laws and acts.<sup>1</sup> “A corporation is subject to the general statutes of the State of its organization applicable to its conduct and management as well as to the reservation of the right on the part of the Legislature to alter its charter by subsequent laws, and a stockholder must be regarded as consenting not only to the existing law but to such alterations as may be made.”<sup>2</sup> A charter secured by a corporation by compliance with a statute couched in general terms does not grant an exclusive privilege to do the things empowered by the statute nor preclude the grant of another charter for a similar franchise.<sup>3</sup> “Equal protection of the law does not require a State to grant to each corporation that it organizes the same power to transact business or in relation to its business;” so that a statute of the State which “regulates the method of transacting business of certain corporations which it has

<sup>19</sup> Mayor, etc., of New York v. Manhattan Ry. Co., 143 N. Y. 1, 37 N. E. 494 (1894); L. 1867, c. 489. The act not constitutionally entitled incorporated a company for railway purposes and provided for payment of a percentage of income to the municipality.

On charter limitations as to period of existence of corporation, see note in 33 L.R.A. 576.

<sup>20</sup> N. Y. Const. of 1894, art 8., § 1.

<sup>1</sup> Lord v. Equitable Life Assurance Soc., 194 N. Y. 212, 22 L.R.A. (N.S.) 420, 87 N. E. 443 (1909); New York Consts. of 1846 and 1894, art. 8, § 1. “. . . both by the Constitution and the Revised Statutes the legislature has the reserved power to so amend the law under which a charter has been taken out as to carry with it a corresponding amendment of the charter itself, B. C. N. Y.—2

either directly, or by authorizing the corporation to make the change.”

On necessity of legislative sanction of consolidation of corporation, see note in 52 L.R.A. 370.

<sup>2</sup> Martin v. Remington-Martin Co., 95 A. D. 18, 88 Supp. 573 (1904). Promoters agreed “that the capital stock of the ——— company is to consist of \$150,000 common stock” and certain preferred stock. The company when formed arranged in good faith to issue additional common stock. Plaintiff, one of the promoters, became a director of the company and participated in enactment of by-law giving each stockholder the right to buy proportionately any increase of the capital stock, when made. An injunction against issuing additional common stock was refused.

<sup>3</sup> Matter of City of Brooklyn, 143 N. Y. 596, 26 L.R.A. 270, 38 N. E. 983 (1894).

organized and restricts them as to the amount of business that they are authorized to do" is unobjectionable; and that "another corporation is not so restricted is not a grant of an exclusive privilege, immunity or franchise to the unrestricted corporation."<sup>4</sup> " . . . Acts which do no more than regulate and control the internal management of a corporation, so far as it has relation to the public and concerns the policy of the State, are within the power [of the Legislature under the State Constitution] to alter and repeal, even though the exercise of the power adds to the burden of the stockholder by increasing his liability, or diminishes the value of his stock, or changes the name, offices or proportion in management and control of the corporation. Within this power under this rule must necessarily fall the right to change the capital stock of the corporation as to amount, kind and classification."<sup>5</sup> A reservation in the Legislature of power to alter, amend or repeal all laws and charters of incorporation gives it authority to amend the charter of a corporation so as to take from stockholders of a corporation the vote for directors and give it to policyholders.<sup>6</sup> "The legislative power to amend a corporate charter, where it exists at all — whether by virtue of a State Constitution or a general law of the State reserving such right — includes the right to repeal a provision exempting the property of the corporation from taxation."<sup>7</sup> "The right to amend a charter, however, does not include the right to take away money invested in reliance thereon, or property acquired thereunder. The power of amendment reserved by the Constitution or statutes of a state does not permit interference with property or property rights, because they are protected by the Constitution of the United States. . . . As the property of stockholders cannot be given away either in whole or in part, it follows that the gift of any right so connected with their property as to be essen-

<sup>4</sup> *Bush v. New York Life Insurance Co.*, 135 A. D. 447, 119 Supp. 796 (1909); *Ins. L.* § 96; *N. Y. Const.* §§ 16, 18, art. 3.

<sup>5</sup> *Hinckley v. Schwarzschild & Sulzberger Co.*, 107 A. D. 470, 95 Supp. 357 (1905); *app. dismissed* 193 N. Y. 599, 86 N. E. 1125; *N. Y. Const.*, art. 8, § 1; *St. Corp. L.* § 47 (*L.* 1892, c. 688, as amended *L.* 1901, c. 354).

<sup>6</sup> *Lord v. Equitable Life Assurance Society*, 57 Misc. 417, 108

Supp. 67 (1908); *aff'd* 126 A. D. 937, 110 Supp. 1135; *N. Y. Const.* of 1846, art. 8, § 1.

<sup>7</sup> *People ex rel. Cooper Union v. Gass*, 190 N. Y. 323, 83 N. E. 64 (1907); *L.* 1859, c. 279, founding Cooper Union, exempted Peter Cooper's endowments from taxation, but the New York Constitution of 1848, art. 8, § 1, was then in force, and the Tax Law, § 292, making all mortgages subject to tax, was held constitutional as to Cooper Union.

tial to its preservation and existence, would be a violation of primary rights," *e. g.*, the right of a stockholder to vote.<sup>8</sup> The general rule that the right to alter, or to repeal a corporate charter becomes a part of the charter of every corporation, whether under a general, or a special statute, and that the General Tax Law of 1896 must be presumed to have been intended as a repeal of prior exemptions in the statutes, does not apply when the transfer of property, in endowment of a charitable corporation, was directly induced by a promise of an exemption from taxation, which was acted upon.<sup>9</sup>

**§ 14. Id.: Contents, In General.**— Every certificate of incorporation must be in the English language.<sup>10</sup> The certificate of incorporation of a stock corporation must set forth: (1) Its name; (2) its purposes; (3) as to its capital stock, if it have nominal or par value: (a) the amount; (b) if any portion is preferred, and, if so, the preferences; (c) the number of shares, of not less than five nor more than one hundred dollars each, of which the capital stock shall consist, and (d) the amount of capital, not less than five hundred dollars, with which it will begin business; or, if it have no nominal or par value, (a) the number of shares that may be issued by the corporation; (b) if any of such shares be preferred stock, the particular character of the preference thereof, and, if any of such preferred stock shall have preference as to principal, the amount of such preferred stock having preference as to principal, and the amount of each share of such preferred stock, which must be five dollars or some multiple of five dollars, but not more than one hundred dollars; (c) the amount of capital, not less than the amount of preferred stock (if any) authorized to be issued with a preference as to principal plus a sum equivalent to five dollars or to some mul-

<sup>8</sup> *Lord v. Equitable Life Assurance Soc.*, 194 N. Y. 212, 22 L.R.A. (N.S.) 420, 87 N. E. 443 (1909); 1 R. S. (of 1827) 600, § 8; N. Y. Consts. of 1846 and 1894, art. 8, § 1. The old charter of the society permitted its change so as to confer on policyholders the right to vote for directors, and the court held that the Insurance Law "simply allowed an object, contemplated by the charter to be effected by a method varying in unessential details from that provided by the charter itself;" and approved the act of the directors under the char-

ter in granting policyholders voting powers as directors; but the court held inoperative as to stockholders a change in the charter depriving them of the right to vote for all directors although it gave them absolute power to elect 24 out of the 52.

<sup>9</sup> *People ex rel. Roosevelt Hospital v. Raymond*, 194 N. Y. 189, 87 N. E. 90 (1909); L. 1896, c. 908 (General Tax L.); L. 1864, c. 4 (incorporating Roosevelt Hospital).

<sup>10</sup> Gen. Corp. L. § 5 (L. 1913, c. 479).

multiple of five dollars for every share authorized to be issued other than such preferred stock, but in no event an amount of capital less than five hundred dollars; (4) the city, village or town in which its principal business office is to be located, and, if it is to be located in the city of New York, the borough therein in which it is to be located; (5) its duration; (6) as to its directors, (a) their number, not less than three, and (b) that the meetings of their board are to be held only within the state, if such be the case, unless such statement is put in the by-laws; (7) as to the subscribers, (a) their names, (b) their post-office addresses and (c) the number of shares of stock which each agrees to take.<sup>11</sup> The various points which must be covered by the certificate of incorporation are hereinafter treated in detail, one by one.

**§ 15. Id.: Name.**—The certificate of incorporation must contain the name of the proposed corporation.<sup>12</sup> The subject of the corporate name is extensively discussed further on in the present chapter.<sup>13</sup>

**§ 16. Id.: Purposes.**—The subject of the powers of corporations is hereinafter<sup>14</sup> discussed at length.

The certificate of incorporation must contain the purpose or purposes for which the corporation is to be formed.<sup>15</sup> The certificate of incorporation of any corporation may contain any provision for the regulation of the business and the conduct of the affairs of the corporation; and any limitation upon its powers which does not exempt its directors and stockholders from the performance of any obligation or the performance of any duty imposed by law.<sup>16</sup> A clause in a certificate of incorporation authorizing the directors to dispose of the whole of the property of the proposed corporation, except its franchises, to a domestic or to a foreign corporation, on the consent of two-thirds of the capital stock issued and outstanding, is illegal; and the Secretary of State cannot be mandamusd to file it.<sup>17</sup> A statement in a certificate of

<sup>11</sup> Bus. Corps. L. § 2 (L. 1909, c. 484); and § 2-a (L. 1909, c. 484); and § 19 (L. 1917, c. 500). The full text of the Business Corporations Law is printed at the end of this book.

<sup>12</sup> Bus. Corps. L. § 2 (L. 1909, c. 484).

<sup>13</sup> See §§ 32-35, *infra*.

<sup>14</sup> See the eighth chapter dealing with "Powers, Duties and Liabilities of Corporations."

<sup>15</sup> Bus. Corps. L. § 2 (L. 1909, c. 484).

<sup>16</sup> Gen. Corp. L. § 10 (L. 1909, c. 28).

<sup>17</sup> *People ex rel. Barney v. Whalen*, 119 A. D. 749, 104 Supp. 555 (1907); *aff'd* 189 N. Y. 560, 82 N. E. 1131; Bus. Corps. L. 82 (L. 1904, c. 446); Gen. Corp. L. § 10 (L. 1895, c. 672); St. Corp. L. § 33 (L. 1901, c. 130).

incorporation that the corporation's objects are "the mining of gold, silver and lead" and that such mining was to be carried on in a certain district of a certain territory sufficiently complies with a statute providing for a statement in such certificate of "the objects for which the company shall be formed" and of "the names of the town and county" in which the operations of the company are to be carried on.<sup>18</sup> "The words 'and' and 'or', when used in a statute, are convertible as the sense may require," and, therefore, under a statute permitting persons to become a corporation "for manufacturing . . . gas . . . or for manufacturing electricity," they may file a certificate authorizing the corporation to do both.<sup>19</sup> No corporation can be organized or created under the provisions of the Business Corporations Law for the purpose or purposes of (1) conducting any branch of the practice of law or of retaining or (2) employing an attorney or attorneys to furnish legal advice, draw legal papers or perform legal services of any kind or description, either directly for the person, persons or corporation for whose use such services are rendered, or for the corporation retaining such attorney in compliance with any contract of employment of the corporation or of the attorney made by the corporation with any other person, persons or corporation; and the statement of the purpose or purposes of a corporation in any certificate of its incorporation filed under the provisions of the Business Corporations Law, in whatsoever language it may be set forth, cannot be held or construed to confer on the corporation the power to transact any such law business as a purpose for which the creation of a corporation under the Business Corporations Law is provided; and, particularly, when the stated objects of a corporation include the collection of debts or accounts, in words or substance, they cannot be construed to include the employment or furnishing of attorneys to prosecute any action or pursue any legal or equitable remedy in aid of such collections.<sup>20</sup> The power of a corporation to practice law is fully discussed hereinafter, and to that discussion reference is made.<sup>1</sup>

<sup>18</sup> People *ex rel.* Belknap v. Beech, 19 Hun, 259 (1879); L. 1848, c. 40.

<sup>19</sup> People *ex rel.* Municipal Gas Co. v. Rice, 138 N. Y. 151, 33 N. E.

846 (1893); Corporation Act (L. 1890, c. 566), § 60.

<sup>20</sup> Bus. Corps. L. § 2-a (L. 1909, c. 484).

<sup>1</sup> § 433, *infra*.

§ 17. **Id.: Stock, Capital and Stockholders.**—The subjects of stock, capital stock and stockholders are discussed at length hereinafter.<sup>2</sup>

What statements a certificate of incorporation must contain with reference to its capital stock depends to some extent upon whether the shares thereof have or do not have a nominal or par value. If the shares have a nominal or par value the certificate of incorporation must contain (1) the number of shares of which the capital stock is to consist, each of which must be not less than five nor more than one hundred dollars, and (2) the amount of capital with which the corporation will begin business, which must be not less than five hundred dollars.<sup>3</sup> If the shares have no nominal or par value the certificate of incorporation may provide for the issuance of the shares of stock of the corporation, other than preferred stock having a preference as to principal, without any nominal or par value, by stating in such certificate, in lieu of any statements as to the amount or the maximum amount of its capital stock or the number of shares into which it is to be divided or of the amount or the par value of such shares, as follows: (1) the number of shares that may be issued by the corporation; (2) if any of such shares be preferred stock, the preferences thereof, and, if such preferred stock or any part thereof have a preference as to principal, (a) the amount of such preferred stock having such preference, (b) the particular character of such preferences, and (c) the amount of each share thereof (which must be five dollars or some multiple of five dollars, but not more than one hundred dollars); (2) the amount of capital with which the corporation will carry on business, which amount must not be less than the amount of preferred stock (if any) authorized to be issued with a preference as to principal, plus a sum equivalent to five dollars or to some multiple of five dollars for every share authorized to be issued other than such preferred stock; but in no event must the amount of such capital be less than five hundred dollars.<sup>4</sup> The original or amended certificate of incorporation of any stock corporation may contain a provision expressly authorizing the issue of the whole or any part of the capital stock as partly paid stock, subject to calls thereon until the

<sup>2</sup> For stock and capital stock see chapter Fourth on "Stock"; and for stockholders, see chapter Fifth on "Stockholders."

<sup>3</sup> Bus. Corp. L. § 2 (L. 1909, c. 484).

<sup>4</sup> Bus. Corp. L. § 19 (L. 1917, c. 500).

whole thereof has been paid in.<sup>5</sup> Every business corporation formed under the Business Corporations Law may be or become a full liability corporation by inserting a statement in the certificate of incorporation that the corporation thereby formed is intended to be a full liability corporation.<sup>6</sup>

Unless otherwise provided in the certificate of incorporation, every stockholder of record of a stock corporation is entitled at every meeting of the corporation to one vote for every share of stock standing in his name on the books of the corporation.<sup>7</sup> Our statutes permit the certificate of incorporation to provide what right to vote various classes of stockholders shall possess, *e. g.*, that preferred stockholders shall be deprived of voting power.<sup>8</sup> If the certificate of a domestic stock corporation so provide, it may issue preferred stock and common stock and different classes of preferred stock.<sup>9</sup> The certificate of incorporation of any corporation may contain any limitation upon the powers of its stockholders which does not exempt them from the performance of any obligation or the performance of any duty imposed by law.<sup>10</sup>

**§ 18. Id.: Principal Business Office.**—For a discussion of the subject of the residence of a corporation for purposes of suit, taxation, and so forth, consult the references in the note.<sup>11</sup>

A stock corporation's certificate of incorporation must contain the city, village or town in which its principal business office is to be located, and, if it is to be located in the City of New York, the borough therein in which it is to be located.<sup>12</sup> The statement as to a corporation's residence required by statute to be inserted in its certificate of incorporation cannot be therein qualified.<sup>13</sup>

**§ 19. Id.: Duration.**—The full discussion of the duration of a corporation's existence will be found hereinafter.<sup>14</sup> The

<sup>5</sup> St. Corp. L. § 60 (L. 1909, c. 61). See § 96, *infra*.

<sup>6</sup> Bus. Corp. L. § 6 (L. 1909, c. 12).

<sup>7</sup> Gen. Corp. L. § 23 (L. 1909, c. 28).

<sup>8</sup> People *ex rel.* Browne v. Koenig, 133 A. D. 756, 118 Supp. 136 (1909); Gen. Corp. L. § 23 (Cons. L. c. 23, § 23).

<sup>9</sup> St. Corp. L. § 61 (L. 1917, c. 542).

<sup>10</sup> Gen. Corp. L. § 10 (L. 1909, c. 28).

<sup>11</sup> Residence for purpose of suit,

see § 439 *et seq.*, *infra*. Residence for purpose of taxation, see § 603, *infra*, as to real property tax; and § 620, *infra*, as to personal property tax; and § 632 *infra*, as to special franchise tax.

<sup>12</sup> Bus. Corp. L. § 2 (L. 1909, c. 484).

<sup>13</sup> People *ex rel.* Edison Electric Co. v. Barker, 91 Hun, 594, 36 Supp. 844 (1895); L. 1848, c. 40, and L. 1892, c. 691, § 2.

<sup>14</sup> See Ninth Chapter on "Existence and Change."

certificate of incorporation of a stock corporation must set forth its duration.<sup>15</sup> The certificate of incorporation of any corporation the duration of which is limited by such certificate or by law may require that the consent of the stockholders owning a greater percentage than two-thirds of the stock shall be requisite to effect an extension of corporate existence beyond the time specified in such certificate or by law, or in any certificate of extension of corporate existence.<sup>16</sup>

**§ 20. Id.: Directors.**—A full treatment of “Directors” will be found further on in this book.<sup>17</sup>

A stock corporation's certificate of incorporation must contain, with regard to its directors, (1) the names and post-office addresses of the directors for the first year, and (2) the number of its directors, not less than three.<sup>18</sup> Unless otherwise provided in the certificate of incorporation each director must be a stockholder.<sup>19</sup> The certificate of incorporation of any corporation may contain any limitation upon the powers of its directors which does not exempt them from the performance of any obligation or the performance of any duty imposed by law.<sup>20</sup> The law permits the division in a certificate of incorporation of the directors of the corporation into two or more classes whose terms of office shall respectively expire at different times.<sup>1</sup> At least one of the directors of the corporation must be a citizen of the United States and a resident of New York State.<sup>2</sup>

<sup>15</sup> Bus. Corp. L. § 2 (L. 1909, c. 484).

<sup>16</sup> Gen. Corp. L. § 37 (L. 1913, c. 306).

<sup>17</sup> See Seventh Chapter on “Directors, Officers and Agents.”

<sup>18</sup> Bus. Corp. L. § 2 (L. 1909, c. 484).

<sup>19</sup> St. Corp. L. § 25 (L. 1909, c. 61).

<sup>20</sup> Gen. Corp. L. § 10 (L. 1909, c. 28).

<sup>1</sup> St. Corp. L. § 26 (L. 1909, c. 421), stating that “if the original or amended certificate of incorporation of the corporation shall provide that the directors shall be divided into two or more classes, whose terms of office shall respectively expire at different times,” etc.

<sup>2</sup> Gen. Corp. L. § 34 (L. 1917, c. 538).

It was held in *People ex rel. Gales*

*v. McDonough*, 28 Misc. 652, 60 Supp. 40 (1899) under the provision of section 29 of the General Corporation Law, that “the affairs of every corporation shall be managed by its board of directors, at least two of whom shall be residents of this state,” had been repealed by implication by the subsequent amendment of section 4 of the same Law, that “a certificate of incorporation must be executed by natural persons, who must be of full age and at least two-thirds of them must be citizens of the United States, and one of them a resident of this State,” so that a certificate of incorporation showing that only one of the directors named for the first year resides in New York must be accepted by the Secretary of State for filing.

**§ 21. Id.: Subscribers.**—A stock corporation's certificate of incorporation must contain, as regards the subscribers thereto: (1) Their names and post-office addresses, and (2) a statement of the number of shares of stock which each agrees to take in the corporation.<sup>3</sup> The statute requiring in a certificate of incorporation the names and post-office addresses of the subscribers to its stock does not require that the certificate shall be signed by the individual subscriber, as only the incorporators need sign it.<sup>4</sup> When a certificate of incorporation is circulated in an incomplete state in order to procure subscriptions, the mere signing of it "cannot be regarded as binding the signer to abide by such filling up of blanks and supplying of wanting provisions as any one may choose to insert;" but his assent must be had to the completed paper.<sup>5</sup>

**§ 22. Id.: Filing, Recording and Indexing.**—The fees and taxes payable on incorporation are shortly treated.<sup>6</sup> The status of those signing a certificate of incorporation which is defectively signed, filed, recorded, etc., is discussed in a previous section.<sup>7</sup> Every certificate of incorporation must be filed (1) in the office of the Secretary of State, and be by him duly recorded and indexed in books specially provided therefor; and either a certified copy of such certificate with a certificate of the Secretary of State of such filing and record or a duplicate original of such certificate must be filed and similarly recorded and indexed (2) in the office of the clerk of the county in which the office of the corporation is to be located.<sup>8</sup> "The filing of the proposed certificate of incorporation is to effect an incorporation. . . . It is upon making, signing, acknowledging *and filing* the certificate that a proposed corporation becomes a corporation."<sup>9</sup> The Secretary of State is not required to file a certificate of incorporation containing provisions unauthorized by law.<sup>10</sup> The Secretary of State has a right to pass on a question as to the

<sup>3</sup> Bus. Corp. L. § 2 (L. 1909, c. 484).

<sup>4</sup> *Yonkers Gazette Co. v. Taylor*, 30 A. D. 334, 51 Supp. 969 (1898); Bus. Corp. L. § 2, subd. 9.

<sup>5</sup> *Dutchess & Columbia Co. R. R. Co. v. Mebbett*, 58 N. Y. 397 (1874); Gen. R. R. Act, L. 1850, c. 140. The action was to recover an alleged subscription. The names for directors were blank in the certificate when the defendant signed and were later put in without his assent.

<sup>6</sup> See § 31, *infra*.

<sup>7</sup> § 9, *supra*.

<sup>8</sup> Gen. Corp. L. § 5 (L. 1913, c. 479).

<sup>9</sup> *People ex rel. Columbia Co. v. O'Brien*, 101 A. D. 296, 91 Supp. 649 (1905).

<sup>10</sup> *People ex rel. Barney v. Whalen*, 119 A. D. 749, 104 Supp. 555 (1907); *aff'd* 189 N. Y. 560, 82 N. E. 1131.

form of a certificate of incorporation and as to whether or not the applicant is entitled to have it filed under the statute under which the company is sought to be organized, subject to review in a proper proceeding.<sup>11</sup> It seems that the district in which application should be made for mandamus to compel the Secretary of State to file a certificate of incorporation is not dependent on the location of his office but on the district in which the material facts occurred.<sup>12</sup> When a certificate of incorporation is accepted and filed by the Secretary of State with the same name as that of an existing corporation, or when the name so nearly resembles that of the existing corporation as to be calculated to deceive, the action of the Secretary of State is not conclusive and the courts may by judgment in equity grant relief to the aggrieved prior corporation; but a writ of certiorari to review the Secretary of State's action is not proper.<sup>13</sup> It seems that if the Secretary of State refuses to file a certificate of incorporation on the ground that the name proposed for the company is the same as or deceitfully similar to that of an existing corporation, the only adequate remedy to the established company would be by writ of certiorari.<sup>14</sup>

If either of the certificates of incorporation is lost or destroyed after filing, a certified copy of the other certificate may be filed in the place of the one so lost or destroyed and as of the date of its original filing, and such certified copy has the same force and effect as the original certificate had when filed.<sup>14a</sup>

**§ 23. Id.: Amendment of and Addition to; Governing Statutes.**—All general laws and special acts passed pursuant to the New York Constitution for the formation or creation of corporations may be altered from time to time or repealed.<sup>15</sup> The charter of every corporation is subject to alteration, suspension and repeal in the discretion of the Legislature.<sup>16</sup> The law permits amendments to and alterations of a certificate of

<sup>11</sup> *People ex rel. Davenport v. Rice*, 68 Hun, 24, 22 Supp. 631 (1893). The Secretary refused to file a certificate of a club on the ground that it embraced business purposes, and the claim was that he had no option because it had been approved by a judge pursuant to statute.

<sup>12</sup> *People ex rel. Davenport v. Rice*, 68 Hun, 24, 22 Supp. 631 (1893); C. C. P. §§ 2068, 2084.

<sup>13</sup> *People ex rel. Columbia Co. v. O'Brien*, 101 A. D. 296, 91 Supp. 649 (1905); Gen. Corp. L. § 6; Bus. Corp. L. § 2 (L. 1904, c. 446).

<sup>14</sup> *People ex rel. Columbia Co. v. O'Brien*, 101 A. D. 296, 91 Supp. 649 (1905).

<sup>14a</sup> Gen. Corp. L. § 8 (L. 1909, c. 28).

<sup>15</sup> N. Y. Const. of 1894, art. 8, § 1.

<sup>16</sup> Gen. Corp. L. § 320 (L. 1909, c. 28).

incorporation by making and filing sometimes an amended certificate of incorporation and sometimes a verified transcript of the proceedings producing the change; and sometimes by court proceedings. The statutes differ for accomplishing various things, such as curing informality; defective proof or acknowledgment, and unlawful contents in a certificate of incorporation;<sup>17</sup> or obtaining court authority for the change;<sup>18</sup> or changing the corporate office and place of business;<sup>19</sup> or including additional powers;<sup>20</sup> or changing the number of directors;<sup>1</sup> or classifying the stock;<sup>2</sup> or increasing or reducing the capital stock;<sup>3</sup> or the number of the shares thereof.<sup>4</sup> These various changes are discussed separately in the seven following sections, while the reorganization of a corporation organized before the Business Corporations Law was enacted so as to avail itself of that law and reincorporate thereunder is treated in the five hundred and seventh<sup>4a</sup> section of this treatise; and the reorganization so as to provide for issuance of its shares of stock, other than stock preferred as to principal, without any nominal or par value is discussed in the five hundred and seventh-k section of this work.<sup>4b</sup>

**§ 24. Id.: For Informality, Unlawful Contents or Defective Proof or Acknowledgment.**—The incorporators or directors of a corporation may make and file an amended certificate of its incorporation; and the original, amended or supplemental certificate of incorporation already on file is deemed to be amended according to the newly made amended certificate as of the date the latter is filed, and the corporation is then for all purposes deemed to be a corporation from the time of the filing of the original, amended or supplemental certificate on file before the newly made amended certificate was filed; but

<sup>17</sup> Gen. Corp. L. § 7 (L. 1909, c. 28).

<sup>18</sup> Gen. Corp. L. § 7 (L. 1909, c. 28).

<sup>19</sup> St. Corp. L. § 13 (L. 1915, c. 117).

<sup>20</sup> St. Corp. L. § 18 (L. 1909, c. 61), and Gen. Corp. L. § 7 (L. 1909, c. 28).

<sup>1</sup> St. Corp. L. § 26 (L. 1909, c. 421).

<sup>2</sup> St. Corp. L. § 61 (L. 1917, c. 542).

<sup>3</sup> St. Corp. L. §§ 62, 63, 64 (§ 62 and § 63, L. 1909, c. 61; § 64, L. 1913, c. 305).

<sup>4</sup> St. Corp. L. § 65 (L. 1909, c. 61).

<sup>4a</sup> The governing statute is Bus. Corps. L. § 4 (L. 1909, c. 12).

<sup>4b</sup> The governing statute is St. Corp. L. § 24, *et seq.* (L. 1917, c. 484).

On reserved right to amend and repeal charter of corporation as to taxation, see note in 60 L.R.A. 69.

On right under reserved power to amend or repeal charter of corporation to change the right of stockholders as to voting the stock, see note in 22 L.R.A.(N.S.) 420.

such a way to change a certificate of incorporation can only be availed of in three classes of cases: When in the original, amended or supplemental certificate of any corporation (1) any informality exist, or (2) there be any matter not authorized by law to be stated therein, or (3) the proof or acknowledgment thereof is defective. The amended certificate must correct the informality or defect or strike out the unauthorized matter. When an amended or supplemental certificate is filed, an entry must be made upon the margin of the index and record of the original certificate of the date and place of record of every such amended certificate. Such an amendment of a certificate is without prejudice to any pending action or proceeding, or to any rights previously accrued.<sup>5</sup>

**§ 25. Id.: To Correct or Add to Purposes of.**—The supreme court may, (1) upon due cause shown, (2) and proof made, and (3) upon notice (a) to the attorney-general, and (b) to such other persons as the court may direct, and (4) upon such terms and conditions as it may impose, amend any certificate of incorporation which (5) fails to express the true object and purpose of the corporation, so as to truly set forth such object and purpose. When an amended or supplemental certificate is filed, an entry must be made upon the margin of the index and record of the original certificate of the date and place of record of every such amended certificate. Such an amendment is without prejudice to any pending action or proceeding or to any rights previously accrued.<sup>6</sup>

Any domestic stock corporation may alter its certificate of incorporation so as to include therein any purposes, powers or provisions (a) which at the time of such alteration may apply to corporations engaged in a business of the same general character, or (b) which might be included in the certificate of a corporation organized under any general law of New York State for a business of the same general character, by filing (1) an amended certificate of incorporation (a) in the manner provided for the original certificate of incorporation, (b) executed by the president and secretary of the corporation, stating (c) the alteration proposed and (d) that it has been duly authorized by a vote of a majority of the

<sup>5</sup> Gen. Corp. L. § 7 (L. 1909, c. 28).

As to validity of acknowledgment of corporate instrument before one who is a stockholder or officer of corporation, see note in 23 L.R.A. (N.S.) 1075; 41 L.R.A. (N.S.) 375.

On right of officer of corporation to take acknowledgment of instrument in which corporation is interested, see note in 33 L.R.A. 337.

<sup>6</sup> Gen. Corp. L. § 7 (L. 1909, c. 28).

directors and also by vote of stockholders representing at least three-fifths of the capital stock, at a meeting of the stockholders called for the purpose in the manner provided in the sixty-third section of the Stock Corporation Law; and (2) a copy of the proceedings of such meeting, verified by the affidavit of one of the directors present thereat, with such amended certificate.<sup>7</sup>

**§ 26. Id.: To Change Office and Place of Business.**—Change of its principal office and place of business from the city, town or county either named in its certificate of incorporation or to which it may have been previously changed under the law, to any other city, town or county in New York State in which it may desire actually to transact and carry on its regular business from day to day, may be made by a domestic stock corporation (except a moneyed one) at any time, provided such change (1) has been authorized by unanimous consent of the stockholders expressed in writing and duly acknowledged and filed in the office of the Secretary of State, or (2) has been authorized by a vote of the stockholders of such corporation at a special meeting of the stockholders called for that purpose, or (3) has been effected by an act of the Legislature creating a separate and distinct county wholly within the limits and boundaries of a then existing county or counties. In any of such cases (1) a certificate must be signed by (a) the president and (b) secretary and (c) a majority of the directors of such corporation, which (2) must be verified by the oaths of all the persons signing it, and (3) must be filed, when so signed and verified, in the office (a) of the Secretary of State, and a duplicate thereof in the office (b) of the clerk of the county from which such principal office and place of business is about to be removed or changed, and another in the office (c) of the clerk of the county to which such removal or change is to be made, whereupon the principal office and place of business of such corporation is changed as stated in such certificate. The certificate must state (1) the name of the corporation, (2) the city, town and county where its principal office and place of business was originally located, and to which it may have been subsequently changed, and (3) the city, town and county to which it is desired to change such principal office and place of business, and (4) that it is the purpose of such corporation actually to transact and carry on its regular business from day to day at such place, and (5) that such change has been authorized according to the pro-

<sup>7</sup> St. Corp. L. § 18 (L. 1909, c. 61).

visions of the statute, and (6) the names and respective addresses of the directors of such corporation.<sup>8</sup>

**§ 27. Id.: Change in Number of Directors.**—The subject of change in the number of directors of a corporation is fully treated in a subsequent section, to which reference is made.<sup>9</sup>

**§ 28. Id.: Preferred and Common and Non-Par Value Stock, and Classes of Preferred.**—The method of issuing preferred and common stock and different classes of preferred stock when the certificate of incorporation either does or does not provide therefor, is considered in subsequent sections, to which reference is made.<sup>10</sup>

**§ 29. Id.: Increase or Reduction of Capital Stock.**—The subject of increase or reduction of capital stock is discussed in later sections to which reference is made.<sup>11</sup>

**§ 30. Id.: Increase and Reduction of Number or Par Value of Shares.**—The change of the number or par value of shares of capital stock is discussed in a later section, to which reference is made.<sup>12</sup>

**§ 31. Id.: Fees and Taxes on Incorporation.**—The Secretary of State charges twenty-five dollars for filing any original certificate of incorporation of a private business stock corporation; and for recording a certificate, notice or other paper in general which the law requires to be recorded twenty-five

<sup>8</sup> St. Corp. L. § 13 (L. 1915, c. 117).

<sup>9</sup> See § 277, *infra*. The governing statute is St. Corp. L. § 26 (L. 1909, c. 421).

<sup>10</sup> See § 63 *et seq.*, *infra*. The governing statute is St. Corp. L. § 61 (L. 1917, c. 542). As to giving corporation with stock having par value stock without nominal or par value, see § 507-k, *infra*. The governing statute is St. Corp. L. § 24, *et seq.* (L. 1917, c. 484).

On power of corporation to issue preferred, guaranteed, and interest bearing stock, see notes in 27 L.R.A. 136; 21 L.R.A.(N.S.) 228; 39 L.R.A.(N.S.) 1007.

As to validity of guaranty of dividends of preferred stock, see note in 46 L.R.A.(N.S.) 637.

<sup>11</sup> See § 102 *et seq.*, *infra*. The governing statutes are St. Corp. L. § 62 (L. 1909, c. 61); § 63 (L. 1909, c. 61); and § 64 (L. 1913, c. 305).

As to when assets of corporation are consideration for increase of stock, see note in 50 L.R.A.(N.S.) 68.

Generally as to power to increase capital stock of corporation, see note in 38 L.R.A. 616.

For authorities discussing the right of existing stockholders to subscribe for increase, see note in 12 L.R.A.(N.S.) 969.

On right as between owner of capital and income, to increased stock, see note in 16 L.R.A. 461.

<sup>12</sup> See § 102 *et seq.*, *infra*. The governing statute is St. Corp. L. § 65 (L. 1909, c. 61).

On right of injunction against reduction of capital stock, see note in 1 L.R.A.(N.S.) 571.

On reduction of preferred, guaranteed, and interest bearing stock, see note in 27 L.R.A. 151.

cents per folio; and for a certified or exemplified copy of any paper fifteen cents per folio and one dollar additional for the certificate under seal of his office, attached thereto.<sup>13</sup> Whenever there is presented to any public officer for certification a previously prepared legibly typewritten or printed copy of any document paper or record in his custody, his fees for certification must be at the rate of three cents for each folio, with a minimum total charge for certification of twenty-five cents.<sup>14</sup> But this charge of three cents per folio for certification of a previously prepared typewritten or printed copy of a paper does not apply to a certified or exemplified copy of any paper when made by the Secretary of State, who is authorized to charge fifteen cents per folio therefor (and one dollar additional for the certificate under the seal of his office) "whether such copy be made by the Secretary of State or previously prepared and presented to him for certification,

<sup>13</sup> Executive L. § 26 (L. 1917, c. 69): "The secretary of state shall collect the following fees: . . . 2. For searching the records in his office for any one year and for every other year in which such search is made, six cents. 3. For a copy of any paper or record not required to be certified or otherwise authenticated by him, ten cents per folio. 4. For a certified or exemplified copy of any law, record or paper, fifteen cents per folio, and one dollar additional for the certificate under seal of his office, attached thereto; and this fee shall be the same whether such copy be made by the secretary of state or previously prepared and presented to him for certification, any other law to the contrary notwithstanding. 5. For a certificate under the great seal of the state, two dollars. 6. For recording a certificate, notice or other paper required to be recorded, except as otherwise provided by this section, twenty-five cents per folio. . . . 10. For filing the original certificate of incorporation of . . . any other stock corporation [than a railroad corporation] twenty-five dollars; . . . for filing a consent to, or certificate of, increase of capital stock, pursuant to either section six

or sixty-three or sixty-four of the stock corporation law, ten dollars; for filing a certificate of merger, pursuant to section fifteen of the stock corporation law, twenty-five dollars; . . . for filing an agreement for the consolidation of two or more corporations other than railroad corporations, twenty-five dollars; for filing an amended certificate of incorporation, pursuant to either section seven of the general corporation law or section eighteen or twenty-two of the stock corporation law, ten dollars; for filing a certificate of change of number of directors, pursuant to section twenty-six of the stock corporation law, ten dollars; for filing a certificate of reorganization pursuant to section nine of the stock corporation law, twenty-five dollars; for filing a certificate of extension or revival of corporate existence, twenty-five dollars. 11. For filing the statement and designation and copy of certificate of incorporation of a foreign corporation desiring to do business in this state, fifty dollars. . . . 15. For a certificate under subdivision three of section nine of the general corporation law, twenty-five dollars.

<sup>14</sup> C. C. P. § 3305-a.

any other law to the contrary notwithstanding.”<sup>15</sup> A county clerk is entitled to eight cents for each folio of a copy of an order, record or other paper entered or filed in his office; ten cents for each folio of any instrument recorded by him which must or may legally be recorded by him; twelve cents for sealing any paper, when required; six cents for filing any paper required by law to be filed in his office when no other fee is prescribed; and twenty-five cents for a certificate other than that a paper for the copying of which he is entitled to a fee is a copy.<sup>16</sup> The Secretary of State collects a fee of ten dollars for filing an amended certificate of incorporation pursuant to section seven of the General Corporation Law or section eighteen or twenty-two of the Stock Corporation Law.<sup>17</sup> The questions relating to corporate taxation are treated fully in a subsequent chapter to which reference is made.<sup>18</sup> But it must be borne in mind when incorporating a company that all taxes required by law to be paid before or upon incorporation must be paid before the certificate of incorporation is filed, and that no corporation can exercise any corporate powers or privileges until such taxes and fees have been paid.<sup>19</sup> A résumé of the amount of and procedure for paying the fees and taxes on organization or incorporation of a company follows:

To the Secretary of State, the certificate of incorporation, and twenty-five dollars for filing such certificate, and twenty-five cents per folio for recording such certificate, and fifteen cents per folio for a certified or exemplified copy of such certificate (and one dollar for a certificate under seal of his office attached thereto).<sup>20</sup>

To the State Treasurer, a minimum organization tax of ten dollars whatever the corporation's capitalization may be and whether its stock have or have not a par value; and if it have par value stock, then so much more than ten dollars as one-twentieth of one per centum upon the amount of capital stock which the corporation is *authorized* to have shall exceed ten dollars, and if it do not have par value stock, then so much

<sup>15</sup> Executive L. § 26 (L. 1917, c. 69).

<sup>16</sup> C. C. P. § 3304.

<sup>17</sup> Executive L. § 26 (L. 1917, c. 69).

<sup>18</sup> See § 563 *et seq.*, *infra*.

Taxation of shares of stock and corporate assets as double taxation, see notes in 58 L.R.A. 589; 15

L.R.A.(N.S.) 952; 30 L.R.A.(N.S.) 704.

The question of taxation of corporations generally is discussed in a note in 60 L.R.A. 366.

<sup>19</sup> Gen. Corp. L. § 5 (L. 1913, c. 479).

<sup>20</sup> Gen. Corp. L. § 5 (L. 1913, c. 479); Executive L. § 26 (L. 1917, c. 69).

more than ten dollars as the total of five cents for each share of its stock which it is *authorized* to issue shall exceed ten dollars.<sup>1</sup>

To the County Clerk, a duplicate original or a copy certified by the Secretary of State of the certificate of incorporation; and six cents per folio for filing such certificate; and ten cents per folio for recording such certificate.<sup>2</sup>

The fees and taxes on reorganization of a corporation having stock with par value so as to permit of the issuance of stock without nominal or par value are discussed under the section dealing with corporate reorganization.<sup>2a</sup>

**§ 32. Name: Governing Statutes.**—The conditions imposed by law upon choosing a name for a stock corporation are these: (1) no certificate for the incorporation of a company having (a) the same name as a corporation authorized to do business under the laws of New York State, or (b) a name so nearly resembling it as to be calculated to deceive, can be filed or recorded in any office for the purpose of effecting its incorporation, or of authorizing it to do business in New York State; (2) no business stock corporation can be authorized to do business in New York State unless (a) its name has such word or words, abbreviation, affix or prefix, therein or thereto, as will clearly indicate that it is a corporation as distinguished from a natural person, firm or co-partnership; or (b) such corporation uses with its corporate name, in New York State, such an affix or prefix; (3) no stock business corporation can be organized in New York State with the word “trust”, “bank”, “banking”, “insurance”, “assurance”, “indemnity”, “guarantee”, “guaranty”, “title”, “casualty”, “surety”, “fidelity”, “bonding”, “savings”, “investment”, “loan”, or “benefit”, as part of its name.<sup>3</sup> Any corporation other than a moneyed corporation who, or which within New York State, directly or indirectly or through agents or representatives transacts business under, or in anywise uses a corporate name or a corporate title with the words “trust”, “bank”, “banking”, “insurance”, “assurance”, “indemnity”, “guarantee”,

<sup>1</sup> Tax L. § 180 (L. 1917, c. 493), and St. Corp. L. § 21 (L. 1917, c. 501).

<sup>2</sup> Gen. Corp. L. § 5 (L. 1913, c. 479); C. C. P. § 3304.

<sup>2a</sup> See § 507-k, *infra*. The governing statute is St. Corp. L. § 24-e (L. 1917, c. 484).

On assessments on paid up stock  
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generally, see notes in 45 L.R.A. 648; 22 L.R.A.(N.S.) 1013.

<sup>3</sup> Gen. Corp. L. § 6 (L. 1917, c. 594). Subd. 2 of the same section (L. 1909, c. 28), prohibits the employment of the words “Loretta Mott” by any domestic corporation to designate any hospital or similar institution.

“ guaranty ”, “ savings ”, “ investment ”, “ loan ”, “ benefit ”, as a part of such name or title, is guilty of a misdemeanor.<sup>4</sup> The word “ company ” in the name of a corporation does not satisfy the statutory requirement that a corporate name must have as part of it some word, abbreviation, etc., which will clearly indicate that it is a corporation.<sup>5</sup>

**§ 33. Id.: Protection of.**—“ The right of a man to use his own name in his own business the law protects, even when such use is injurious to another who has established a prior business of the same kind and gained a reputation which goes with the name. But in such case the courts require that the name shall be honestly used, and they permit no artifice or deceit, designed or calculated to mislead the public and palm off the business as that of the person who first established it and gave it its reputation (*citations*). It is well settled that an exclusive right may be acquired in the name in which a business has been carried on, whether the name of a partnership or of an individual, and it will be protected against infringement by another who assumes it for the purposes of deception, or even when innocently used without right to the detriment of another, and this right, which is in the nature of a right to a trade mark, may be sold or assigned (*citation*). In respect to corporate names the same rules apply as to the names of firms or individuals, and an injunction lies to restrain the simulation and use by one corporation of the name of a prior corporation which tends to create confusion and to enable the later corporation to obtain, by reason of the similarity of names, the business of the prior one. The courts interfere in these cases, not on the ground that the State may not affix such corporate names as it may elect to the entities it creates, but to prevent fraud, actual or constructive. The names of corporations organized under general laws, and in most other cases, are chosen by the promoters, and it would

<sup>4</sup> Penal L. § 666 (L. 1909, c. 88); “ provided, however, that any domestic corporation, other than a moneyed corporation, heretofore duly organized and heretofore duly authorized by law to use and on April twenty-ninth, nineteen hundred and four, lawfully using either or any of such words as a part of its lawful corporate title, may lawfully continue to use such words as a part of such corporate title, provided and if it, being a corporation other than a moneyed corporation,

shall, wherever the name shall be printed, written, engraved or displayed, add, in legible English characters, of substantially the same size and style as the name, directly under the said name or immediately in connection therewith, wherever so used, the words ‘ not a moneyed corporation.’ ”

<sup>5</sup> Matter of American Cigar Lighter Co., 77 Misc. 643, 138 Supp. 455 (1912); Gen. Corp. L. § 6 (L. 1912, c. 2).

be an easy way to escape from the obligations which are enforced as between individuals, if a corporation were granted immunity by reason of their corporate character. . . . Whether the court will interfere in a particular case must depend upon circumstances; the identity or similarity of the names; the identity of the business of the prospective corporations; how far the name is a true description of the kind and quality of the articles manufactured or the business carried on; the extent of the confusion which may be created or apprehended, and other circumstances which might justly influence the judgment of the judge in granting or withholding the remedy."<sup>6</sup> A corporation is protected in the use of its trade as well as its corporate name.<sup>7</sup> A corporation named in part after the family name of one who had conducted the business it conducts before he sold out to it may not enjoin either him after it has discharged him from its employ or another of his family and name who has employed him from conducting the same business under their own family name, although it may enjoin a corporation formed by them with such family name in a title very like the complainant's from using such name in the same business.<sup>8</sup> One Albert Romeike and another, officers and employees of a corporation named, after an ancestor of the former, "Henry Romeike" and which advertises itself as "Henry Romeike, Inc.," may lawfully do a like business as such corporation in the same city, but a different neighborhood, after leaving its employ, under the name of "Albert Romeike Co., Inc.," being a company incorporated by them, provided they do not use such name dishonestly nor resort to any artifice to mislead the public as to the identity of the two businesses.<sup>9</sup> One who has by his own voluntary act given a corporation the right to use his name as and in its corporate name cannot avail himself of the statute permitting a person

<sup>6</sup> Chas. S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 27 L.R.A. 42, 39 N. E. 490 (1895). The use by a corporation of defendant's name held to infringe plaintiff's name, both making soap and plaintiff's soap being known as "Higgins' Soap."

<sup>7</sup> Mark Realty Corp'n v. Major Amusement Co., — Misc. — (1918); N. Y. L. J. Jan. 9, App. Div., 1st Dept. Corporation using name "Strand" for theater enjoined suc-

cessfully use of name "Harlem Strand" by another corporation.

<sup>8</sup> Merritt Burial & Cremation Co. v. Merritt Company, 155 A. D. 565, 140 Supp. 895 (1913), dissenting opinion of Ingraham, P. J., in accordance with which judgment was modified 214 N. Y. 676, 108 N. E. 1108.

<sup>9</sup> Romeike, Inc. v. Romeike & Co., Inc., 179 A. D. 712, 167 Supp. 235 (1917).

whose name is used in trade without written consent first had to restrain such use and recover damages.<sup>10</sup> One selling to a corporation his business and the right to use his name cannot start a new business of a like character either in his individual or in a corporate name which is similar to his own; and if he does, will be enjoined.<sup>11</sup> The right to injunctive relief against the unfair and misleading use of a corporate name is as available to a benevolent or fraternal association, not carrying on any trade or industrial or financial business which can be injuriously affected by the action of a similar body in appropriating its name, as to a trading corporation.<sup>12</sup> "The provision of our statute, in prohibiting the adoption of a name nearly resembling that of an existing corporation, and the rule of law, underlying the intervention by courts to restrain the simulation by one corporation of the name of a prior corporation, find their application, when it is plain that the business of the prior corporation would, or might, be obtained and thus the perpetration of fraud be made possible."<sup>13</sup> If it be made to appear that there is real ground for a present apprehension of future injury to a corporation's property by reason of confusion in the minds of those transacting business with it and another corporation because of the similarity of names of such two corporations, liable to create unfair trade, the corporation to be injured would have standing in court to protect itself against the injury reasonably to be anticipated; but if there be no identity in the business of the two corporations but the name of the complained-of corporation clearly enough distinguishes the kind of article it would offer to the trade, there is no ground of complaint.<sup>14</sup> A corporation has no absolute right to the aid of a court of equity to restrain another corporation from the use of its corporate name on the

<sup>10</sup> *White v. White*, 160 A. D. 709, 145 Supp. 743 (1914); *Civil Rights L. § 51*.

<sup>11</sup> *Wheeler Syndicate, Inc. v. Wheeler*, 99 Misc. 291, 163 Supp. 817 (1917).

<sup>12</sup> *B. P. O. Elks v. Improved B. P. O. Elks*, 205 N. Y. 459, L.R.A. 1915B, 1074, 98 N. E. 756 (1912). The Benevolent and Protective Order of Elks was granted an injunction against the use by the Grand Lodge of the Improved Benevolent and Protective Order of Elks of the World, commonly known simply as the Improved Be-

nevolent and Protective Order of Elks of the World, prohibiting not only the use of that title but of the word Elks; but prohibition of the use of the same titles for its officers was refused. The second organization was not an offshoot but entirely independent of the first.

<sup>13</sup> *Corning Glass Works v. Corning Cut Glass Co.*, 197 N. Y. 173, 90 N. E. 449 (1910); *Gen. Corp. L. § 6*.

<sup>14</sup> *Corning Glass Works v. Corning Cut Glass Co.*, 197 N. Y. 173, 90 N. E. 449 (1910); *Gen. Corp. L. § 6*.

ground that it so nearly resembles that of the complaining corporation as to be calculated to deceive unless there was fraudulent intent by the complained-of company to appropriate the corporate complainant's name or any part of it; but in such a case the court may withhold its equitable aid in the exercise of a sound discretion as the circumstances require, and only when deception or confusion has in fact resulted from the use of the name or it appears that such result is likely to follow will it be time for the court to exercise its extraordinary powers.<sup>15</sup> While a court cannot change the name of a corporation incorporated in violation of the statute prohibiting the incorporation of a company having a name so nearly resembling that of an existing corporation as to be calculated to deceive, it can and will enjoin it from using such name without other appropriate words to distinguish the business it conducts, like the older corporation's, from the other's.<sup>16</sup> A corporation is entitled to enjoin the use by another of a name similar to the one under which it has manufactured and sold a commercial article if such use makes for deception and injury, and the two parties are dealing in the same or substantially similar articles; and it is immaterial that the distinctive and similar features of both names are a combination of geographical terms, that there was no intent to produce confusion in the selection of the similar name, or that no confusion has yet resulted.<sup>17</sup> It seems that a corporate name "The German-American Hand Crochet Button Works" would be refused a corporation if another corporation was already in existence called "German-American Button Co."<sup>18</sup> The name "The Columbian Chemical Company" so nearly resembles the name "Columbia Chemical Company" that if a company has been duly incorporated with the latter name

<sup>15</sup> *Hygeia Water Ice Co. v. New York Hygeia Ice Co., Ltd.*, 140 N. Y. 94, 135 N. E. 417 (1894).

<sup>16</sup> *Material Men's Association, Ltd. v. New York Material Men's Mercantile Association, Inc.*, 169 A. D. 843, 155 Supp. 706 (1915); Gen. Corp. L. § 6. The defendant charged less for doing the same work as plaintiff had for years done, had its office in the same borough of New York City, published a book like plaintiff did and under the same name.

<sup>17</sup> *German-American Button Co. v.*

*Hegmsfeld, Inc.*, 170 A. D. 416, 156 Supp. 223 (1915). Plaintiff made several kinds of buttons and defendant advertised itself as importing one of such kinds and as "sole selling agents of The German-American Hand Crochet Button Works," manufactured by H. H. who had filed a certificate of adoption of the trade-name of "German-American Hand Crochet Button Works."

<sup>18</sup> *German-American Button Co. v. Hegmsfeld, Inc.*, 170 A. D. 416, 156 Supp. 223 (1915); Gen. Corp. L. § 6.

the Secretary of State should refuse to file a certificate of a new company with the former name.<sup>19</sup> One entering into a contract with another, who is an individual but uses a corporate name instead of his individual name to bind himself, cannot for that reason hold such individual to a different price for the subject-matter of the contract than that prescribed therein, if both parties knew when the contract was signed that such individual intended to bind himself as such and not a corporation.<sup>20</sup> A corporation to which is transferred certain cabinets bearing the name of an individual skilled in making certain goods which such corporation makes under his supervision as president does not by assignment for benefit of creditors of all its property except such as may be exempt from execution give such assignee the right to convey, with some of such property which he sells, the right to use such individual's name on such kind of goods, except, of course, on the very goods on which it was when it came to him and which he in turn sells.<sup>1</sup> Questions arising out of the refusal of the Secretary of State to file a certificate of incorporation because of the similarity of the name of the proposed corporation to an existing corporation have already been discussed.<sup>2</sup>

**§ 34. Id.: Change of.**—The courts will not interfere with a change of name authorized for a corporation by its directors and a majority in interest of its stock unless there be fraud, illegality or a purpose detrimental to the corporation.<sup>3</sup> The method prescribed by law for the assumption by a domestic business stock corporation of another corporate name is for it to make a petition to the supreme court at a special term thereof held in the judicial district in which its principal business office is situated, with a certificate of the Secretary of State annexed thereto that the name which such corporation proposes to assume is not the name of any other domestic corporation, or a name which he deems so nearly resembling it as to be calculated to deceive.<sup>4</sup> The petition must (1) be in writing, (2) be signed by the petitioner, (3) be verified in like manner as a pleading in a court of record, (4) specify the grounds of the application, (5) specify the corporation's present name,

<sup>19</sup> *People ex rel. Columbia Co. v. O'Brien*, 101 A. D. 296, 91 Supp. 649 (1905); Gen. Corp. L. § 6 (L. 1902, c. 9).

<sup>20</sup> *Davis v. Smith*, 42 A. D. 333, 59 Supp. 120 (1899).

<sup>1</sup> *Cutter v. Gudebrod Brothers Co.*, 36 A. D. 362, 55 Supp. 298 (1898).

<sup>2</sup> See § 22, *supra*.

<sup>3</sup> *Matter of Hinds, Noble & Eldredge*, 172 A. D. 140, 158 Supp. 249 (1916); Gen. Corp. L. §§ 62, 63 (L. 1910, c. 296).

<sup>4</sup> Gen. Corp. L. § 60 (L. 1909, c. 28).

(6) specify the name it proposes to assume, which must not be the name of any other corporation or a name so nearly resembling it as to be calculated to deceive.<sup>5</sup> Notice of the presentation of the petition must be published once in each week of three successive weeks in a newspaper of every county in which such corporation shall have a business office, or if it has no business office, of the county in which its principal corporate property is situated, or in which its operations are or theretofore have been principally conducted, unless such county be the county of New York or in the city of New York, when the notice must be published in two newspapers instead of one, both of which must be daily newspapers.<sup>6</sup> A copy both of (a) the petition and (b) the notice of motion must be filed with the Secretary of State, and the proposed name must thereupon be reserved for such corporation until three weeks either (a) after the date of such motion or (b) after the date of any adjournment of such motion if notice of such adjournment is filed with the Secretary of State, and no certificate of incorporation of a proposed corporation having the same name as the name proposed in such petition, or a name so nearly resembling it as to be calculated to deceive, can be filed in any office for the purpose of effecting its incorporation, and no corporation formed without the State of New York having the same name or a name so nearly resembling it as to be calculated to deceive can be given authority to do business in New York State.<sup>7</sup> The court to which the petition is presented must make an order authorizing the petitioning corporation to assume the name proposed on a day specified in the order (which must be not less than thirty days after the entry of the order) if the court is satisfied: (1) either from the petition, or the affidavit and certificate presented therewith, that the petition is true; (2) that there is no reasonable objection to the change of name proposed; (3) that the petition has been duly authorized; and (4) that notice of the presentation of the petition, if required by law, has been made.<sup>8</sup> The statutory proviso to a change of corporate name, viz., "that there is no reasonable objection" thereto, puts it within the discretion of the court to permit the change or not, for an abuse of which only the appellate court will grant redress.<sup>9</sup> "The change of name of a corporation is one of

<sup>5</sup> Gen. Corp. L. § 61 (L. 1909, c. 28).

<sup>6</sup> Gen. Corp. L. § 62 (L. 1909, c. 28).

<sup>7</sup> Gen. Corp. L. § 62 (L. 1909, c. 28).

<sup>8</sup> Gen. Corp. L. § 63 (L. 1910, c. 286).

<sup>9</sup> Matter of United States Mercantile Reporting and Collecting Agency, 115 N. Y. 176, 21 N. E. 1034 (1889); L. 1870, c. 322. The

those details of corporate and business management with which, in the absence of fraud or illegality, the courts will not interfere, but will respect the determination of those intrusted with the direction of the affairs of the corporation, even if it does not meet with the unanimous approval of the stockholders.”<sup>10</sup> The order shall direct (1) that it be entered and (2) the papers on which it was granted be filed within ten days thereafter in the office of the clerk of the county in which its certificate of incorporation, if any, is filed, or, if there be none filed, in the office of the clerk of the county in which its principal office is located, or if it has no business office, in the county in which its principal property is situated or in which its operations are or theretofore have been principally conducted, or in the office of the clerk of the county in which the special term granting the order is held; and (2) that a certified copy of the order be filed within ten days after its entry in the office of the Secretary of State; and (3) that a copy of the order be published once in each week for four successive weeks within ten days after its entry in a designated newspaper in the county in which the order is directed to be entered.<sup>11</sup> The petitioning corporation must be known on and after the day specified for that purpose in the order by the name which is by that order authorized to be assumed and by no other name if: (1) the order is fully complied with; and (2) within forty days after the making of the order an affidavit of its publication has been (a) filed and (b) recorded in the office in which the order is entered and in each office in which certified copies thereof are required to be filed, if any.<sup>12</sup> No action or special proceeding, civil or criminal, commenced

new name sought was “United States Commercial Agency and Collecting Company, limited.” The corporation objecting was “The United States Mercantile Reporting Company.” The Court of Appeals said it thought “the court below was somewhat too cautious” in refusing permission to change.

<sup>10</sup> *Matter of Hinds, Noble & Eldredge*, 172 A. D. 140, 158 Supp. 249 (1916); Gen. Corp. L. §§ 62, 63. Two stockholders owing \$117,500 of \$300,000 stock opposed the change.

<sup>11</sup> Gen. Corp. L. § 63 (L. 1910, c. 296).

<sup>12</sup> Gen. Corp. L. § 64 (L. 1913, c. 721), which goes on to say: “No

proceedings had prior to April 4, 1894, under sections 2414 and 2415 of the code of civil procedure for the change of the name of a corporation, shall be invalid by reason of the non-filing of an affidavit of the publication of the order changing such name within 20 days from the date thereof. And no proceedings heretofore had under the provisions of article 3, chapter 23, consolidated laws, for the change of the name of a corporation, shall be invalid by reason of the nonfiling and recording of such affidavit of the publication of the order changing such name within forty days from the making of such order.”

by or against a corporation the name of which is so changed abates, nor is any relief, recovery or other proceeding therein prevented, impeded or impaired in consequence of such change of name; and the plaintiff in the action or the party instituting the special proceeding, or the people, as the case requires, may at any time obtain an order amending any of the papers or proceedings therein by the substitution of the new name, without costs and without prejudice to the action or proceeding.<sup>13</sup>

**§ 35. Id.: On Reincorporation, Reorganization, Consolidation, Sale of Property or Franchise, Merger, Dissolution and Assignment.**—A corporation formed by the reincorporation, reorganization or consolidation of other corporations or upon the sale of the property or franchises of a corporation, or a corporation acquiring or becoming possessed of all the estate, property, rights, privileges and franchises of any other corporation or corporations by merger, may have the same name as the corporation or one of the corporations to the franchise of which it has succeeded.<sup>14</sup> A corporation which on dissolution of a second corporation has acquired all its assets, business and franchises (except the franchise to be a corporation), acquires its good will which carries with it the right to use its name in connection with its own in such way as to show that it is its successor.<sup>15</sup> A corporation which has acquired the business, assets and franchises (save the franchise to be a corporation) of a second corporation on the latter's dissolution may enjoin the use by a third domestic corporation of the same name as the second's, even though the first has never used the second's name and the third is not competing for business with the first or second.<sup>16</sup> A corporation of this State originally granted a certain name apparently has sufficient interest to maintain an action to restrain another corporation incorporated afterwards in this State under the same name from continuing to use that name, although the former company has been formally dissolved, if it still has unmatured bonds of a market value still outstanding and the latter corporation does

<sup>13</sup> Gen. Corp. L. § 65 (L. 1909, c. 28).

<sup>14</sup> Gen. Corp. L. § 6 (L. 1917, c. 594).

On right of corporations to consolidate, see note in 52 LRA 369.

As to rights of minority stockholders to representation in new or reorganized corporation, see note in 10 L.R.A.(N.S.) 725.

<sup>15</sup> Metropolitan Telephone & Telegraph Co. v. Metropolitan Telephone & Telegraph Co., 156 A. D. 577, 141 Supp. 598 (1913).

<sup>16</sup> Metropolitan Telephone and Telegraph Co. v. Metropolitan Telephone and Telegraph Co., 156 A. D. 577, 141 Supp. 598 (1913).

no business and has no assets but has issued bonds similar in appearance to those of the former outstanding.<sup>17</sup> A cause of action against individuals based upon their assumption of an expired corporation's name and of its duties and business is destroyed by proof of continuance of such business in a newly formed corporation's name.<sup>18</sup> Upon the transfer by a partnership of its business and property to a corporation to the stock of which subscriptions were made upon the representation of that one of the partnership whose name was the only one printed in the firm title that all the partnership's trade names and trade-marks had been transferred to the corporation, though there was no written agreement to this effect, any equitable estoppel which might exist in favor of the corporation and its stockholders against the named individual in the partnership title under the operation of which he would be denied a right either to start a business in competition with it or withdraw from the concern his name and trade-mark, or prohibit their use, will not inure in favor of the transferee of an assignee of the corporation for the benefit of creditors; and all the right it will derive from the transfer will be title to the tangible property assigned, including the right to sell it even though the name of the partner appears thereon but not to continue to use such name on other like property manufactured and sold by the transferee.<sup>19</sup>

<sup>17</sup> Metropolitan Telephone and Telegraph Company v. Metropolitan Telephone and Telegraph Company, 156 A. D. 577, 141 Supp. 598 (1913).

<sup>18</sup> People v. De Grauw, 133 N. Y. 254, 30 N. E. 1006 (1892).

<sup>19</sup> Cutter v. Gudebrod Brothers Co., 44 A. D. 605, 61 Supp. 225 (1899); aff'd 168 N. Y. 512, 61 N. E. 887.

## CHAPTER III.

### ORGANIZATION, BY-LAWS, SEAL AND BOOKS.

- V. *Organization: First Meeting of Incorporators and Directors*, § 36.
- VI. *By-Laws*:
  - A. *Governing Statutes*, § 37.
  - B. *How Far Binding on Strangers, Stockholders and Employees*, § 38.
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  - A. *Governing Statutes*, § 41.
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- VIII. *Books and Records*:
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**§ 36. Organization: First Meeting of Incorporators and Directors.**— The first step in the organization of a corporation is the meeting of the incorporators, at which it is proper to accept notification of the due filing of the certificate of incorporation and of payment of the organization tax, and to adopt by-laws. The next step is the first meeting of the directors, at which the officers of the corporation are chosen, its seal is adopted, its form of stock certificate is approved and the secretary instructed to procure a stock certificate book

and stock transfer book and ledger, call is made for payment by subscribers to the capital stock on account of their subscriptions, filing of a certificate of payment of one-half the authorized stock is directed, the principal office and the bank for the company's deposits are designated, the resolution for the method of signing cheques is passed, and the Secretary is directed to keep the stock certificate book and book of account, transfer ledger or register as prescribed by law.

**§ 37. By-Laws: Governing Statutes.**—Every corporation has power, though not specified in the law under which it is incorporated, to have (1) succession for the period specified in its by-law (or certificate of incorporation, and perpetually when no period is specified); and to make by-laws, not inconsistent with any existing law, for (2) the management of its property, the (3) regulation of its affairs, (4) the transfer of its stock, (5) the calling of meetings of its members; (6) the fixing of the amount of stock which must be represented at meetings of the stockholders in order to constitute a quorum, unless otherwise provided by law;<sup>1</sup> (7) the fixing of the number of directors necessary to constitute a quorum at a number less than a majority of the board, but at least equal to one-third of its number;<sup>2</sup> (8) prescribing the powers and duties of the president, secretary, treasurer and other officers, agents and employees of the corporation;<sup>3</sup> (9) prescribing the manner of the appointment of the inspectors of election.<sup>4</sup> By-laws duly adopted at a meeting of the members of the corporation control the action of its directors; and no by-law adopted by the board of directors regulating the election of directors or officers is valid unless published for at least once a week for two successive weeks in a newspaper in the county where the election is to be held, and at least thirty days before such election.<sup>5</sup> Subject to the by-laws, if any, adopted by the members of a corporation, the directors may make necessary by-laws of the corporation.<sup>6</sup> When the directors of any corporation for the first year of its corporate existence hold over and continue to be directors after the first year, because of their neglect or refusal to adopt the by-laws required to enable the stockholders to hold the annual election for directors, all their

<sup>1</sup> Gen. Corp. L. § 11 (L. 1909, c. 28).

<sup>2</sup> Gen. Corp. L. § 34 (L. 1909, c. 28).

<sup>3</sup> St. Corp. L. § 30 (L. 1909, c. 61).

<sup>4</sup> St. Corp. L. § 31 (L. 1909, c. 61).

<sup>5</sup> Gen. Corp. L. § 11 (L. 1909, c. 28).

<sup>6</sup> Gen. Corp. L. § 34 (L. 1909, c. 28).

acts and proceedings while so holding over, done for and in the name of the corporation, designed to charge upon it any liability or obligation for the services of any such director, or any officer, or attorney or counsel appointed by them, and every such liability or obligation, must be held fraudulent and void.<sup>7</sup>

**§ 38. Id.: How Far Binding on Strangers, Stockholders and Employees.**—"It is idle to appeal to the by-laws of . . . [a corporation the business of which is in the hands of executive agents] as affecting contracts made with third persons in reliance upon the apparent authority of its executive agents."<sup>8</sup> "By-laws of business corporations are as to third persons private regulations binding as between the corporation and its members or third persons having knowledge of them, but of no force as limitations *per se* as to third persons of an authority, which, except for the by-law, would be construed as within the apparent scope of the agency."<sup>9</sup> A corporate by-law that no contract be made by the company, by any officer, unless authorized by resolution of its directorate does not limit the authority of a managing agent intrusted with the sale of its securities to make a contract verbally authorized by those controlling the corporation as an incident to such sale.<sup>10</sup> A corporation is bound by a contract in writing made for it by one who generally managed it, sold its manufactured goods, bought raw material for it to manufacture, had charge of its bank account, drew all its cheques, was its secretary and treasurer, owned two-thirds of its stock and was the only one of its three stockholders and directors who lived where it had its place of business, irrespective of a by-law providing a contract for the amount of the one in question should be signed by its president.<sup>11</sup> ". . . the by-laws of a corporation, made in pursuance of its special charter, or of the general laws under which it is organized, are binding on all members and others acquainted with the method of doing business . . . It is another rule, that every by-law made in pursuance of a general or incidental authority, must be a reasonable one. It is not a reasonable by-law, which, without authority express or to be clearly

<sup>7</sup> St. Corp. L. § 27 (L. 1909, c. 61).

<sup>8</sup> Standard Fashion Co. v. Siegel-Cooper Co., 44 A. D. 121, 60 Supp. 739 (1899).

<sup>9</sup> Rathbun v. Snow, 123 N. Y. 343, 10 L.R.A. 355, 25 N. E. 379 (1890).

<sup>10</sup> Sherman v. Dwight, 138 A. D. 595, 123 Supp. 89 (1910). The contract was of guaranty of stock.

<sup>11</sup> Cone v. Empire Plaid Mills, 12 A. D. 314, 42 Supp. 160 (1896).

implied, interferes with the common rights of property and the dealings of third persons, and prevents the purchase and transfer or delivery of property.”<sup>12</sup> A by-law will not be set aside, certainly unless for extremely good cause, as being in subversion of the corporation’s charter and in subversion of and to the irreparable injury of stockholders, because it, in enumerating the powers of the general manager of the company, besides giving him customary powers, gives him general and exclusive charge of the business in all unspecified details and makes him executive officer of the board of trustees, provided it make him at all times subject to the board’s control.<sup>13</sup> A corporate by-law that none of the stock shall be allowed to be transferred on the books if the person in whose name it stands is indebted to the company unless upon consent of the board of trustees or president or treasurer has no warrant in the statutes and if not made known on the stock certificates cannot be upheld.<sup>14</sup> A by-law of a corporation cannot prevent one employed by its president to prepare a pamphlet setting forth the patent under which the company was organized to work from recovering against it for such services.<sup>15</sup>

**§ 39. Id.: Inspection of.**—While it is in the discretion of the court to grant an application of a stockholder to inspect his corporation’s by-laws just as much as its books and other papers, yet it must be a strong case which will warrant a denial of inspection of by-laws, because they are part of the contract between him and it, while the books and papers are not.<sup>16</sup> The general subject of the right of inspection of corporate books and records is treated hereinafter.<sup>17</sup>

**§ 40. Id.: Amendment of.**—“The power to make by-laws is to make such as are not inconsistent with the constitution and the law; and the power to alter has the same limit, so that no alteration could be made which would infringe a right already

<sup>12</sup> *Driscoll v. West Bradley & Cary Mfg. Co.*, 59 N. Y. 96 (1874); *Gen. Mfg. Act*, L. 1848, c. 40, § 8.

<sup>13</sup> *Burden v. Burden*, 159 N. Y. 287, 54 N. E. 17 (1899).

<sup>14</sup> *Driscoll v. West Bradley & Cary Mfg. Co.*, 59 N. Y. 96 (1874); *Gen. Mfg. Law*, L. 1848, c. 40, § 8.

<sup>15</sup> *Powers v. Schlicht Heat & Power Co.*, 23 A. D. 380, 48 Supp. 237 (1897); *aff’d* 165 N. Y. 662, 59 N. E. 1129. “. . . in the absence of express notice, a person dealing

with such corporation is entitled to assume that in the ordinary transaction of its business the president is authorized to act for it, and the corporation is liable for contracts made in the conduct of its business.”

On effect of corporate by-laws as notice, see notes in 25 L.R.A. 48; 39 L.R.A.(N.S.) 295.

<sup>16</sup> *Matter of Coats*, 75 A. D. 567, 78 Supp. 429 (1902).

<sup>17</sup> See § 46 *et seq.*, *infra*.

given and secured by the contract of the corporation.”<sup>18</sup> Although a corporation’s by-laws prescribe five as the number of its directors and that the stockholders by a vote of ninety per cent of the issued and outstanding stock may amend the by-laws, and at a duly called meeting the holders of over fifty but less than ninety per cent of the issued and outstanding stock, vote to decrease the number of directors from five to four and to substitute “four” for “five” in the by-laws’ requirement for directors, yet the reduction is lawful, if all statutory requirements were complied with, as it is not lawful for a corporation to provide in its by-laws that a vote of the holders of ninety per cent of its issued and outstanding stock shall be required in order to change the number of directors.<sup>19</sup>

**§ 41. Id.: Seal, Governing Statutes.**—Every corporation as such has power, though not specified in the law under which it is incorporated, to have a common seal and to alter it at pleasure.<sup>20</sup> A seal of a corporation may be impressed directly upon the instrument or writing to be sealed, or upon wafer, wax or other adhesive substance affixed thereto, or upon paper, or other similar substance affixed thereto by mucilage or other adhesive substance.<sup>1</sup> An instrument or writing duly executed, in the corporate name of a corporation, which has not adopted a corporate seal, by the proper officers of the corporation under their private seals, is deemed to have been executed under the corporate seal.<sup>2</sup>

**§ 42. Id.: In General.**—“ . . . when the sale, assignment or transfer of the property of the corporation requires the use of the common seal, it cannot be made without the assent and authority of the board.”<sup>3</sup> “The seal of a corporation like the seal of an individual when affixed to a contract is presumptive evidence of a sufficient consideration for the contract.”<sup>4</sup> Assuming (what is gravely to be doubted) that

<sup>18</sup> *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159 (1879.)

<sup>19</sup> *Katz v. The H. & H. Mfg. Co.*, 183 N. Y. 578, 76 N. E. 1098 (1906); *St. Corp. L. § 21*, now § 26.

On right under reserved power to amend or repeal charter of corporation to change the rights of stockholders as to voting the stock, see note in 22 L.R.A.(N.S.) 420.

On reserved right to amend repeal charter as to taxation, see note in 60 L.R.A. 69.

<sup>20</sup> *Gen. Corp. L. § 11* (L. 1909, c. 28).

<sup>1</sup> *Gen. Const. L. § 43* (L. 1909, c. 27).

<sup>2</sup> *Gen. Const. L. § 45* (L. 1909, c. 27).

<sup>3</sup> *Hoyt v. Thompson*, 5 N. Y. 320 (1851).

<sup>4</sup> *Mutual Life Insurance Co. v. Yates County National Bank*, 35 A. D. 218, 54 Supp. 743 (1898).

the presence of the corporate seal upon instruments having the appearance of having been made as the company's negotiable promissory notes could affect their negotiability, yet its mere presence, unaccompanied by a single fact evidencing that the company's officers intended to, or did, affix it, is quite insufficient to have any effect upon their apparent character.<sup>5</sup>

**§ 43. Id.: Adoption of.**—The statutes governing the adoption by a corporation of a seal are set forth in the last section but one, and should be read in considering the present section. "A corporation, like an individual, may adopt any seal that is convenient for the particular occasion. The only limitation of the rule is, that the seal adopted must be affixed as the seal of the corporation (*citations*). Where . . . it is found that the contract recites that it is executed under the hands and seals of the parties, if one seal is affixed after the names of the parties, that will be sufficient proof that the particular seal was adopted by all those who sign under the recital, and the seal will be deemed to be the seal of all parties alike."<sup>6</sup> Adoption by the trustees of a religious corporation of a seal affixed opposite the name of its president signed to a mortgage is sufficient if it had no seal at the time.<sup>7</sup> When a prior president of a corporation withholds its corporate seal and stock book so as to prevent the transfer of stock thereon, and the issue of new stock in time to permit it to be voted upon at an annual meeting, it is lawful for the directors to adopt and procure a new seal and new stock book to accomplish that purpose and those holding stock of record in the new book may legally vote.<sup>8</sup>

**§ 44. Id.: Affixation Presumed to be by Authority and to made Instrument Binding on Corporation.**—"It is an ancient and well-established rule of law that where the seal of a corporation is affixed to a contract or written instrument, to which such corporation is a party, and it is signed by the president and secretary or other proper officers, it will be presumed that such officers did not exceed their powers, as the seal is *prima facie* proof that it was attached by proper authority, and it lies with the party objecting to its execu-

<sup>5</sup> Weeks v. Esler, 143 N. Y. 374, 38 N. E. 377 (1894).

<sup>6</sup> Rusling v. Union Pipe & Construction Co., 5 A. D. 448, 39 Supp. 216 (1896); 158 N. Y. 737, 53 N. E. 1131. "The contract recites that, 'in witness whereof' the parties 'have hereunto set their hands and seals.' It is signed 'Union Pipe &

Construction Co., by Calvin Detrick, Pres't, Jos. L. Rusling.' Opposite the name of Rusling appears a seal."

<sup>7</sup> South Baptist Society of Albany v. Clapp, 18 Barb. 35 (1853).

<sup>8</sup> Socorro Mountain Mining Co. v. Preston, 17 Misc. 220, 40 Supp. 1040 (1896).

tion to show that it was affixed surreptitiously or improperly.”<sup>9</sup> “Although the presence of a seal upon an instrument is *prima facie* proof that it was attached by proper authority . . . it is only such proof as may be conclusively rebutted . . .”<sup>10</sup> “The seal of a corporation, affixed to an instrument, proves itself, and is of itself sufficient *prima facie*, or presumptive evidence, that it was so affixed by due authority. It lies with the party objecting to the instrument so sealed to show that the seal of the corporation was improperly affixed, or without the assent of the proper authority (*citations*). The officer taking proof of the deed is not required to take evidence that the corporate seal was affixed by authority, or to examine into the title of the person who assumes to be the officer of the corporation.”<sup>11</sup> A contract is presumed to be that of a corporation which is a party to it if signed by its president and secretary and if it had the corporate seal affixed; but this *prima facie* showing may be upset by the corporation’s demonstration that it was *ultra vires*, even though it does not affirmatively so allege in its answer, provided it generally denies.<sup>12</sup> A corporate seal affixed to a contract, within its lawful powers to make, by lawful authority is sufficient to bind it until impeached.<sup>13</sup> “A deed formally executed under the corporate seal, bears upon its face the presumption that it was executed by competent authority from the corporation.”<sup>14</sup>

**§ 45. Books and Records: Adopting, Keeping and Compelling Delivery.**—Every stock corporation must keep at its office (1) correct books of account of all its business and transactions, and (2) a book to be known as the stock book, containing (a) the names, alphabetically arranged, of all persons who are stockholders of the corporation, showing (b) their places of residence, (c) the number of shares of stock held by them respectively, (d) the time when they respectively became the owners thereof, and (e) the amount paid thereon.<sup>15</sup> The board of directors has power at a meeting lawfully convened to adopt a new stock book, as the adoption of a stock book in the first instance pertains to the duties of the directors

<sup>9</sup> Quackenboss v. Globe & R. F. Ins. Co., 177 N. Y. 71, 69 N. E. 223 (1903).

<sup>10</sup> Gause v. Commonwealth Trust Co., 196 N. Y. 134, 24 L.R.A.(N.S.) 967, 89 N. E. 476 (1909).

<sup>11</sup> Canandaigua Academy v. McKechnie, 19 Hun, 62 (1879).

<sup>12</sup> Quackenboss v. Globe & Rut-  
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gers Fire Ins. Co., 106 A. D. 466, 94 Supp. 723 (1905).

<sup>13</sup> New England Iron Co. v. Gilbert Elevated R. R. Co., 91 N. Y. 153 (1883).

<sup>14</sup> Hoyt v. Thompson, 5 N. Y. 320 (1851).

<sup>15</sup> St. Corp. L. § 32 (L. 1916, c. 127).

of a stock corporation, and if for any reason the existing transfer book is not available for use by the directors for the making of transfers of stock, the adoption of a new stock book is incident to the original power vested in the directors.<sup>16</sup> When one of three directors has left town after locking up the corporate stock book the other two are faced with such an exigency as enables them to issue a new stock book.<sup>17</sup> "Mandamus is the proper remedy to compel an outgoing officer of a corporation to deliver over books and papers belonging to the corporation."<sup>18</sup> Directors found by judicial determination to be the legal ones of a corporation as against others claiming to be such are entitled to peremptory mandamus against one of the latter who has its books compelling him to turn them over.<sup>19</sup>

§ 46. *Id.*: **Inspection, In General.**—" . . . A stockholder has the right at common law to inspect the books of his corporation at a proper time and place, and for a proper purpose, and . . . if this right is refused by the officers in charge a writ of mandamus may issue, in the sound discretion of the court, with suitable safeguards to protect the interests of all concerned. It should not be issued to aid a blackmailer, nor withheld simply because the interest of the stockholder is small, but the court should proceed cautiously and discreetly, according to the facts of the particular case. To the extent, however, that an absolute right is conferred by statute, nothing is left to the discretion of the court, but the writ should issue as a matter of course, although even then, doubtless, due precautions may be taken as to time and place so as to prevent interruption of business, or other serious inconveniences"; but the statutory provision that a corporation shall keep a stock book which shall be open to the inspection of its stockholders does not abridge the common law rights of the stockholders to examine the corporate books, stock as well as other.<sup>20</sup> The distinction must be borne in mind between the

<sup>16</sup> Matter of Petition of Argus Co., 138 N. Y. 557, 34 N. E. 388 (1893).

<sup>17</sup> Matter of Petition of Argus Co., 138 N. Y. 557, 34 N. E. 388 (1893).

<sup>18</sup> People *ex rel.* Keeseville, Ausable Chasm & Lake Champlain R. R. Co. v. Powers, 145 A. D. 693, 130 Supp. 529 (1911). But if there is much litigation and an accounting pending between such officers

and others the court will direct the corporate books delivered to the county clerk so that they may be accessible to all parties.

<sup>19</sup> Matter of Journal Publishing Club, 30 Misc. 326, 63 Supp. 465 (1900).

<sup>20</sup> Matter of Steinway, 159 N. Y. 250, 45 L.R.A. 461, 53 N. E. 1103 (1899); Stock Corp. L. § 29. See now § 32.

general business books and the stock book of a corporation in determining a stockholder's right of inspection thereof; because the inspection of the former is a common-law right granted or withheld in the sound discretion of the court; and an inspection of the general books will be withheld unless the stockholder seek in good faith to learn something he has a right to know or if he seek it for the purpose of annoying the company; while the inspection of the stock book is an absolute right given by statute in addition to any common-law rights, and the stockholder's motives in inspecting the stock book alone are immaterial.<sup>1</sup> "The principle upon which a stockholder is allowed access to the books of a corporation is as applicable to the case of a banking corporation, as it is to any other kind of corporation. It is his common-law right, and, unless restricted by law or by the charter, the exercise of that right will not be denied him, at a proper time and place, when the circumstances are such as seem to the court to make that right available."<sup>2</sup> Two directors who control a corporation cannot prevent a third whom they have made secretary and a dummy director (to satisfy the demand of the statute that there be three) from inspecting the corporate books.<sup>3</sup> All that a director "need show to entitle himself to an inspection [of his corporation's books] is that he is a director of the company; that he has demanded permission to examine and that his demand has been refused."<sup>4</sup> While a director may examine his corporation's books assisted by a person designated by him and mandamus its officers to permit this, yet he cannot turn his right over to professional accountants acting alone.<sup>5</sup> A president has the right to inspect the books of his corporation, irrespective of his motive, and may have peremptory mandamus to command the corporation's secretary and treasurer, who refuses him such inspection, to permit it.<sup>6</sup> In order to entitle a stockholder to the aid of the court in securing an examination of the books of account of his corporation he should first show that he has demanded of its

On effect of by-laws on stockholder's right to inspect corporate books, see note in 20 L.R.A.(N.S.) 196.

<sup>1</sup> *People ex rel. Callanan v. Keeseville, Ausable Chasm & Lake Champlain R. R. Co.*, 106 A. D. 349, 94 Supp. 555 (1905); St. Corp. L. § 29 (L. 1901, c. 354). See now § 32.

<sup>2</sup> *Matter of Tuttle v. Iron Nat. Bank*, 170 N. Y. 9, 62 N. E. 761 (1902).

<sup>3</sup> *People ex rel. Stauffer v. Bonwit Bros.*, 69 Misc. 70, 125 Supp. 958 (1910).

<sup>4</sup> *People ex rel. Leach v. Central Fish Co.*, 117 A. D. 77, 101 Supp. 1108 (1907).

<sup>5</sup> *People ex rel. Bartels v. Borgstede*, 169 A. D. 421, 155 Supp. 322 (1915).

<sup>6</sup> *People ex rel. Gunst v. Goldstein*, 37 A. D. 550, 56 Supp. 306 (1899).

treasurer, and been refused, the statement, provided for by statute, of its affairs under oath, if such a statement will furnish him with about the same information as he seeks by inspection of its account books.<sup>7</sup> A peremptory writ of mandamus to compel a corporation to exhibit its books and papers to a stockholder will not be granted if his avowed object is to obtain information to submit to the attorney-general and district attorney so that they may make such use thereof as might be necessary to cause the parties to make good any deficit which might occur from a loan made by the corporation which the stockholder desires to show by his inspection was illegal.<sup>8</sup> One holding forty-three per cent of the stock of a corporation of which he formerly was an officer is entitled to mandamus to inspect the books to ascertain how the money is being expended to build a large factory on land belonging to the sister of the corporation's president who is of precarious financial status, even though it be claimed that he is seeking information to benefit a company (formed by himself on severing his connection with the corporation) to make player pianos, under a right reserved to him to make them when the corporation was first formed to make pianos.<sup>9</sup> A stockholder, however small his holdings, alleging that bonds of the corporation were redeemed by the company at more than the market value at the time of redemption, presents ground for judicial intervention by mandamus to inspect the books to find with what moneys such bonds were redeemed, etc.; but if the allegation is denied, a peremptory writ of mandamus cannot issue, but the issue of fact must be determined upon a trial, after the issuance of an alternative writ.<sup>10</sup>

**§ 47. Id.: In Actions By and Against Corporations.**—The points which arise in connection with the inspection of the books of a corporation in actions by and against it are discussed in sections of a subsequent chapter to which reference is made.<sup>11</sup>

**§ 48. Id.: Stock Books, Governing Statutes.**—Every stock corporation must keep at its office a book to be known as the stock book containing (1) the names, alphabetically arranged, of all persons who are stockholders of the corporation, show-

<sup>7</sup> *People ex rel. Clason v. Nassau Ferry Co.*, 86 Hun, 128, 33 Supp. 244 (1895); *St. Corp. L.* § 52 (L. 1892, c. 688). See now § 32.

<sup>8</sup> *People ex rel. McElwee v. Produce Exchange Trust Co.*, 53 A. D. 93, 65 Supp. 926 (1900); *C. C. P.* § 2070.

<sup>9</sup> *People ex rel. Ludwig v. Ludwig & Co.*, 126 A. D. 696, 111 Supp. 94 (1908).

<sup>10</sup> *Matter of Hitchcock*, 157 A. D. 328, 142 Supp. 247 (1913).

<sup>11</sup> See § 448, *infra*.

ing (2) their places of residence, (3) the number of shares of stock held by them respectively, (4) the time when they respectively became the owners thereof, and (5) the amount paid thereon. No transfer of stock is valid as against the corporation, its stockholders and creditors for any purpose except to render the transferee liable for the debts of the corporation to the extent provided in the Stock Corporation Law until it has been entered in the stock book by an entry showing from and to whom transferred.<sup>12</sup> If a corporation does not keep such a book as the statute prescribes a stockholder shall have a right to inspect, it must permit him to see such book as it does keep which will give him the information the statute intends he shall get, even though it contain other information, too.<sup>13</sup>

**§ 49. Id.: Who May Examine.**—The stock book of every stock corporation must be open daily, during at least three business hours, for inspection by (1) any judgment creditor of the corporation; or (2) by any person who has been a stockholder of record in the corporation for at least six months immediately preceding his demand; or (3) by any person holding stock of such corporation to an amount equal to five per centum of all its outstanding shares; or (4) by any person thereunto in writing authorized by the holders of stock of such corporation to an amount equal to five per centum of all of its outstanding shares.<sup>14</sup> The right to examine corporate books is a personal right depending on ownership of its stock which makes the stockholder a member of the corporation, and the right does not, therefore, extend to a mere custodian of the stock pending a litigation as to its ownership, although the custodian may become a stockholder as the result of the litigation.<sup>15</sup> A stockholder who has pledged his holdings of a corporation's stock to it is entitled to inspect its books and to sue for the penalty on its refusal to permit such inspection.<sup>16</sup> The executor of a stockholder is entitled to mandamus the officers of a corporation to exhibit its books to him and permit him to examine them.<sup>17</sup> An executor of a deceased

<sup>12</sup> St. Corp. L. § 32 (L. 1916, c. 127).

<sup>13</sup> *People ex rel. Richmond v. Pacific Mail Steamship Co.*, 50 Barb. 280 (1867); 1 R. S. 601, § 1.

<sup>14</sup> St. Corp. L. § 32 (L. 1916, c. 127).

<sup>15</sup> *Matter of Hastings*, 120 A. D. 756, 105 Supp. 834 (1907).

<sup>16</sup> *Booth v. Consolidated Fruit Jar*

*Co.*, 62 Misc. 252, 114 Supp. 1000 (1909).

On right of stockholder to inspect books of the corporation, see notes in 45 L.R.A. 446; 20 L.R.A.(N.S.) 185; 30 L.R.A.(N.S.) 290; 42 L.R.A.(N.S.) 332.

<sup>17</sup> *Matter of Hastings*, 56 Misc. 45, 106 Supp. 938 (1907).

holder of one-half of the capital stock of a corporation should be granted mandamus to compel the corporation to permit examination by him of its books.<sup>18</sup> Personal representatives of a deceased stockholder may have peremptory mandamus to compel his corporation to permit inspection of its books to enable them to testify in a transfer tax proceeding as to the value of decedent's holdings of stock.<sup>19</sup>

**§ 50. Id.: Demand.**—"If the officer or agent having charge of the stock book can be found at the office of the corporation, during business hours, a demand made, there and then, by a person entitled thereto, for an inspection of such book is sufficient, even though it be at some other place, as he is not obliged to go elsewhere for that purpose (*citation*). But if the officer or agent having the custody of the specified book has removed the same from the company's office, and he cannot be found therein, during business hours, then a demand elsewhere would, in my opinion, be valid."<sup>20</sup>

**§ 51. Id.: Making Extracts.**—Persons entitled to inspect the stock books of corporations may make extracts therefrom.<sup>1</sup> Under a statute giving stockholders the right at reasonable times for thirty days prior to any election of directors to examine the stock transfer book, the stockholders may not only inspect the book but take copies of the names listed.<sup>2</sup> "The right of inspection . . . [by a stockholder of his corporation's stock book] carries with it the right to make such extracts from the book as will enable the shareholder to retain the information disclosed by the inspection."<sup>3</sup> A statute providing an unrestricted examination of a corporation's books by a stockholder or his attorney necessarily includes the right to take extracts therefrom.<sup>4</sup>

**§ 52. Id.: Penalty for Refusing.**—Every stock corporation which neglects or refuses to keep or cause to be kept a stock

<sup>18</sup> *Matter of Hastings*, 128 A. D. 516, 112 Supp. 800 (1908); *aff'd* 194 N. Y. 546, 87 N. E. 1120.

<sup>19</sup> *Matter of Kennedy*, 37 Misc. 317, 75 Supp. 457 (1902).

<sup>20</sup> *Gunst v. Goldstein*, 30 Misc. 44, 61 Supp. 707 (1899).

<sup>1</sup> St. Corp. L. § 32 (L. 1916, c. 127). The statutes providing for inspection of the books of a domestic and foreign corporation formerly were different in that the latter does not provide for making extracts therefrom while the former does. See *People ex rel. Althause v.*

*Giroux Consolidated Mines, Co.*, 122 A. D. 617, 107 Supp. 188 (1907); St. Corp. L. §§ 29, 53 (L. 1901, c. 354 and L. 1897, c. 384). See now §§ 32 and 33, respectively.

<sup>2</sup> *Cotheal v. Brouwer*, 5 N. Y. 562 (1851); 1 R. S. 601, § 1.

<sup>3</sup> *People ex rel. Lorge v. Consolidated National Bank*, 105 A. D. 409, 94 Supp. 173 (1905); St. Corp. L. § 29 (L. 1901, c. 354). See now § 32.

<sup>4</sup> *Matter of Martin*, 62 Hun, 557, 17 Supp. 133 (1891); L. 1876, c. 611, §§ 16, 17.

book, or to keep any book open for inspection as required by the statute, forfeits to the people the sum of fifty dollars for every day it so neglects or refuses.<sup>5</sup> If any officer or agent of a stock corporation neglects or refuses to make any proper entry in its stock book, or neglects or refuses to exhibit it, or to allow it to be inspected and extracts taken therefrom as provided by the statute, the corporation and such officer or agent each forfeits and pays to the party injured a penalty of fifty dollars for every such neglect or refusal, and all damages resulting to him therefrom.<sup>6</sup> It is a defense to any action for penalties under the statute that the person suing therefor has within two years sold or offered for sale any list of stockholders of such corporation or of any other corporation, or had aided or abetted any person in procuring any stock list for any such purpose.<sup>7</sup> There can be no recovery by a corporation's judgment creditor of a statutory penalty for its refusal to allow him to inspect its stock book if it kept none, but showed him on demand the stock certificate book, the only book it kept.<sup>8</sup> An officer of a corporation cannot be held liable for the penalty imposed by statute on him for failure to exhibit his corporation's stock book if the corporation does not keep one.<sup>9</sup> The penalty prescribed by statute for failure to exhibit a corporation's books to a stockholder on demand cannot be exacted if the corporation's president, on demand for such inspection, asked the stockholder to come back the next business day because the books were in the safe and the clerk in charge was away and only knew the combination.<sup>10</sup> A statement by an agent of a corporation to a stockholder seeking inspection of its stock book that it was not at that, its main office, but that the applicant was at liberty to examine it at the office of the corporation's president only a short distance from its main office, is neither a refusal nor a neglect to exhibit the book within the meaning of the statute subjecting him to a penalty for such a refusal or neglect.<sup>11</sup> When a plaintiff stockholder, suing to recover from his corporation the penalty imposed by statute for its failure to allow

<sup>5</sup> St. Corp. L. § 32 (L. 1916, c. 127).

<sup>6</sup> St. Corp. L. § 32 (L. 1916, c. 127).

<sup>7</sup> St. Corp. L. § 32 (L. 1916, c. 127).

<sup>8</sup> Moore v. Institute of Educational Travel, Inc., 89 Misc. 369, 151 Supp. 929 (1915); St. Corp. L. § 32.

<sup>9</sup> Billingham v. Gleason Mfg. Co., 43 Misc. 681, 88 Supp. 398 (1904); St. Corp. L. § 29. See now § 32.

<sup>10</sup> Kelsey v. Pfaudler Process Fermentation Co., 41 Hun, 20 (1886); L. 1848, c. 40, § 25.

<sup>11</sup> Lozier v. Saratoga Gas Co., 59 A. D. 390, 69 Supp. 247 (1901); St. Corp. L. § 29 (L. 1892, c. 688). See now § 32.

him to inspect its books, admits his several demands were for the purpose of getting certain information sought once for all, the defendant is liable for but one penalty in each action in spite of having refused three separate times to submit its books to inspection.<sup>12</sup> A complaint to recover a penalty for failure to exhibit a corporation's stock certificate book should allege that the company is a stock corporation.<sup>13</sup>

**§ 53. Id.: Practice In Enforcing, In General.**—Inspection of corporate books in actions against corporations is treated in § 448 of this book. Nothing in the statute enabling inspection of a corporation's stock book under certain penalties impairs the power of the courts to compel by mandamus or judgment the production for examination by any stockholder of the stock books of a corporation.<sup>14</sup> While the right of a stockholder to inspect his corporation's books exists at common law irrespective of any such right granted by statute, the common law remedy will not be granted simply to enable the stockholder to determine if the company has been properly conducted.<sup>15</sup> The proceeding for discovery of papers of a corporation must be commenced by petition upon notice and is entirely distinct from that for taking depositions begun by summons in an action followed by affidavits and in which the corporation to be examined may be required to produce its books, not to be inspected by the other side as in a discovery proceeding, but to refresh the recollection of the corporate officer orally examined.<sup>16</sup>

**§ 54. Id.: By Mandamus, As to Books In General.**—A small stockholder is entitled to mandamus to compel his corporation to submit its books to his inspection when he has been such three years and since its formation, no report has ever been made by it, the president (a personal friend alleged to have induced the purchase of the stock) says that he has answered all "reasonable inquiries," that the corporation lost much money in a transaction of which the stockholder knew and that the latter has become hostile to him and is trying to make him buy the stock.<sup>17</sup> A director is entitled as matter of law

<sup>12</sup> *Walcott v. Little*, 46 Misc. 96, 91 Supp. 411 (1904); St. Corp. L. § 29. See now § 32.

<sup>13</sup> *Gunst v. Goldstein*, 30 Misc. 44, 61 Supp. 707 (1899); St. Corp. L. § 29. See now §§ 32.

<sup>14</sup> St. Corp. L. § 32 (L. 1916, c. 127).

<sup>15</sup> *Matter of Colwell*, 76 A. D. 615, 78 Supp. 607 (1902).

<sup>16</sup> *Manthey v. Wyoming County Co-operative Fire Ins. Co.*, 76 A. D. 579, 78 Supp. 596 (1902); C. C. P. §§ 803-809 and 872, subd. 7.

On power to compel production of corporate books to aid in assessing holder of stocks or his estate, see note in 8 L.R.A.(N.S.) 788.

<sup>17</sup> *Matter of O'Neill*, 47 Misc. 495, 95 Supp. 964 (1905).

to a peremptory writ of mandamus to compel his domestic corporation's president and treasurer to permit him and an accountant to examine its books for a period limited by the necessity of the case.<sup>18</sup> As a peremptory writ of mandamus issues only when the applicant's right to it depends upon questions of law and in every other case it cannot issue until after an alternative writ, one seeking only a peremptory writ to examine a corporation's books to find out the value of his stock, upon allegations that dividends were paid when he managed it whereas none are now paid, will be unsuccessful if the answering affidavits allege the reason for this to be that he is unjustly and unfairly and illegally competing with its business, because such answer is substantially admitted as true by his demand for a peremptory writ.<sup>19</sup>

**§ 55. Id.: As to Stock Transfer Book.**—The exercise of the power of the court in granting a mandamus to a stockholder to enable him to examine the transfer books of the corporation in which he holds stock for proper purposes and on proper occasions is discretionary, and will not be reviewed by the Court of Appeals when the intermediate appellate tribunal has held that such discretion has properly been exercised in refusing the writ.<sup>20</sup> The Court has discretion to mandamus a corporation to show its stock transfer book to a stockholder even though the application to the corporation by the stockholder for permission to inspect be not made within thirty days of an election.<sup>1</sup>

**§ 56. Id.: Stockholder's Motive in Seeking.**—When there is a strong and natural inference that the granting to one stockholder of a peremptory writ of mandamus to his corporation to allow him to inspect its books would be inimical to and destructive of the rights and interests of other stockholders and of the corporation, it would be an abuse of discretion to grant the writ.<sup>2</sup> Although there is no express provision of law authorizing a mandamus to compel a corporation, whether

<sup>18</sup> *People ex rel. McInnes v. Columbia Bag Co.*, 103 A. D. 208, 92 Supp. 1084 (1905).

<sup>19</sup> *People ex rel. Giles v. Klaunder-Weldon Dyeing Machine Co.*, 179 A. D. 149, 167 Supp. 429 (1917).

Generally on the right of a stockholder to enforce inspection of books of corporation by mandamus, see note in 45 L.R.A. 457.

<sup>20</sup> *Matter of Sage*, 70 N. Y. 220 (1877).

<sup>1</sup> *People ex rel. Stobo v. Eadie*, 63 Hun, 320, 18 Supp. 53; aff'd 133 N. Y. 573, 30 N. E. 1147; L. 1882, c. 409, § 199.

<sup>2</sup> *Matter of Coats*, 73 A. D. 179, 76 Supp. 730 (1902). The applicant was stenographer to the person said to want to get the information in order to get control of the corporation, and hardly had the money himself to buy his holdings, acquired while such stenographer.

domestic or foreign, to let one of its stockholders inspect its books, yet it will be granted when he shows a legal right to such inspection; but the writ is in the court's judicial discretion and if the corporation states facts which justify an inference that the application is not made *bona fide* for the stockholder's purposes or protection but for the benefit of undisclosed persons for undisclosed purposes, the court should require the applicant frankly to state (by replying affidavit or before a referee) the purpose of the application and at whose instigation made.<sup>3</sup> "A stockholder has the right for a proper purpose and at a proper time and place to inspect the books of his corporation, and . . . if that right is denied him by the officers of the corporation, the Supreme Court may in its sound discretion issue a writ of mandamus to compel an inspection . . . An examination will not be allowed for an ulterior purpose or to embarrass the corporation."<sup>4</sup> Inspection of corporate books through the aid of the court's mandamus will be denied when the real object of the petitioner is to obtain information that will aid him in crippling the corporation's business for the benefit of its business rival.<sup>5</sup> " . . . The motives of a stockholder, however sinister, constitute no answer to an action by him to recover the penalty prescribed by statute for the refusal of a corporation to exhibit its stock book upon proper demand "; but "the right to a mandamus to compel compliance with the statute is not . . . specifically given by the written law " and the court will not aid a stockholder by mandamus if his designs are sinister, *e. g.*, if he makes the application in the interest of a business rival of the corporation.<sup>6</sup> A corporation will be mandamusd to allow a stockholder to examine its books only in proper aid of his stock interest, and not to secure to him information to aid him in a suit against directors of the corporation for damages sustained by him because of a false report published by them inducing him to

<sup>3</sup> People *ex rel.* Hunter v. National Park Bank, 122 A. D. 635, 107 Supp. 369 (1907); St. Corp. L. § 29 (L. 1901, c. 354), as to domestic corporation; and People *ex rel.* Althaus v. Giroux Consolidated Mines Co., 122 A. D. 617, 107 Supp. 188 (1907); St. Corp. L. § 53 (L. 1897, c. 384).

<sup>4</sup> People *ex rel.* Lehman v. Consolidated Fire Alarm Co., 142 A. D. 753, 127 Supp. 348 (1911); "the motive . . . was to obtain in-

formation to furnish to the president of a competing company . . ."

<sup>5</sup> Matter of Kennedy, 75 A. D. 188, 77 Supp. 714 (1902); the declared object of the examination was to enable the county treasurer to ascertain the value of the corporation's stock so as to determine the taxable value of transfers of it by will.

<sup>6</sup> People *ex rel.* Britton v. American Press Assn., No. 1, 148 A. D. 651, 133 Supp. 216 (1912); St. Corp. L. § 32.

become a stockholder.<sup>7</sup> The court, in its discretion, will deny to a stockholder a peremptory writ of mandamus compelling his corporation to exhibit to him its books, when his papers do not make it appear that his purpose is to promote the interest of its security holders or to enhance the value of or protect his securities, but simply show his purpose to be to determine if it be a fact that its directors have imperilled its financial standing, and compelled it to resort to its capital to pay its fixed charges by reducing the price of the commodity it sells, which the answering papers show was necessary because of competition.<sup>8</sup> A stockholder will not be granted mandamus to inspect his corporation's books when his purpose is to make an investigation which was the basis of an action by him against it which resulted in a judgment against him.<sup>9</sup>

**§ 57. Id.: Pleading, Practice and Evidence.**—"Statements or denials on information and belief, or which are unspecific and indefinite, are worthless in mandamus proceedings."<sup>10</sup> Before one claiming to be entitled to peremptory mandamus for inspection of a domestic corporation's books as one of its stockholders can succeed he must show that he is a stockholder of record on its books.<sup>11</sup> Peremptory mandamus for examination of a corporation's books will not lie simply on the affidavit of one who alleges he has power of attorney from a stockholder to examine such books.<sup>12</sup> "The rule is that before a relator is entitled [as a stockholder to a peremptory writ of mandamus directing his corporation to permit him to examine its books] . . . he must establish that the information desired has been refused by the corporation, after a demand made therefor, and that it was necessary for him to have the information in order to properly protect his interest in the corporation."<sup>13</sup> Before a stockholder may obtain the court's power to compel his corporation to open its books to his inspection he must establish that the information desired has been refused by it after demand and that he needs the information to protect his corporate interests.<sup>14</sup> In determin-

<sup>7</sup> Matter of Taylor, 117 A. D. 348, 101 Supp. 1039 (1907).

<sup>8</sup> Matter of Pierson, 44 A. D. 215, 60 Supp. 671 (1899.)

<sup>9</sup> People *ex rel.* Mackey v. American Union Life Ins. Co., 31 Misc. 617, 64 Supp. 916 (1900).

<sup>10</sup> Matter of Reiss, 30 Misc. 234, 62 Supp. 145 (1900).

<sup>11</sup> Matter of Reiss, 30 Misc. 234,

62 Supp. 145 (1900); St. Corp. L. § 29. See now § 32.

<sup>12</sup> Matter of Latimer v. Herzog Teleseme Co., 75 A. D. 522, 78 Supp. 314 (1902).

<sup>13</sup> Matter of Hitchcock, 149 A. D. 824, 134 Supp. 174 (1912).

<sup>14</sup> Matter of Latimer v. Herzog Teleseme Co., 75 A. D. 522, 78 Supp. 314 (1902).

ing an application for a peremptory writ of mandamus to a corporation to allow a stockholder to inspect its books, the affidavits submitted by respondent must be taken as true.<sup>15</sup> "It is a settled rule of law that where in an application for a peremptory writ of mandamus the relators . . . proceed wholly on the papers presented, only undisputed statements of facts contained in the petition can be considered, and every other statement of fact contained in the answering papers must be assume[d] to be true."<sup>16</sup> Moving affidavits on an application for a mandamus to a corporation to show books to its stockholder pursuant to his common-law right of inspection should state his belief that transactions complained of resulted or likely will result in loss to the corporation or its stockholders.<sup>17</sup> A denial to a flat statement that one is a holder of stock of a corporation and has been refused permission to examine its stock transfer book is not sufficient to defeat his application if it be to the effect that the person making it, a director of the corporation, was advised by counsel and charged the fact to be that the applicant was not the owner or holder of shares although he held a certificate therefor—such possession being illegal.<sup>18</sup>

**§ 58. Id.: As Evidence, In General and Books of Account.—**

"The books of a corporation for many purposes are evidence, not only as between the corporation and its members, and between members, but also as between the corporation or its members and strangers. They are received in evidence generally to prove corporate acts of a corporation such as its incorporation, its list of stockholders, its by-laws, the formal proceedings of its board of directors and its financial condition when its solvency comes in question. But we have not been able . . . to find any case in which it has been decided that the books of account of a corporation are competent evidence, of themselves, to establish an account or claim against a trustee or stockholder in an action brought in behalf of the corporation."<sup>19</sup> The books of a corporation proven to have been kept by its treasurer, in his handwriting and he dead, are admissible in evidence as entries made in the usual course of business by one who had no interest to falsify.<sup>20</sup> The books of a corporation proven by its treasurer to have been kept by

<sup>15</sup> Matter of Coats, 73 A. D. 179, 76 Supp. 730 (1902).

<sup>16</sup> Matter of Kennedy, 75 A. D. 188, 77 Supp. 714 (1902).

<sup>17</sup> Matter of Colwell, 76 A. D. 615, 78 Supp. 607 (1902).

<sup>18</sup> Matter of Martin, 62 Hun, 557,

17 Supp. 133 (1891); L. 1876, c. 611, §§ 16, 17.

<sup>19</sup> Rudd v. Robinson, 126 N. Y. 113, 12 L.R.A. 473, 26 N. E. 1046 (1891).

<sup>20</sup> Chenango Bridge Co. v. Lewis, 63 Barb. 111 (1872).

him and to contain correct entries of tolls as given by the toll-gatherer, coupled with proof by the latter that he had made correct report of tolls gathered by him, are admissible in evidence.<sup>1</sup> The books of a corporation proven by its treasurer to have been received by him as the company's books upon his accession to office are not admissible.<sup>2</sup> The books of account of a corporation relating to its own matters and management, such as its stock and minute books, may be *per se* evidence; but its ordinary books of account kept by it relating to its transactions with third parties are not *per se* evidence of an indebtedness against it in an action to charge its directors with liability for its debts by reason of failure to file an annual statement.<sup>3</sup>

**§ 59. Id.: Stock Books.**—The stock book of every stock corporation is presumptive evidence of the facts therein stated pursuant to statute in favor of the plaintiff in any action or proceeding against such corporation or any of its officers, directors or stockholders.<sup>4</sup> “There is nothing in any statute which makes the books of the company the incontrovertible evidence of ownership of stock. A person may be the absolute, legal and equitable owner of stock without any transfer appearing upon the books.”<sup>5</sup> “The books containing the lists of the stockholders are evidence of the ownership of the stock, and a corporation is justified in being governed thereby until proof or notice is given showing that other parties than those named therein are the owners of the stock.”<sup>6</sup> “As between himself and third parties, the person who appears upon the transfer books to be a stockholder, may have parted with all his interest in the stock, but as between himself and the corporation, such person, and he only, is treated as a stockholder.”<sup>7</sup> The statute making a corporation's stock book presumptive evidence of the facts therein stated in an action against its directors, and others, does not prevent common-law evidence to prove who are its

<sup>1</sup> *Chenango Bridge Co. v. Lewis*, 63 Barb. 111 (1872).

<sup>2</sup> *Chenango Bridge Co. v. Lewis*, 63 Barb. 111 (1872).

<sup>3</sup> *Minor v. Crosby*, 76 A. D. 561, 78 Supp. 594 (1902).

On admissibility of account books in evidence to establish personal liability of directors, see note in 53 L.R.A. 537.

<sup>4</sup> *St. Corp. L. § 32* (L. 1916, c. 127).

<sup>5</sup> *McMahon v. Macy*, 51 N. Y. 155 (1872); Gen. R. R. Act, L. 1850, c. 140, §§ 10, 11, as amended L. 1854, c. 284.

<sup>6</sup> *Brisbane v. Delaware, Lackawanna & Western R. R. Co.*, 94 N. Y. 204 (1883).

<sup>7</sup> *Roosevelt v. Brown*, 11 N. Y. 148 (1854). The question was as to a stockholder's liability for corporate debts on dissolution, under 1 R. L. 1813, p. 247, § 7; 3 R. S. 222, § 7.

stockholders if it does not keep such a book.<sup>8</sup> A stock certificate book is not a stock transfer book required by statute to be kept so as to be presumptive evidence of the facts therein stated as provided by such statute.<sup>9</sup> The appearance of one's name on a corporation's stock book is presumptive evidence that he is a stockholder and throws upon him the burden of proving that he is not.<sup>10</sup>

**§ 60. Id.: Resolutions, Deeds and Records.**—"The acts of corporations may be proved in the same way as the acts of individuals. If there be no record evidence, they may be proved by the testimony of witnesses; and even where no direct evidence of such acts can be given, facts and circumstances may be proved from which the acts may be inferred."<sup>11</sup> When the whole agreement between a corporation and individuals is not in writing, though partly in a corporate resolution, it is proper to admit parol evidence of the agreement.<sup>12</sup> Entries in the minute books of a corporation which come from the place where such books are deposited and bear all the evidence of genuineness are competent evidence to show possession of realty if the minutes refer to things which were done at the time the entries were made and are ancient.<sup>13</sup> No law requires the keeping of minutes by a private corporation, or, if kept, their signature and attestation by any officer; and, if it be shown that a book is an original corporate minute book, used in the corporation's business, handed down to its officers, minutes therein in the handwriting of one who was its secretary and which state that such one acted as secretary of the meeting, should be admitted as evidence of what they state, even though unsigned.<sup>14</sup> Corporate records, properly proven, are evidence of corporate action, but not of the truth of recitals therein as to the value of its property and so of its stock which are taken from the report of an expert spread on the corporate minutes.<sup>15</sup> When a corporate resolution desired to be gotten in evidence is in

<sup>8</sup> *Union National Bank v. Scott*, 53 A. D. 65, 66 Supp. 145 (1900); St. Corp. L. § 29. See now § 32.

<sup>9</sup> *Geneva Mineral Springs Co., Ltd. v. Steele*, 111 A. D. 706, 97 Supp. 996 (1906); (L. 1875, c. 611, § 17).

<sup>10</sup> *Hoagland v. Bell*, 36 Barb. 57 (1861).

<sup>11</sup> *Moss v. Averell*, 10 N. Y. 449 (1853).

<sup>12</sup> *Rochester Folding Box Co. v.*

*Browne*, 55 A. D. 444, 66 Supp. 867 (1900); aff'd 179 N. Y. 542, 71 N. E. 1139.

<sup>13</sup> *Hamerschlag v. Duryea*, 58 A. D. 288, 68 Supp. 1061 (1901); aff'd 172 N. Y. 622, 65 N. E. 1117.

<sup>14</sup> *Woodhaven Bank v. Brooklyn Hills Improvement Co.*, 69 A. D. 489, 74 Supp. 1023 (1902).

<sup>15</sup> *Reilly v. Freeman*, 84 A. D. 433, 82 Supp. 929 (1903).

writing it should be produced; and not sought to be proven in substance by oral testimony.<sup>16</sup> The entry of a resolution of a board of directors in the minute book under direction of the corporation's secretary and its signature by him are sufficient acts to permit the reading of the resolution in evidence.<sup>17</sup> As directors control a corporation, their resolution providing for the employment and compensation of a person is evidence thereof — whether by way of original employment or ratification of the act of the president.<sup>18</sup> The formal act of a corporation recorded in a resolution of its board of directors cannot be limited, modified or annulled by oral proof in contradiction of its terms, not directed to mistake or to fraud in the record of the resolution.<sup>19</sup> A resolution of corporate directors to increase the capital stock of their corporation when it is already issued to the full authorized amount will be construed to mean the sale of some of such stock which has been surrendered to the company after first having been duly issued.<sup>20</sup> A corporate board of directors' resolution offering stock at a stated price is not repealed by a second resolution not referring to the first which provides for issue of its bonds to retire notes held by its stockholders.<sup>1</sup> A deed over thirty years old purporting to be executed by a corporation, with a concluding clause stating its treasurer by order of its board of directors thereto affixed its common seal and his signature as treasurer, subscribed by him and witnessed, and by him acknowledged in the usual manner of the acknowledgment of a deed executed by an individual, is properly received in evidence, and imports a grant by the corporation as distinguished from the act and seal of the individual officer, though it may be that it is necessary to prove that the seal was that of the corporation and the individual was its treasurer.<sup>2</sup> An admission that a corporate resolution was "duly adopted" precludes any contention that it was invalid because the vote of one relying thereon was necessary as director to its adoption.<sup>3</sup> The books of a corporation are

<sup>16</sup> *Mengis v. Fifth Avenue Ry. Co.*, 81 Hun, 480, 30 Supp. 999 (1894).

<sup>17</sup> *United Growers Co. v. Eisner*, 22 A. D. 1, 47 Supp. 906 (1897). The action was to compel a subscriber to pay for his subscription and the resolution was that one by which the directors called for payment.

<sup>18</sup> *Fraker v. Hyde & Sons*, 127 A. D. 620, 111 Supp. 757 (1908).

<sup>19</sup> *Dusenberry v. Sagamore Devel-*

*opment Co.*, 164 A. D. 573, 150 Supp. 229 (1914).

<sup>20</sup> *City Bank of Columbus v. Bruce & Fox*, 17 N. Y. 507 (1858).

<sup>1</sup> *Dusenberry v. Sagamore Development Co.*, 164 A. D. 573, 150 Supp. 229 (1914).

<sup>2</sup> *Hooper v. Auburn Water-Works Co.*, 37 Hun, 568 (1885); *aff'd* 109 N. Y. 635, 16 N. E. 681.

<sup>3</sup> *Maune v. Unity Press*, 143 A. D. 94, 127 Supp. 1002 (1911).

competent evidence to show an individual to have been a director in order to enable a creditor to hold him to a liability imposed by statute or directors.<sup>4</sup> A corporation cannot put in evidence against a plaintiff suing it a train sheet and train record, showing what trains passed a certain point at a certain time on its line, which is kept at one town by telegraphed information from such point, unless the station man at that point who gave the information to the telegraph operator to click to the town in question and such operator are called as witnesses.<sup>5</sup>

<sup>4</sup> *St. George Vineyard Co. v. Fritz*, 48 A. D. 233, 62 Supp. 775 (1900); *St. Corp. L.* § 30 (L. 1892, c. 688). See now § 34.

<sup>5</sup> *Graville v. New York Central & Hudson River R. R. Co.*, 34 Hun, 224 (1884).

## CHAPTER IV.

### STOCK.

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**§ 61. Stock: Definitions, Distinctions and Nature of.**—"The word stock has various significations, but, as applied to a joint stock association or corporation, it means the property and franchises of the corporation. It is sometimes used to designate the certificate, or scrip, issued to the stockholders; but this is an inappropriate use of the word. The scrip is not stock. The moment a corporation has either franchises or property of any kind it has stock; and the distributive share of its members respectively, in this stock, will depend upon the terms of its charter or articles of association."<sup>1</sup> "Shares of stock are in the nature of *choses in action*, and give the holder a fixed right in the division of the profits or earnings of a company so long as it exists, and of its effects when it is dissolved."<sup>2</sup> "A share of corporate stock is the right which

<sup>1</sup> *Burr v. Wilcox*, 22 N. Y. 551 (1860). Determining the liability of one as stockholder for corporate debts up to the amount of his hold-

ings, under Gen. Mfg. Act, L. 1848, c. 40, § 10.

<sup>2</sup> *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159 (1879).

the shareholder has to participate according to the number of shares in the surplus profits of the corporation on a division, and in the assets or capital stock remaining after payment of its debts on its dissolution or the termination of its active existence and operation (*citations*). It is created by the joint action of the corporation and the shareholder. It imports a contribution to the capital stock made by the shareholder and accepted by the corporation. When a corporation has agreed that a person shall be entitled to a certain number of shares for a consideration permitted by law and executed by the person, those shares come into existence and are owned by him. The statement in the certificate of incorporation or charter of the corporation that the capital stock is a designated amount divided into a certain number of shares, each of a named value, creates neither shares nor capital stock. It expresses the power of the corporation to acquire a capital stock. It creates potential shares which, transferred into actual shares by the acquisition of members and their payments, produce the money or property which, put into a single corporate fund, is the actual capital or capital stock on which the corporate business is undertaken and in which are the shares. It also fixes the sum of the payment necessary to create a share. The certificate of the corporation for the shares, or the stock certificate, is not necessary to the existence of the shares or their ownership. It is merely the written evidence of those facts. It expresses the contract between the shareholder and the corporation and his co-shareholders. But it is the payment, or the obligation to pay for shares of stock, accepted by the corporation, that creates both the shares and their ownership.”<sup>3</sup> “The words ‘cash capital \$150,000,’ do not necessarily import that the capital of the company was all paid in, or that it was intact, or that the stock was worth par. The terms ‘cash capital’ are sometimes used to signify the nominal capital, and their meaning is at least equivocal.”<sup>4</sup> A certificate of stock is the subject of conversion and by that corporation which issued it.<sup>5</sup>

**§ 62. Id.: Classes, Kinds and Rights of, In General.**—Every domestic stock corporation may issue preferred stock and common stock and different classes of preferred stock: (1) by the unanimous consent of the stockholders expressed in

<sup>3</sup> U. S. Radiator Co. v. State of New York, 208 N. Y. 144, 46 L.R.A. (N.S.) 585, 101 N. E. 783 (1913).

<sup>4</sup> Wakeman v. Dalley, 51 N. Y. 27 (1872).

<sup>5</sup> Condouris v. Imperial Turkish, etc., Co., 3 Misc. 66, 22 Supp. 695 (1893).

writing and filed in the office of the Secretary of State and in the office of the clerk of the county in which the principal business office of the corporation is located; or (2) by the consent of the holders of record of two-thirds of the capital stock, given at a meeting called for that purpose upon notice such as is required for the annual meeting of the corporation.<sup>6</sup> A certificate of the proceedings of such meeting, signed and sworn to by the president or a vice-president and by the secretary or assistant secretary of the corporation, must be filed and recorded in the offices where the original certificate of incorporation of such corporation was filed and recorded.<sup>7</sup> A corporation may issue stock with par value, whether common or preferred, and stock, other than preferred stock having a preference as to principal, without any nominal or par value.<sup>8</sup> "There is nothing in the constitution or the law that inhibits a corporation from beginning its corporate action by classifying the shares in its capital stock, with peculiar privileges to one share over another, and thus offering its stock to the public for subscriptions thereto. No rights are got until a subscription is made."<sup>9</sup>

**§ 63. Id.: Changing Classification of Issued Stock.**—But when it comes to changing the classification of stock which has been already issued, the rule is more strict. "The right of every shareholder to his proportion of the profits of the corporation . . . [is] vested, and in the absence of some power to change the relative value of the shares conferred by statute or by the articles of association, no change . . . [can] be made without the consent of all the shareholders," such *e. g.*, as giving certain shares priority over the rest.<sup>11</sup> Once a by-law is adopted dividing corporate capital stock into shares equal in amount, each share issued pursuant thereto is equal in value and in right; and the rights of the holders cannot be diverted without their consent.<sup>12</sup> " . . . any action of a corporation which takes hold of the shares of its capital stock already sold and in the hands of lawful owners, and divides them into two classes — one of which is thereby given prior right to a receipt of a fixed sum from the earnings before the other may have any receipt therefrom, and is given an equal share afterwards with the

<sup>6</sup> St. Corp. L. § 61 (L. 1917, c. 542).

<sup>7</sup> Id.

<sup>8</sup> St. Corp. L. § 19 (L. 1917, c. 500).

<sup>9</sup> Kent v. Quicksilver Mining Co., 78 N. Y. 159 (1879).

<sup>11</sup> Campbell v. American Zylonite Co., 122 N. Y. 455, 11 L.R.A. 596, 25 N. E. 853 (1890).

<sup>12</sup> Kent v. Quicksilver Mining Co., 78 N. Y. 159 (1879).

other in what earnings may remain—destroys the equality of the shares, takes away a right which originally existed in it, and materially varies the effect of the certificate of stock," and is voidable.<sup>13</sup>

§ 64. **Id.: Preferred Stock.**—Every domestic stock corporation may issue preferred stock and different classes of preferred stock.<sup>14</sup> But it cannot issue preferred stock without any nominal or par value with a preference as to principal.<sup>15</sup> "The permission to issue preferred stock is practically allowing the stockholders to divide the profits of the business in such manner as they may see fit. It is the usual practice to allow a certain dividend on the preferred stock, the holder having no right to vote; also to defer payment of dividend on the common stock until the claims of the preferred shareholders are satisfied. It is assumed, as a matter of course, that the total amount of stock, preferred and common, represents an actual contribution of capital paid in either in money or in property at a legal valuation."<sup>16</sup> The Legislature may prescribe what conditions may be attached to preferred stock issued by a corporation, but, if it do not specify any conditions, the corporation may attach them, so that they become a contract between it and those who acquire the stock.<sup>17</sup> Although a stock certificate itself gives no preference and a written guaranty thereon only authorizes the dividend described therein, yet the whole proceeding relating to the issue of the stock may be taken into consideration as constituting one and an entire transaction in order to show the preference claimed.<sup>18</sup> An owner by assignment of common stock is as much bound by an agreement by his assignor as to the preference to be given the holders of preferred stock as would be his assignor.<sup>19</sup> A holder of preferred or guaranteed stock entitled to cumulative dividends does not deprive himself of the right to have net earnings applied to payment of such dividends by alleged acquiescence in their distribution among general stockholders, if he protested against such dis-

<sup>13</sup> Kent v. Quicksilver Mining Co., 78 N. Y. 159 (1879).

<sup>14</sup> St. Corp. L. § 61 (L. 1917, c. 542).

<sup>15</sup> St. Corp. L. § 19 (L. 1917, c. 500).

On right of preferred stock to preference as to capital, see notes in 27 L.R.A. 136; 21 L.R.A.(N.S.) 228; 39 L.R.A.(N.S.) 1007.

<sup>16</sup> People *ex rel.* Cohn & Co. v.

Miller, 180 N. Y. 16, 72 N. E. 525 (1904).

<sup>17</sup> Hackett v. Northern Pacific Ry. Co., 36 Misc. 583, 73 Supp. 1087 (1901).

<sup>18</sup> Boardman v. Lake Shore & Michigan Southern Ry. Co., 84 N. Y. 157 (1881).

<sup>19</sup> Matter of Seneca Oil Co., 153 A. D. 594, 138 Supp. 78 (1912); *aff'd* 208 N. Y. 545, 101 N. E. 1121.

position of net earnings and demanded his dividends on his preferred or guaranteed stock.<sup>20</sup> One who is found to have been entitled to have the net earnings of a corporation applied to accumulated dividends due on his preferred or guaranteed stock instead of to dividends on general stock is entitled to interest on the dividends he was entitled to receive from the time the net earnings were appropriated to the holders of the common stock.<sup>1</sup> No essential difference exists between preferred stock, having priority over the remaining stock in the payment of dividends, and stock to which that preference is guaranteed; in the one case the agreement to preserve the preference and pay the dividend before dividends may be paid on the common stock, is to be clearly implied, while in the other it is explicitly expressed.<sup>2</sup> A corporation may make such arrangement with its stockholders as they please as to the rights of preferred stockholders and if the agreement is that the preferred stock is "to bear interest at the rate of six per centum per annum, payable semi-annually, cumulative," the dividends when declared would be only of interest earned, and if a person take some of a new issue on October 1 of preferred stock on the same terms and with the same rights as the old issued June 13, he should get such interest on the new, only, as will equalize it with the old, *i. e.*, only from October 1 and not from July 1.<sup>3</sup> Holders of certificates of guaranteed corporate stock, which entitle them "to dividends at the rate of ten per cent. per annum, payable semi-annually, . . . out of the net earnings of said company, and . . . to share *pro rata* with the other stock of the company, in any excess of earnings over ten per cent. per annum," are entitled, if the corporation fail, for want of net earnings, to make the dividends on the days set, to have dividends paid when the net earnings necessary for that purpose should afterward be realized.<sup>4</sup> One holding stock of a corporation represented by a certificate having printed on it a copy of a guaranty by another corporation of a certain rate of dividends by the former, provided for in a lease between the two corporations, cannot on surrender of the certificate

<sup>20</sup> *Prouty v. Michigan Southern & Northern Indiana R. R. Co.*, 1 Hun, 655 (1874).

<sup>1</sup> *Prouty v. Michigan Southern & Northern Indiana R. R. Co.*, 1 Hun, 655 (1874).

<sup>2</sup> *Prouty v. Michigan Southern & Northern Indiana R. R. Co.*, 1 Hun, 655 (1874).

<sup>3</sup> *Utica Trust & Deposit Co. v. Kellogg & Sons Co.*, 126 A. D. 176, 110 Supp. 1048 (1908).

<sup>4</sup> *Prouty v. Michigan Southern & Northern Indiana R. R. Co.*, 1 Hun, 655 (1874).

require the new certificate to contain a like guaranty if his corporation's directors have in good faith changed the guarantor corporation's liability to a smaller rate; because the lease is between the corporations and not their stockholders.<sup>5</sup> Evidence may be introduced to show that the actual agreement as to the preference to be given stock the certificates for which provide for a preference as to dividends only was that the preference should be not only as to the dividends but also on the distribution of assets.<sup>6</sup> An agreement made on consolidation of two corporations into one that a person receiving some of the capital stock shall so long as he hold stock be paid a stated interest on its par value does not entitle him to the issue of stock preferred according to the agreement.<sup>7</sup>

**§ 65. Id.: Unissued and Treasury Stock.**—The distinction between unissued and treasury stock is that the latter has been duly issued and then turned back into the treasury of the company.<sup>8</sup>

**§ 66. Capital Stock: Definitions, Distinctions and Nature.**—The distinction between the capital stock of a corporation and the shares of that stock should be well understood: "A corporation cannot issue and deliver a share of its capital stock. By the joint action of the corporation and the subscriber for its stock, he may become the owner of a given number of shares thereof, but not in such sense as that he may take away those shares out of the common corporate fund. The capital stock, is that money or property, which is put into a single corporate fund, by those, who by subscription therefor, become members of the corporate body. That fund becomes the property of the aggregate body only. A share of the capital stock, is the right to partake, according to the amount put into the fund, of the surplus profits of the corporation, and ultimately on the dissolution of it, of so much of the fund thus created, as remains unimpaired, and is not liable for debts of the corporation. . . . But such a right, that is, such a share, cannot be issued and delivered by a corporation, continuing in legal existence, and carrying on the business for which it was formed. . . . Those shares are intangible, and rest in abstract legal contemplation. . . . What the corporation can do, and what in some cir-

<sup>5</sup> People *ex rel.* Content v. Metropolitan Elevated Ry. Co., 26 Hun, 82 (1881).

<sup>6</sup> Matter of Seneca Oil Co., 153 A. D. 594, 138 Supp. 78 (1912); *aff'd* 208 N. Y. 545, 101 N. E. 1121.

<sup>7</sup> Noble v. Eldredge, 175 A. D. 803, 162 Supp. 503 (1916).

<sup>8</sup> Sanders v. Proctor, 172 A. D. 713, 158 Supp. 433 (1916).

cumstances it is compellable to do, is to issue and deliver, the written evidence, of the existence of such shares, and of the ownership of them; a paper usually called a stock certificate.”<sup>9</sup> “The capital of a corporation consists of its funds, securities, credits and property of whatever kind which it possesses. The word ‘capital’ applied to corporations is often used interchangeably with the words ‘capital stock,’ and both are frequently used to express the same thing—the property and assets of the corporation. Strictly, the capital stock of a corporation is the money contributed by the corporators to the capital, and is usually represented by shares issued to subscribers to the stock on the initiation of the corporate enterprise.”<sup>10</sup> “When a corporation is organized it secures capital by the issue of shares of capital stock. The fund or property thus secured answers the twofold purpose of furnishing means for carrying on the operations of the corporation and also security for the payment of creditors. This capital stock is carried as a liability and universally, so far as I am aware, at its par amount. It is thus carried as a liability because this is the proper bookkeeping entry. But aside from this, such entry also serves to emphasize the duty of the corporation to keep its capital stock unimpaired for the protection of those dealing with it. If the operations of the corporation result in gains, such gains are carried to the credit, not of the capital stock account but of some other account as surplus or profit and loss. Of course they may be capitalized by the issue of stock against them and sometimes in the case of certain corporations like banks or insurance corporations where a certain ratio between assets and liabilities other than to capital stock is required, such surplus or profits may be counted and maintained as capital although not formally capitalized. In the absence of some such special consideration I think we may take notice that it is the ordinary rule of corporate management established by decisions, statutes and business usages that the surplus of these gains or profits beyond what may be necessary to keep good the liability to capital stock which has been issued, may, in the discretion of a board of directors, be distributed amongst its stockholders as dividends and returns on their investment.”<sup>11</sup> “That which constitutes the capital stock of a corporation belongs to all of its stockholders, proportionately to their

<sup>9</sup> *Burrall v. Bushwick R. R. Co.*, 75 N. Y. 211 (1878).

<sup>10</sup> *Christensen v. Eno*, 106 N. Y. 97, 12 N. E. 648 (1887).

<sup>11</sup> *Equitable Life Assurance Soc. v. Union Pacific R. R. Co.*, 212 N. Y. 360, L.R.A.1915D, 1052, 106 N. E. 92 (1914).

holdings. It is divided into shares and each share represents the holder's proportionate interest."<sup>12</sup> "By loss or misfortune, or misconduct of the managing officers of a corporation, its capital stock may be reduced below the amount limited by its charter; but whatever property it has up to that limit must be regarded as its capital stock. When its property exceeds that limit, then the excess is surplus. Such surplus belongs to the corporation and is a portion of its property, and, in a general sense, may be regarded as a portion of its capital, but in a strictly legal sense it is not a portion of its capital, and is always regarded as surplus profits."<sup>13</sup>

**§ 67. Id.: Is a Trust Fund for Creditors.**— "It is the established law of this State that the capital of a corporation is regarded as a substitute for the personal liability which subsists in private ownerships and as a fund set apart and pledged for the payment of its debts. While a corporation is continuing its business, seeking credit and incurring liabilities, or while, after it has ceased to do business, it has outstanding liabilities, its directors or stockholders cannot lawfully and with immunity from personal liability to the corporation reduce the capital, which is the product of its capital stock as certified in its incorporating certificate, by appropriating or squandering it or giving it away."<sup>14</sup> "The proposition is well settled, that the stock and property of every corporation is to be regarded as a trust fund for the payment of its debts; and its creditors have a lien upon it, and the right to priority of payment over any stockholder. It may be followed into the hands of its directors; and even when it has been divided among its stockholders before its debts are paid, a judgment-creditor may pursue it, after the return of an execution unsatisfied, and maintain an action in the nature of a creditor's bill against a stockholder, to reach whatever was so received by him."<sup>15</sup> The law's policy is to maintain unimpaired a business corporation's capital stock as a fund to which its creditors may look and not to allow the corporation to pur-

<sup>12</sup> *Roberts v. Roberts-Wicks Co.*, 184 N. Y. 257, 3 L.R.A.(N.S.) 1034, 77 N. E. 13 (1906).

<sup>13</sup> *Williams v. Western Union Telegraph Co.*, 93 N. Y. 162 (1883).

<sup>14</sup> *Hazard v. Wight*, 201 N. Y. 399, 94 N. E. 855 (1911); *St. Corp. L. § 23*. By transfer on incorporation, the corporation owned personal property; defendant owned its capital stock subject to an agreement to

sell and assign it to W.; W. owed defendant a debt for the original price of such personalty; the corporation through defendant and W. as its officers and pursuant to such agreement paid moneys to defendant from its business on W.'s debt. Held, a violation of *St. Corp. L. § 23*.

<sup>15</sup> *Hastings v. Drew*, 76 N. Y. 9 (1879).

chase its own capital stock except from surplus earnings, which is simply reducing the nominal capital stock by increasing the value of the actual capital stock in a like amount.<sup>16</sup> "In equity, the stock and other property of a private corporation are deemed a trust fund for the payment of its debts, and the creditors have a lien upon it; or a right of priority of payment, in preference to its stockholders . . . The trust is implied, and arises from what are called equitable liens, being liens which exist in equity, and of which courts of equity alone take cognizance (*citation*). Upon the dissolution of such corporation, the creditors may pursue the property and enforce their claims, unless it has passed into the hands of *bona fide* purchasers; for the property is deemed to be held in trust, first, for the payment of the debts of the corporation; and second, for the benefit of the stockholders, in proportion to their respective interests."<sup>17</sup> "The assets of a corporation are a trust fund for the payment of its debts upon which the creditors have an equitable lien both as against the stockholders and all transferees, except those purchasing in good faith and for value;" and if, during the pendency of an action against a corporation, all its assets are transferred to another so that on rendition of judgment it cannot be satisfied the creditor may have judgment of sequestration and the appointment of a receiver.<sup>18</sup> The *bona fide* creditors of a corporation, organized, and the business of which is carried on by an individual in its name, to defraud his creditors, have no right to property held by him in the corporation's name superior to that of a defrauded creditor of the individual, because of the mere fact that the corporation was regularly organized.<sup>19</sup>

**§ 68. Id.: Subscriptions To, Governing Statutes.**—The certificate of incorporation of a business stock corporation must state the number of shares of stock which each subscriber agrees to take in it.<sup>20</sup> If the whole capital stock is not subscribed at the time of filing the certificate of incorporation the directors named therein may open books of subscription to fill up the capital stock in such places and after giving such notices as they may deem expedient, and may continue to receive subscriptions until the whole capital stock is sub-

<sup>16</sup> McGill Co. v. Underwood, 161 A. D. 30, 146 Supp. 362 (1914); St. Corp. L. § 28.

<sup>17</sup> Sands v. Kimbark, 27 N. Y. 147 (1863).

<sup>18</sup> Cole v. Millerton Iron Co., 133 N. Y. 164, 30 N. E. 847 (1892).

<sup>19</sup> Booth v. Bunce, 24 N. Y. 592 (1862).

<sup>20</sup> Bus. Corp. L. § 2 (L. 1909, c. 484).

scribed; and at the time of subscribing every subscriber whose subscription is payable in money must pay to the directors ten per centum upon the amount subscribed by him in cash, and no such subscription must be received or taken without such payment.<sup>1</sup> Subscriptions to the capital stock of a corporation must be paid at such times and in such installments as the board of directors may by resolution require. If default is made in the payment of any installment as required by such resolution the board may declare the stock and all previous payments thereon forfeited for the use of the corporation after the expiration of sixty days from the service on the defaulting stockholder, personally, or by mail directed to him at his last known post-office address, of a written notice requiring him to make payment within sixty days from the service of the notice at a place specified therein, and stating that in case of failure to do so his stock and all previous payments thereon will be forfeited for the use of the corporation. If a receiver of the assets of the corporation has been appointed all unpaid subscriptions to the stock must be paid at such times and in such installments as the receiver or the court may direct.<sup>2</sup> A person who signs the name of a fictitious person to any subscription for or agreement to take stock in any corporation, existing or proposed, or signs to any such subscription or agreement the name of any person knowing that such person does not intend in good faith to comply with the terms thereof, or under any understanding or agreement that the terms of such subscription or agreement are not to be complied with or enforced, is guilty of a misdemeanor.<sup>3</sup>

**§ 69. Id.: When Binding, In General.**—The subject of the consideration for which stock may be issued and with which subscriptions therefor may be covered is treated hereinafter.<sup>4</sup> “In this State contracts by which individuals agree to become shareholders in corporations are not governed by the rules applicable to common-law contracts, but are controlled by the statutes prescribing how such contracts shall be made;” and corporations may not “provide for securing their capital by contracts to subscribe in the future for shares instead of by subscriptions made in the mode prescribed by statute.”<sup>5</sup> “. . . the liability of a shareholder to pay for stock

<sup>1</sup> St. Corp. L. § 53 (L. 1909, c. 61).

<sup>2</sup> St. Corp. L. § 54 (L. 1909, c. 61).

<sup>3</sup> Penal L. § 660 (L. 1909, c. 88).

<sup>4</sup> See § 97, *infra*.

<sup>5</sup> General Electric Co. v. Wightman, 3 A. D. 118, 39 Supp. 420 (1896); St. Corp. L. §§ 41, 42 (L. 1892, c. 688). See now § 53 *et seq.*

does not arise out of his relation, but depends upon his contract, express or implied, or upon some statute, and in the absence of either of these grounds of liability, . . . a person to whom shares have been issued as a gratuity has [not], by accepting them, committed any wrong upon creditors, or made himself liable to pay the nominal face of the shares as upon a subscription or contract."<sup>6</sup> "There can be no doubt that an agreement to take a certain number of shares of the capital stock of an incorporated company creates an obligation to pay for the shares so to be taken;" and whether the obligation be considered express or implied, the result is the same.<sup>7</sup> Taking a note in payment of a subscription for its stock is an illegal thing for a corporation to do; but if it has done so and has accepted the benefit of a discount thereof by the maker neither it nor its directors can plead such illegality in an action by the discounter based upon the indebtedness of the corporation on the note.<sup>8</sup> The fact that the amount loaned on a promissory note made by a subscriber to corporate stock was not directly paid to the corporation is no bar to an action against the maker of the note if such corporation received the benefit of the money.<sup>9</sup> Subscribers to corporate stock *prima facie* estop themselves from objecting that the whole amount of stock offered has not been subscribed for by making their original subscription, accepting certificates for their stock and paying assessments levied by their board of directors; and must take advantage of the objection by answer.<sup>10</sup> A subscriber to shares of a corporation to be formed has an interest in the application of his money which a purchaser of stock of an existing corporation has not, because the former must know what persons will have control of the corporation and if others are subscribing honestly.<sup>11</sup> In a stockholder's action to obtain a rescission of his stock subscription, a return of his money paid for the stock and rescission of an agreement with the

<sup>6</sup> Christensen v. Eno, 106 N. Y. 97, 12 N. E. 648 (1887).

<sup>7</sup> Buffalo & N. Y. City R. R. Co. v. Dudley, 14 N. Y. 336 (1856).

<sup>8</sup> First National Bank v. Cornell, 8 A. D. 427, 40 Supp. 850 (1896); St. Corp. L. § 42; American Silk Works v. Salomon, 4 Hun, 135 (1875). There is no opinion, but only this head-note: "Corporations may acquire title to money paid upon subscriptions to capital stock

before the corporation has a legal existence, and such subscriptions may be in the form of property other than money."

<sup>9</sup> Borough Bank v. Lampheer, 154 A. D. 177, 138 Supp. 864 (1912).

<sup>10</sup> Myers v. Sturgis, 123 A. D. 470, 108 Supp. 528 (1908); *aff'd* 197 N. Y. 526, 90 N. E. 1162.

<sup>11</sup> Walker v. Anglo-American Mortgage & Trust Co., 72 Hun, 334, 25 Supp. 432 (1893).

corporation, on the ground that the subscription and agreement were procured by false and fraudulent representations, 'there must be some tangible facts set out connecting the alleged false statements with the transactions set forth and showing that damages have resulted to the plaintiff by reason thereof.' ''<sup>12</sup>

**§ 70. Id.: When Subscription is in Certificate of Incorporation.**—A subscription in a certificate of incorporation, sufficient in form and substance, takes effect simultaneously with the filing of the certificate.<sup>13</sup> A certificate of incorporation when filed becomes binding on the subscribers, and their liability is fixed by their subscriptions without the formal issuance of stock to them.<sup>14</sup> One signing an agreement, with others, to form a corporation, which designates the number of shares to be subscribed for by each, and subsequently signing and acknowledging a certificate of incorporation of the company, is liable to the corporation or its receiver for his subscription.<sup>15</sup> A subscription to stock of a corporation is binding though it consist but of a signing of the certificate whereby it was created and the placing opposite the signature of the number of shares taken.<sup>16</sup>

**§ 71. Id.: When Subscription is in Separate Agreement.**—A sufficient consideration to hold a subscriber for stock to his subscription agreement results from the corporation's obligation to issue the stock, his consequent control over the corporation to the extent of his holdings, the request implied in his signing that the corporation proceed with its powers under the charter and the detriment to it through having done so.<sup>17</sup> While a subscription by one to corporate stock before the complete formation of the corporation is not valid and binding because there is no party with whom the subscriber could then contract, yet he becomes a stockholder liable to pay the full amount of his subscription if, after the corporation is formed, it accepts the subscription and recognizes the subscriber as a stockholder and he does, too, by paying calls on his subscription.<sup>18</sup> One is bound to fulfill his

<sup>12</sup> *Ritzwoller v. Luriè*, 176 A. D. 100, 162 Supp. 475 (1916). The complaint is dissected in the opinion.

<sup>13</sup> *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294 (1876).

<sup>14</sup> *Stevens v. Episcopal Church History Co.*, 140 A. D. 570, 125 Supp. 573 (1910).

<sup>15</sup> *Dorris v. French*, 4 Hun, 292 (1875).

<sup>16</sup> *Phoenix Warehousing Co. v. Badger*, 6 Hun, 293 (1875).

<sup>17</sup> *Richmondville Union Seminary v. McDonald*, 34 N. Y. 379 (1866).

<sup>18</sup> *Buffalo & Jamestown R. R. Co. v. Gifford*, 87 N. Y. 294 (1882). Also holding that statutory provisions permitting the directors on filing the charter to open subscription books for stock, if not already

subscription agreement to take stock, without formal acceptance thereof or the actual issue of stock to him, if he signs the agreement, at such time is requested to take stock in the company, the paper is presented to him and he subscribes for certain shares, the agreement comes to the possession of the corporation which calls upon him to pay and he refuses without reason given.<sup>19</sup> An agreement by persons to form a corporation and to take stock in it when formed becomes binding when the corporation has been accordingly formed, and it may recover the amount agreed to be subscribed; but an agreement to subscribe for stock in a corporation thereafter to be formed (not by the parties agreeing to take stock) is unenforceable.<sup>20</sup> An agreement by which individuals agree with a corporation to subscribe for its stock at a future time and not to make any payment till such time on such subscription does not make them shareholders till their shares are paid for and issued and until then they have no voice in the management of the corporation but are wholly under the control of the original incorporators.<sup>1</sup> In order to hold one to his subscription to stock of a corporation to be formed "a legal and effectual formation of a corporation . . . for the purpose specified in the contract was [is] a condition precedent to his obligation to put in his capital. He would not be bound under such a contract to invest his capital in the stock of a corporation not legally formed, or which had not obtained the franchise of carrying on the business contemplated by the contract, and in which he had agreed to become interested."<sup>2</sup> One signing with others an agreement to subscribe to shares of stock of a corporation to be formed to *deal in* automobiles, cannot, if the agreement do not state the amount of his sub-

all subscribed, after such notice, etc., as they liked, and to continue till the whole capital was subscribed; and directing that on subscribing each subscriber should pay 10 per cent. of his subscription in money, did not make invalid a subscription good at common law. Gen. R. R. Act, L. 1850, c. 140, § 4.

<sup>19</sup> Richmondville Union Seminary v. McDonald, 34 N. Y. 379 (1866).

<sup>20</sup> Sanders v. Barnaby, 166 A. D. 274, 151 Supp. 580 (1915).

<sup>1</sup> General Electric Co. v. Wightman, 3 A. D. 118, 39 Supp. 420 (1896); St. Corp. L. §§ 41, 42 (L. 1892, c. 688). See now St. Corp. L. § 53.

<sup>2</sup> Dorris v. Sweeney, 60 N. Y. 463 (1875). One subscribing to stock of a corporation to be formed "for the purpose of purchasing the exclusive right to make, use and vend Nyce's patent for preserving fruits, or other products out of season," cannot be held to his subscription if the corporation formed is so formed for "the manufacture of preserved fruits, and the canning of fruits and other products, and the preserving and keeping of fruits and other articles from decay, and the transaction of such other business as is connected with and incidental to the same."

scription or the par value of the shares, be held liable thereon at the suit of a corporation formed to make automobiles, not shown to be identical with the one contemplated in the agreement; because only those parties to the agreement could enforce it *contra sese*, the agreement is too indefinite to be a binding obligation, and no connection was shown between the plaintiff corporation's certificate of incorporation and the agreement.<sup>3</sup>

**§ 72. Id.: When Ten Per Cent Payment Necessary.**—The certificate of incorporation must state the number of shares of stock which each subscriber agrees to take; and if the whole capital stock is not subscribed at the time the certificate is filed the directors named therein may open subscription books to fill up the capital stock and continue to receive subscriptions until the whole capital stock is subscribed, and at the time of subscribing every subscriber whose subscription is payable in money must pay the directors ten per centum upon the amount subscribed by him in cash and no such subscription must be received or taken without such payment.<sup>4</sup> It is not necessary that ten per cent of an original subscription to stock of a corporation, made for the purpose of its organization, should be paid, to bind the subscriber.<sup>5</sup> Payment of ten per cent of subscriptions to corporate capital stock is required only of those who subscribe after the organization of the corporation.<sup>6</sup> A subscription to corporate stock after the incorporation of the company is void unless ten per cent thereof is paid in cash; but as to original subscriptions before incorporation, the necessity of such percentage payment is dubious.<sup>7</sup> One subscribing to capital stock of a corporation after its incorporation but not paying ten per cent of his subscription in cash as required by statute is not bound by his contract.<sup>8</sup> A contract of cash subscription to corporate capital stock made after incorporation, which has been assigned as collateral security for a loan made upon the faith thereof, is no more enforceable in the hands of the assignee if ten per cent thereof has not been paid when the contract was made than

<sup>3</sup> Woods Motor Vehiele Co. v. Brady, 181 N. Y. 145, 73 N. E. 674 (1905).

<sup>4</sup> Bus. Corp. L. § 2 (L. 1909, c. 484), and St. Corp. L. § 53 (L. 1909, c. 61).

<sup>5</sup> United Growers Co. v. Eisner, 22 A. D. 1, 47 Supp. 906 (1897); St. Corp. L. § 41. See now § 53.

<sup>6</sup> Yonkers Gazette Co. v. Taylor,

30 A. D. 334, 51 Supp. 969 (1898); St. Corp. L. §§ 41-43 (L. 1890, c. 564). See now § 53 *et seq.*

<sup>7</sup> Van Schaick v. Mackin, 129 A. D. 335, 113 Supp. 408 (1908); St. Corp. L. § 41 (L. 1892, c. 688). See now § 53.

<sup>8</sup> South Buffalo Natural Gas Co. v. Bain, 9 Misc. 425, 30 Supp. 264 (1894).

it would be by the corporation itself.<sup>9</sup> The statute requiring ten per cent of every money subscription to corporate capital stock to be paid in cash at the time of subscribing "relates only to subscriptions made subsequently to incorporation . . . and, as between the corporation and the subscriber, a failure to comply with it undoubtedly renders the contract of subscription invalid. . . . payment . . . by check does not satisfy the requirement of the statute . . . ; nor is payment by promissory note a compliance with it. . . . neither a promise to subscribe . . . nor a conditional subscription . . . is valid."<sup>10</sup> Statutes regulate contracts for shareholding in corporations and an omission to obey the statute requiring a ten per cent payment in cash for an original issue of stock avoids the subscription, and the giving of a note is not the equivalent of a cash payment.<sup>11</sup> A cheque may be taken instead of cash as a payment of ten per cent of a subscription to the capital stock of a corporation under a statute prohibiting filing of the corporate certificate until a certain amount of stock is subscribed for and ten per cent paid thereon in good faith and in cash.<sup>12</sup>

**§ 73. Id.: Calls, Who May Make.**—Subscriptions to the capital stock of a corporation must be paid at such times and in such installments as the board of directors may by resolution require, and if a receiver of the assets of the corporation has been appointed all unpaid subscriptions to the stock must be paid at such times and in such installments as the receiver or the court may direct.<sup>13</sup> Upon insolvency of a corporation the right to call for unpaid subscriptions to its capital stock passes to its representative in bankruptcy and its directors cannot relieve subscribers from liability by refusing to issue a call.<sup>14</sup> When an agreement made after all a corporation's stock has been taken up and is in the hands of stockholders provides for putting a part of it with a trustee for sale at a stated price, payable "one-third thereof as soon as the whole" number of shares deposited had been subscribed for

<sup>9</sup> *Harriman National Bank v. Palmer*, 93 Misc. 431, 158 Supp. 111 (City Ct., N. Y. C. 1916); St. Corp. L. § 53.

<sup>10</sup> *Harriman National Bank v. Palmer*, 93 Misc. 431, 158 Supp. 111 (City Ct., N. Y. C. 1916); St. Corp. L. § 53.

<sup>11</sup> *Hapgoods v. Lusch*, No. 1, 123 A. D. 23, 107 Supp. 331 (1907); St. Corp. L. § 41 (L. 1892, c. 688, § 41). See now § 53.

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<sup>12</sup> *Syracuse, Phoenix & Oswego R. Co. v. Gere*, 4 Hun, 392 (1875); 3 Stats. at Large, 618.

<sup>13</sup> St. Corp. L. § 54 (L. 1909, c. 61).

<sup>14</sup> *Rathbone v. Ayer*, No. 2, 84 A. D. 186, 82 Supp. 235 (1903); St. Corp. L. §§ 53, 54 (L. 1901, c. 354). See now § 54 (L. 1909, c. 61).

and the rest as the board of trustees call for it "for the purposes of the business," it is not intended that all shall be paid at once and the trustees cannot call for payment in full immediately, but only when they in good faith determined that the purposes of the business so required.<sup>15</sup>

**§ 74. Id.: When No Call Necessary.**—No call or demand for payment of subscriptions to capital is necessary when by its certificate of incorporation, to which the subscribers were parties, it was to commence business with the full amount of capital stock paid in, and when it had commenced business, continued it till bankrupt and has ceased to do business.<sup>16</sup> One subscribing to stock of a corporation under an agreement to pay therefor when the board of directors by resolution might require, without stipulating for notification to him of the resolution, is bound to pay if the resolution be passed, though he have no notice thereof.<sup>17</sup> A stock subscription may be held due, notwithstanding there be no allegation that it has been called by the board of directors, on the theory that the subscription is to be deemed payable on demand.<sup>18</sup>

**§ 75. Id.: After Transfer of Stock.**—No share of stock is transferable until all previous calls thereon have been fully paid in.<sup>19</sup> One transferring in a valid, *bona fide* and effectual manner to another shares of corporate stock held by him, is not liable for calls made after the transfer.<sup>20</sup> It would seem "that where the subscriber, after receiving his shares, made transferable upon the books of the corporation by the terms of the certificate, makes such transfer in good faith, and the company accepts a surrender of his certificate, and issues a new one to the transferee and credits him with the stock upon its books, the transaction amounts to a consent by the company to a release of the old stockholder from liability for future calls, and a substitution of the liability of the transferee," but if the company understood that the old stockholder transferred his stock and resigned as director on condition of the substitution of the new stockholder, as liable in such capacity, there can be no question of the former's release.<sup>1</sup> Although a transfer by a stockholder of his stock before fully paid at par might have been held void as fraudulent, yet this

<sup>15</sup> Williams v. Taylor, 120 N. Y. 244, 24 N. E. 288 (1890).

<sup>16</sup> Rathbone v. Ayer, No. 2, 84 A. D. 186, 82 Supp. 235 (1903); St. Corp. L. §§ 43, 54 (L. 1901, c. 354). See now § 54 (L. 1909, c. 61).

<sup>17</sup> United Growers Co. v. Eisner, 22 A. D. 1, 47 Supp. 906 (1897).

<sup>18</sup> McNelus v. Stillman, 172 A. D. 307, 158 Supp. 428 (1916).

<sup>19</sup> St. Corp. L. § 50 (L. 1909, c. 61).

<sup>20</sup> Billings v. Robinson, 94 N. Y. 415 (1884).

<sup>1</sup> Billings v. Robinson, 94 N. Y. 415 (1884).

cannot be done, as between it and the corporation, when the corporation ratified the transfer by canceling his certificate and issuing a new one to the purchaser and suing the latter as a stockholder to recover the amount of a call.<sup>2</sup> A transferee on the company's books from an original subscriber to corporate stock who signs a receipt for the certificate therefor on the stock certificate stub showing a portion unpaid thereon at the time of its original issue, who has paid some calls on the stock and was duly notified of others duly made but unpaid, is impliedly liable, independent of any statute, to pay the calls on the stock transferred to him.<sup>3</sup>

**§ 76. Id.: Defenses Against Liability On.**—The courts of this State will not enforce a liability against one of its citizens for calls made on stock held by him when it is illegal, unequal and oppressive.<sup>4</sup> In an action against a stockholder to recover for a call made upon his stock, it is a defense that the call was illegal, unwarranted and made without authority.<sup>5</sup> Under the "well settled principle, that where money is paid by one of two parties to the other on an illegal contract, in a case where they may be considered as *particeps criminis*, and *in pari delicto*, an action cannot be maintained after the contract is executed to recover the money back again, for *in pari delicto potior est conditio defendantis*," one who consented and acted in all steps taken to increase a corporation's capital stock illegally cannot sue to recover on account of his subscription to such increase, part of which he has paid.<sup>6</sup> " . . . *prima facie* subscribers to the stock of a corporation are not bound to pay assessments upon their stock unless the whole capital of the company has been subscribed for. . . ." " . . . a complaint for an unpaid assessment need not allege that all the stock has been subscribed for or anticipate the possible defense that it has not been subscribed for."<sup>8</sup>

**§ 77. Id.: Forfeiture for Nonpayment of.**—If default be made in payment of any installment on a subscription to capital stock as required by resolution of the board of directors the board may declare the stock and all previous

<sup>2</sup> *Rochester & K. F. Land Co. v. Raymond*, 158 N. Y. 576, 47 L.R.A. 246, 53 N. E. 507 (1899).

<sup>3</sup> *Sigua Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194 (1902).

<sup>4</sup> *Bank of China, etc., v. Morse*, 168 N. Y. 458, 56 L.R.A. 139, 61 N. E. 774 (1901).

<sup>5</sup> *Bank of China, etc., v. Morse*, 168 N. Y. 458, 56 L.R.A. 139, 61 N. E. 774 (1901), C. C. P. § 507.

<sup>6</sup> *Knowlton v. Congress & Empire Spring Co.*, 57 N. Y. 518 (1874).

<sup>7</sup> *Myers v. Sturgis*, 123 A. D. 470, 108 Supp. 528 (1908); *aff'd* 197 N. Y. 526, 90 N. E. 1162.

<sup>8</sup> *Myers v. Sturgis*, 123 A. D. 470, 108 Supp. 528 (1908); *aff'd* 197 N. Y. 526, 90 N. E. 1162.

payments thereon forfeited for the use of the corporation after the expiration of sixty days from the service on the defaulting stockholder, personally, or by mail directed to him at his last known postoffice address, of a written notice requiring him to make payment within sixty days from the service of the notice at a place specified therein, and stating that in case of failure to do so his stock and all previous payments thereon will be forfeited for the use of the corporation.<sup>9</sup> In order to forfeit stock in a corporation all steps must be pursued exactly as prescribed by statute; so that if the notice to the subscriber of intended forfeiture is not determined upon by the board of directors but by persons assembled as such but not being a quorum thereof (though of the executive committee), the forfeiture cannot be enforced.<sup>10</sup> A corporation which has exercised its charter right to forfeit a subscriber's shares for failure to pay a call thereon is barred from any further claim against him upon his contract to take stock.<sup>11</sup>

**§ 78. Id.: Secret Profit to Subscriber.**—A secret agreement between a corporation and a subscriber to its stock by which the latter seeks to escape his statutory liability for payment of his subscription is against public policy and will not be upheld against creditors.<sup>12</sup> One subscribing to half the stock of a corporation, acting as a director and the president thereof, keeping no stock book, and assigning his stock while it was to his knowledge insolvent, cannot profit by a secret agreement with it whereby he is relieved from paying his stock subscription.<sup>13</sup> One subscribing to corporate stock enters into a joint undertaking with the other persons who at the same or a later time become subscribers which makes it illegal for him secretly to agree with one to whom some of the corporate stock is issued in payment of a business conducted by him and turned over to the corporation to accept some of the latter's stock as a condition to his own subscription; and such an agreement cannot be enforced.<sup>14</sup> No action lies by

<sup>9</sup> St. Corp. L. § 54 (L. 1909, c. 61).

<sup>10</sup> Matter of New York & Westchester Town Site Co., No. 1, 145 A. D. 623, 130 Supp. 414 (1911); St. Corp. L. § 54.

<sup>11</sup> Small v. Herkimer Mfg. Co., 2 N. Y. 330 (1849); L. 1833, pp. 191-2, § 4.

On effect of forfeiture of stock on stockholder's personal liability as to unpaid assessments, see note in 27 L.R.A. 314.

<sup>12</sup> Beals v. Buffalo Construction Co., 49 A. D. 589, 63 Supp. 635 (1900); St. Corp. L. § 41 (L. 1892, c. 688); Bus. Corp. L. § 5 (L. 1892, c. 691). See now St. Corp. L. § 53 (L. 1909, c. 61).

<sup>13</sup> Beals v. Buffalo Construction Co., 49 A. D. 589, 63 Supp. 635 (1900); St. Corp. L. §§ 29, 48. See now §§ 32, 66.

<sup>14</sup> Koster v. Pain, 41 A. D. 443, 58 Supp. 865 (1899). The plaintiff was elected a director of the corpo-

stockholders of a corporation to recover from a firm a "secret profit" made by it under a "stock subscription" if the latter be simply a contract between its subscribers and the firm, which has been fulfilled, to buy from the firm the number of shares subscribed in a company to be organized as the corporation, as there is no interest shown in the corporation in such contract; and the fact that the firm had done some things which by the contract it agreed itself to do or to *procure* to be done makes no difference.<sup>15</sup>

**§ 79. Id.: Unpaid, Are Trust Fund for Creditors.**—Every holder of capital stock not fully paid in any stock corporation is personally liable to its creditors to an amount equal to the amount unpaid on the stock held by him for debts of the corporation contracted while such stock was held by him.<sup>16</sup> The peculiar vigor of the doctrine that a corporation's capital stock is a trust fund for the security of creditors and that a liability in their favor to the extent of the unpaid part of the nominal value of the actual shares exists and can be enforced is "that contrary to the common law of England it secures to the creditors of insolvent corporations or their representatives the right of enforcing subscriptions for shares of which the corporation has deprived itself by release or defeasance. It declares that the capital or capital stock of a corporation is a substitute for the personal liability which subsists in individual or partnership undertakings and is a fund set apart as a security for the payment of the corporate debts. The capital or capital stock which it thus segregates is not the capital stock authorized or named in the charter of the corporation. If it were the members would be bound by the doctrine to contribute on account of it the sum within its named value needed to pay the debts of the insolvent corpora-

tion and voted for the proposition to issue the stock (part of which he got under the agreement) to the individual whose business the corporation bought out.

<sup>15</sup> *Hutchinson v. Simpson*, 92 A. D. 382, 87 Supp. 369 (1904).

On right of corporation to purchase its own shares of stock, see notes in 61 L.R.A. 621; 25 L.R.A. (N.S.) 50; 30 L.R.A. (N.S.) 694; 44 L.R.A. (N.S.) 156; L.R.A. 1916F, 286.

On effect of forfeiture of corporate stock on right to rescind subscription for fraud, see note in 33 L.R.A. 722.

<sup>16</sup> St. Corp. L. § 56 (L. 1909, c. 61). "As to existing corporations the liability imposed by this section shall be in lieu of the liability imposed upon stockholders of any existing corporation, under any general or special law . . . on account of any indebtedness hereafter contracted or any stock hereafter issued; but nothing in this section contained shall create or increase any liability of stockholders of any existing corporation under any general or special law."

tion. The statement in the charter does not create a security for the creditors. It creates authorized or potential capital stock and shares which, transferred into actual shares through the acquisition of subscribing members and their payments, produces the money or property which, put into a single corporate fund, is the actual capital or capital stock on which the business is undertaken and the assets or fund contemplated by the trust fund doctrine which the directors or stockholders may not lawfully diminish by appropriating or squandering it or giving it away. And as there is not a fund or security in the nominal or potential shares, there is none in the excess of the nominal value over the subscribed value of the shares. The subscription agreements, as they are enforceable through their express provisions or implication or statutory conditions, are the sources and the measure of the duty of the subscribers (*citations*). The doctrine further declares that unpaid subscriptions are a part of the capital and that a subscriber cannot be discharged to the injury of creditors by arrangement or device to which the creditors do not give their assent and by which he is to pay less than his subscription (*citations*). The doctrine does not create or nullify subscriptions. It lays hold of the assets of an insolvent corporation, and in doing that it compels subscribers to fulfill their legal obligations and perform their legal duties; but it does not beget those duties or obligations; it does not make unlawful or invalid a subscription which, apart from it, was valid and lawful. The question with it is, has the subscriber fully performed the subscription agreement as it in fact and in law exists, and an affirmative finding renders it inapplicable and inoperative.”<sup>17</sup> “It may be admitted that the liability of subscribers on unpaid stock subscriptions constitute an asset of the corporation, which cannot be surrendered or given up by the corporation without consideration to the prejudice of creditors. . . . The unissued shares of a corporation are not assets. When issued they represent a proportionate interest in the shareholder in the corporate property—an interest, however, subordinate to the claims of creditors.”<sup>18</sup> Unpaid subscriptions to a corporation’s capital stock are debts belonging to the corporation, so that its trustee in bankruptcy may sue therefor.<sup>19</sup>

<sup>17</sup> Southworth v. Morgan, 205 N. Y. 293, 51 L.R.A.(N.S.) 56, 98 N. E. 490 (1912).

<sup>18</sup> Christensen v. Eno, 106 N. Y. 97, 12 N. E. 648 (1887).

<sup>19</sup> Rathbone v. Ayer, No. 2, 84 A. D. 186, 82 Supp. 235 (1903); St. Corp. L. §§ 43, 54 (L. 1901, c. 354). See now §§ 54, 56.

**§ 80. Id.: Payment for Stock or Subscriptions, Governing Statutes.**—No corporation can issue stocks except for money, labor done or property actually received for the use and lawful purposes of such corporation; but any corporation may purchase any property authorized by its certificate of incorporation, or necessary for the use and lawful purposes of such corporation, and may issue stock to the amount of the value thereof in payment therefor, and the stock so issued is full paid stock and not liable to any further call, nor is the holder thereof liable to any further payment under the provisions of the statute, and in the absence of fraud in the transaction the judgment of the directors as to the value of the property purchased is conclusive.<sup>20</sup>

**§ 81. Id.: The Person Liable.**—The subject of the liability of subscribers to corporate stock to calls has been already discussed.<sup>1</sup> The person liable for an amount remaining due on shares of corporate stock is the one in whose name such shares stand in the certificate and on the corporation's books, irrespective of whether or not such one claims to be a trustee or to have assigned his holdings or to have executed a power of attorney to transfer the holdings.<sup>2</sup> A corporation cannot in an action at law against one who was a subscriber to its stock hold him for the unpaid amount due on his subscription if it has transferred such stock to another on the defendant's endorsement of the certificates issued to him therefor and issued new certificates to the transferee, and prosecuted to judgment (which it had satisfied without any payment having been made thereon) its like claim against the transferee.<sup>3</sup> A corporation cannot hold liable for the amount unpaid on a subscription to its stock, marked on the certificates "assessable," a purchaser thereof from the subscriber, if the latter made no formal subscription therefor, the former executed no formal written promise to pay therefor, and the circumstances show reliance by the purchaser upon statements by his vendor and the officers of the company that the stock was fully paid.<sup>4</sup> The signature by one to an agreement, preliminary to a cor-

<sup>20</sup> St. Corp. L. § 55 (L. 1909, c. 61).

As to whether commercial paper will be held to be payment for subscription to capital stock of corporation, see note in 35 L.R.A. (N.S.) 80.

<sup>1</sup> See § 73 *et seq.*, *supra*.

<sup>2</sup> Mann v. Curiè, 2 Barb. 294 (1843).

<sup>3</sup> Rochester Land Co. v. Raymond, 4 A. D. 600, 39 Supp. 145 (1896); *aff'd* 158 N. Y. 576, 47 L.R.A. 246, 53 N. E. 507; St. Corp. L. § 40 (L. 1890, c. 564). See now § 50 (L. 1909, c. 61).

<sup>4</sup> Rochester & Kettle Falls Land Co. v. Roe, 7 A. D. 366, 40 Supp. 72 (1896).

poration's organization, for the formation of a joint stock or corporate company for specified purposes, does not make him a stockholder in a corporation thereafter formed pursuant to statute or bind him to take and pay for stock therein.<sup>5</sup> The fact that one person, using his own name, subscribes to corporate stock for the benefit of another, who pays the installments and is recognized by the company as the owner thereof and is issued the certificate therefor, gives the former no right to insist that he should be considered the owner.<sup>6</sup> "To hold a subscriber to the capital stock of an unsuccessful company liable over to a purchaser upon a public subscription [of its stock], it seems necessary that there should be fraud, misrepresentation or deceit personally brought home to and chargeable upon him."<sup>7</sup> One signing an agreement to subscribe to corporate stock twice, once with his name simply and the second time with his name adding the word "Exr." may be sued in two different actions, one on each signature, even though the latter signature as well as the former bound him individually.<sup>8</sup> The representative of one who has paid but part of his subscription to corporate stock and who has plead successfully to a suit by the corporation to recover the balance of the subscription the Statute of Limitations cannot succeed in having issued to him a certificate for stock equivalent to the whole subscription, as his success in pleading the statute did not make him any the less indebted for the unpaid part of his subscription though it prevented recovery thereof by the corporation.<sup>9</sup> One buying unpaid subscriptions to stock of a corporation on sale thereof by a receiver appointed in proceedings to sequester its property is protected against a claim by a mortgagee of all the corporation's property who acquired title to the property mortgaged under a foreclosure sale thereof that he must pay such subscriptions.<sup>10</sup> A receiver of a corporation which had sold some of its stock outright to an individual cannot hold one who had made a subscription thereto to such individual for a balance claimed to be due on such subscription.<sup>11</sup> A *bona fide* buyer of corporate stock as

<sup>5</sup> *Dorris v. Sweeney*, 64 Barb. 636 (1873); L. 1848.

<sup>6</sup> *Burr v. Wilcox*, 22 N. Y. 551 (1860); Gen. Mfg. Act, L. 1848, c. 40, § 10. The true owner was held liable for the corporate debt under the statute making stockholders so liable to an amount equal to their holdings.

<sup>7</sup> *White v. Robinson*, 145 A. D. 751, 130 Supp. 388 (1911).

<sup>8</sup> *Erie & N. Y. City R. R. v. Patrick*, 41 N. Y. (2 Keyes), 256 (1865).

<sup>9</sup> *Johnson v. Albany & Susquehanna R. R. Co.*, 54 N. Y. 416 (1873).

<sup>10</sup> *Dean v. Biggs*, 25 Hun, 122 (1881); *aff'd* 93 N. Y. 662.

<sup>11</sup> *Stevens v. Lippman*, 85 Misc. 347, 148 Supp. 419 (1914); C. C. P. § 1185.

paid up and without knowledge that it was not paid up cannot be held liable by a receiver later appointed for the corporation for the amount unpaid on the stock.<sup>12</sup> No implied obligation to pay is raised by the delivery of certificates of unissued as distinguished from treasury stock to one man on the request of a third.<sup>13</sup>

**§ 82. Id.: Extent of Liability.**—The binding character of subscriptions to corporate stock has been heretofore considered;<sup>14</sup> as well as liability on calls.<sup>15</sup> Stock issued to the amount of the value of property which a corporation is authorized by its certificate of incorporation to purchase or which is necessary for its use and lawful purposes is full paid and not liable to any further call, nor is the holder thereof liable for any further payment under the statute.<sup>16</sup> Every holder of capital stock not fully paid in any stock corporation is personally liable to its creditors to an amount equal to the amount unpaid on the stock held by him for debts of the corporation contracted while such stock was held by him.<sup>17</sup> The only obligation assumed by any subscriber to an agreement to take stock in a corporation to be formed to the others, or any of them, is to pay the sum subscribed; and the expression in the agreement of a desire to establish a certain institution does not make any subscriber liable for indebtedness incurred by the others to secure such establishment.<sup>18</sup> In the absence of some governing statutory provision a stockholder cannot be held liable for the difference between the nominal or par value of stock to which he has subscribed and the amount paid by him therefor less than such nominal or par value, if by express contract between himself and the corporation it was agreed that he should pay no more than he did pay.<sup>19</sup> A mere subscriber for the stock of a business corporation does not assume a liability to pay the full par value thereof after its transfer,

<sup>12</sup> *Wentingham v. Rosenthal*, 25 Hun, 580 (1881).

<sup>13</sup> *Sanders v. Proctor*, 172 A. D. 713, 158 Supp. 433 (1916).

<sup>14</sup> See § 69 *et seq.*, *supra*.

<sup>15</sup> See § 73 *et seq.*, *supra*.

<sup>16</sup> St. Corp. L. § 55 (L. 1909, c. 61).

<sup>17</sup> St. Corp. L. § 56 (L. 1909, c. 61): "As to existing corporations the liability imposed by this section shall be in lieu of the liability imposed upon stockholders of any existing corporation, under any general or special law, excepting

laws relating to moneyed corporations, and corporations and associations for banking purposes, on account of any indebtedness hereafter contracted on any stock hereafter issued; but nothing in this section contained shall create or increase any liability of stockholders of any existing corporation under any general or special law.

<sup>18</sup> *Shibley v. Angle*, 37 N. Y. 626 (1868).

<sup>19</sup> *Southworth v. Morgan*, 205 N. Y. 293, 51 L.R.A.(N.S.) 56, 98 N. E. 490 (1912).

unless there be some agreement making him so liable.<sup>20</sup> When some of subscribers to stock of a corporation, all of whom had agreed to pay their subscriptions to a lender of money to the corporation on its note, when it matured, to be applied to its payment, pay the lender after verdict had by the lender against themselves and the rest of the subscribers, they may hold such rest for contribution.<sup>1</sup>

**§ 83. Id.: Defenses Against Liability, In General.**—A corporation is not prevented from obtaining and compelling payment of subscriptions to its capital stock because it has not filed its certificate of incorporation with the county clerk and Secretary of State.<sup>2</sup> One cannot avoid his subscription to corporate stock because of a change in the line of the road of the company which does not injure him.<sup>3</sup> In an action to hold one to his unpaid subscription to capital stock of a corporation on his unconditional written agreement to subscribe, it is competent for him to show verbally the conditions upon which the subscription was made if they were part of an original, complete agreement of which but a part was reduced to writing in the subscription agreement.<sup>4</sup> If a corporation's certificate of incorporation expresses no illegal purpose, the fact that subsequent to the incorporation there were corporate acts showing a purpose to form and create a monopoly but not showing any adoption of an illegal scheme therefor planned before the incorporation by promoters, a stockholder cannot claim that his subscription to the capital stock was tainted with the alleged illegal character of the incorporation so to absolve him from payments thereon.<sup>5</sup> A subscriber to capital stock of a corporation "cannot rely upon a mere prospectus or on the representations of promoters to defeat his liability [to pay his subscription in full] unless such prospectus or representations have, after the incorporation, been adopted by the corporation and the business conducted in accordance therewith."<sup>6</sup> One subscribing to stock of a

<sup>20</sup> *Rochester & K. F. Land Co. v. Raymond*, 158 N. Y. 576, 47 L.R.A. 246, 53 N. E. 507 (1899).

<sup>1</sup> *Hart v. Sickles*, 45 Misc. 174, 91 Supp. 897 (1904).

<sup>2</sup> *United Growers Co. v. Eisner*, 22 A. D. 1, 47 Supp. 906 (1897).

<sup>3</sup> *Schenectady & Saratoga Plank Road Co. v. Thatcher*, 11 N. Y. 102 (1854).

<sup>4</sup> *Brewers' Fire Insurance Co. v. Burger*, 10 Hun, 56 (1877). "The case presented was one where the

original contract was verbal and complete, and a part only of it was afterward reduced to writing, and in such cases it is always competent to prove the whole agreement."

<sup>5</sup> *Vinegar Co. v. Foehrenbach*, 148 N. Y. 58, 42 N. E. 403 (1895).

<sup>6</sup> *United States Vinegar Co. v. Schlegel*, 67 Hun, 356, 22 Supp. 407 (1893); *aff'd* 143 N. Y. 537, 38 N. E. 729.

corporation upon the false and material representations of a promoter for it may rescind his subscription and recover what installments he has paid, even though the promoter had no authority to make the representations, if the corporation retained the benefit thereof.<sup>7</sup> The extent to which promoters may bind the corporation resulting from their promotion has been heretofore discussed.<sup>8</sup>

**§ 84. Id.: Change in Charter or Name.**—" . . . no mere addition to or alteration of the charter, however great, would operate to discharge a stockholder from his obligation to the corporation " to fulfill his subscription to its stock; " to work such a discharge the charter must be repealed, or the legislation must be such as virtually to subvert the corporation itself; or, at least, destroy its identity."<sup>9</sup> One subscribing to stock of a corporation incorporated under a charter making the charter subject to a law, permitting its alteration, supervision and repeal at the Legislature's discretion, is not discharged from liability on his subscription by an amendment by the Legislature giving the corporation five instead of two years within which to commence its work, as this is not an organic change.<sup>10</sup> One subscribing to the capital stock of a corporation to be formed under a certain name which is later refused it by the Secretary of State because of its similarity to the name of another corporation is not relieved from liability on his subscription because of the adoption of another name if the purpose of the corporation is carried out and no prejudice results to him from the change.<sup>11</sup>

**§ 85. Id.: Defective Corporate Existence.**—A subscriber cannot defend his liability upon his subscription to corporate stock on the ground that the articles of association were defective if he and his associates formed the corporation by their acts, it has assumed to exercise its corporate powers and has received recognition by the Legislature as a corporation.<sup>12</sup> One sued on his subscription to stock of a corporation cannot raise the point that it was not properly organized if he was one of its original incorporators and directors, took

<sup>7</sup> *Talmadge v. Sanitary Security Co.*, 31 A. D. 498, 52 Supp. 139 (1898).

<sup>8</sup> See § 5, *supra*.

<sup>9</sup> *Buffalo & N. Y. City R. R. Co. v. Dudley*, 14 N. Y. 336 (1856).

<sup>10</sup> *Union Hotel Co. v. Hersee*, 79 N. Y. 454 (1880).

<sup>11</sup> *Yonkers Gazette Co. v. Taylor*, 30 A. D. 334, 51 Supp. 969 (1898).

<sup>12</sup> *Cayuga Lake R. R. Co. v. Kyle*, 64 N. Y. 185 (1876). The claimed defect was that the articles of the railroad, formed under L. 1869, c. 314, did not distinctly state its termini, nor the counties through which it passed.

part in all done by way of incorporation and also in conducting its business as director for three months, till he resigned.<sup>13</sup> One sued for his unpaid subscription to stock of a corporation is estopped from denying that it had an existence, as against creditors, if he not only subscribed for the stock but became an officer of the corporation, serving as one of its directors.<sup>14</sup> One sued on behalf of a receiver of a corporation for an unpaid balance on his subscription to its stock is estopped from denying its legal existence and validity or disputing its *de facto* existence, if he was one of the incorporators and directors, and the suit is for the benefit of creditors of the insolvent corporation.<sup>15</sup> One signing a subscription to stock in a corporation which recites that it has been formed and issued a portion of its authorized stock cannot claim lack of evidence, in a suit by it on such subscription, of its corporate authority or its right to issue stock.<sup>16</sup>

**§ 86. Id.: Defective Subscription Agreement.**—The question of when a stock subscription agreement is binding has already been discussed.<sup>17</sup> A contract by one to subscribe to corporate stock is not *per se* discharged by the facts that a name of another subscriber on the same sheet as that of the first subscriber is canceled by lines drawn through it and that opposite his name is “By agree’t, Mar. 5, ’73,”—a date subsequent to the time of the subscription by the first one.<sup>18</sup> The liability of one to pay in full his subscription to the capital stock of a corporation to be formed is not terminated because his and the many other subscriptions were on as many different subscription blanks, the signatures to which were cut off and pasted consecutively on one of the blanks before it was filed with the Secretary of State.<sup>19</sup>

**§ 87. Id.: Different Agreement with Other Subscribers.**—One of several subscriptions to the capital stock of a corporation for securing to it working capital, all conditioned on the whole number of shares being reliably subscribed, is not in fraud of the other subscribers because the promoters of the corporation, as an inducement to the subscription, agree with the particular subscriber to take the stock off his hands within a year, at cost price, if he so desired; and they cannot escape liability so to do by pleading the invalidity of the agreement

<sup>13</sup> United Growers Co. v. Eisner, 22 A. D. 1, 47 Supp. 906 (1897).

<sup>14</sup> Ruggles v. Brock, 6 Hun, 164 (1875).

<sup>15</sup> Phoenix Warehousing Co. v. Badger, 6 Hun, 293 (1875).

<sup>16</sup> Atlantic Construction Co. v.

Kreusler, 40 A. D. 268, 57 Supp. 983 (1899).

<sup>17</sup> See § 69 *et seq.*, *supra*.

<sup>18</sup> Whittlesey v. Frantz, 74 N. Y. 456 (1878).

<sup>19</sup> Sodus Bay & Corning R. R. Co. v. Hamlin, 24 Hun, 390 (1881).

because of its alleged fraud on other stockholders.<sup>20</sup> It is no defense to one sued for an unpaid subscription to corporate stock that another subscriber was induced to subscribe under an arrangement that paid-up stock to the amount of his subscription should be delivered to him without his paying therefor and that the subscriber being sued made his subscription relying on the genuineness of such other's subscription and other subscriptions.<sup>1</sup>

**§ 88. Id.: Statute of Limitations.**—The statute of limitations on a claim for unpaid installments on subscriptions to capital stock of a defunct corporation does not begin to run from the time of the subscription but from the time an order is made for its trustee to call on the stockholders up to the par amount of their holdings for the benefit of corporate creditors.<sup>2</sup> A creditor of a corporation has no better right than the corporation itself to enforce payment of subscriptions of stock and is limited by the same statute of limitations.<sup>3</sup>

**§ 89. Id.: Enforcement of, Who May Enforce.**—When a plan is expressed in writing to form a corporation for a particular purpose and after such recital the words "we hereby subscribe" appear, followed by the signature of an individual, such individual may be compelled by the corporation formed pursuant to such plan to pay the amount of his subscription without any further move on his part.<sup>4</sup> ". . .

<sup>20</sup> *Meyer v. Blair*, 109 N. Y. 600, 17 N. E. 228 (1888).

<sup>1</sup> *Armstrong v. Danahy*, 75 Hun, 405, 27 Supp. 60 (1894).

<sup>2</sup> *Southworth v. Morgan*, 71 Misc. 214, 128 Supp. 598 (1911).

As to when the statute of limitations begins to run against the unpaid balance of a stock subscription, see note in 1 L.R.A.(N.S.) 901.

<sup>3</sup> *Leighton v. Leighton Lea Assn.*, 146 A. D. 255, 130 Supp. 935 (1911).

<sup>4</sup> *Yonkers Gazette Co. v. Taylor*, 30 A. D. 334, 51 Supp. 969 (1898). "There are agreements of a somewhat similar character which do not admit of enforcement and are not binding as a common-law agreement. It is quite easy to confuse the two classes, although there is a clear distinction between them. In the first class it is to be noticed that the agreement is to form a corporation and subscribe to its stock. The

latter class are mutual agreements to subscribe for stock in a corporation thereafter to be formed. In the first the agreement is unconditional and absolute to form the corporation and take the stock, and when acted upon by the corporation is binding, as that is all that is needful to make the contract of force. Such contracts contemplate no further act upon the part of the person making such agreement. In the second class the agreement is to subscribe for shares when the company shall be organized. This clearly contemplates something more to be done, *i. e.*, the actual subscription. There exists no agreement in such case to become stockholders. When the corporation is formed such agreement is to take shares, which involves a subsequent act, that of formally subscribing for the stock."

the president of a corporation has authority to receive the payment of subscriptions for its stock, even though the corporation is a trust company which cannot transact business until all its capital stock is paid in. . . . Subscriptions to stock are assets of the corporation, and there can be no doubt that a corporation can maintain actions to recover such subscriptions."<sup>5</sup> " . . . a cause of action upon an unpaid subscription to stock, when based merely upon the implied promise of the stockholder to make the payment, does not accrue to the corporation; but where there has been an express promise that promise may be enforced by action as in the case of any other contract liability."<sup>6</sup> One of many subscribers to a paper agreeing to pay the amount set opposite their names to a party selected by them, on establishment of a proper consideration for his undertaking, may be sued therefor by the individual selected as such party.<sup>7</sup> A stock subscription due on a contract between the subscriber and the corporation may be enforced, by attachment in this state against the resident subscriber on a debt owing by the corporation itself, by a creditor as lone plaintiff, without his suing on behalf of all creditors or a receiver bringing the suit.<sup>8</sup> Syndicate managers under an agreement showing an intention of the parties that each should pay the amount of his subscription to the managers who in turn should pay it to a lender of moneys used in buying bonds to be bought by such managers under the agreement may as trustees of an express trust sue to recover subscriptions to such bonds.<sup>9</sup>

**§ 90. Id.: Pleading, Practice and Evidence.**—An action may properly be brought on an original subscription to stock, without the necessity of averring calls, if no condition as to time of payment is attached.<sup>10</sup> An action brought by a corporation to collect unpaid subscriptions before the appointment of a receiver may be continued for the latter's benefit in the name of the original party.<sup>11</sup> The enforcement of an

<sup>5</sup> *Higginbotham v. International Trust Co.*, 141 A. D. 535, 126 Supp. 366 (1910).

<sup>6</sup> *Harris v. Wells*, 57 Misc. 172, 108 Supp. 1078 (1907); *aff'd* 126 A. D. 911, 110 Supp. 1131, "within this rule, . . . the trustee in bankruptcy certainly succeeds to a cause of action existing in favor of the bankrupt corporation upon an express agreement by the stockholder to pay for the stock delivered to him . . ."

<sup>7</sup> *Presbyterian Society v. Beach*, 74 N. Y. 72 (1878).

<sup>8</sup> *McNelus v. Stillman*, 172 A. D. 307, 158 Supp. 428 (1916); C. C. P. §§ 677, 678.

<sup>9</sup> *Gallooly v. Whitmore*, 172 A. D. 381, 158 Supp. 830 (1916); C. C. P. § 449.

<sup>10</sup> *Phœnix Warehousing Co. v. Badger*, 67 N. Y. 294 (1876).

<sup>11</sup> *Phœnix Warehousing Co. v. Badger*, 67 N. Y. 294 (1876).

unpaid subscription to stock of a corporation may be accomplished in a statutory action by a creditor to sequester its property, by joining the subscriber as a party, on the theory that he owes the corporation the amount of his subscription which is available to its creditors.<sup>12</sup> A delivery or tender of a certificate of stock in a corporation to a subscriber to its original stock is not necessary as a condition precedent to the maintenance by its receiver of an action to recover the amount of his subscription in behalf of the corporate creditors.<sup>13</sup> A subscription for shares is a legal obligation enforceable by action and forfeiture for non-payment, and if a bond and mortgage be given to secure payment of the subscription it may be collected after he has demanded scrip for his shares and the company has neglected or refused to issue it.<sup>14</sup> An agreement by persons to form a corporation and subscribe to its stock is not so indefinite as to be unenforceable because the agreement to subscribe is not for a stated sum but a certain number of dollars or such portion thereof as may be necessary to provide the corporation with working funds and capital as a going concern, as how much will be necessary for such purpose is a matter of fact not difficult to ascertain and *prima facie* is the amount such persons fixed on in their agreement in fixing the amount of capital stock to be issued.<sup>15</sup>

**§ 91. Id.: Corporation's Remedies on Failure of.**—The right of the corporation to sue for unpaid subscriptions to its stock has been previously considered.<sup>16</sup> If default is made in the payment of any installment of a subscription to stock of a corporation as required by resolution of its board of directors, the board may declare the stock and all previous payments upon it forfeited for the use of the corporation, after the expiration of sixty days from the service on the

<sup>12</sup> *Beals v. Buffalo Construction Co.*, 49 A. D. 589, 63 Supp. 635 (1900); C. C. P. §§ 1784-1796. The remedy is not confined to that provided by St. Corp. L. § 54.

<sup>13</sup> *Kohlmetz v. Calkins*, 16 A. D. 518, 44 Supp. 1031 (1897). "A person may become the owner of shares of stock of a corporation by subscription or by purchase. In the former case he becomes a member and takes all the rights as such by his subscription to the original stock. And no offer or delivery of a certificate is essential to his liability to pay the amount of the

shares for which he has subscribed; but if his relation is that of purchaser, the delivery of the certificate and payment for the stock are in contemplation concurrent, and the offer or tender of the certificate before suit is necessary to its maintenance for the recovery of the amount of the unpaid balance for the stock."

<sup>14</sup> *Battershall v. Davis*, 31 Barb. 323 (1860).

<sup>15</sup> *Sanders v. Barnaby*, 166 A. D. 274, 151 Supp. 580 (1915).

<sup>16</sup> See § 89, *supra*.

defaulting stockholder, personally, or by mail directed to him at his last-known post-office address, of a written notice requiring him to make payment within sixty days from the service of the notice at a place specified therein and stating that in case of failure to do so his stock and all previous payments thereon will be forfeited for the use of the corporation; and such stock, if forfeited, may be reissued or subscriptions therefor may be received as in the case of stock not issued or subscribed for, and if not sold for its par value or subscribed for within six months after such forfeiture, shall be cancelled and deducted from the amount of the capital stock.<sup>17</sup>

**§ 92. Id.: Certificate of Payment of Capital Stock.**—One-half of the capital stock of a stock business corporation must be paid in within one year from its incorporation, or the corporation must be dissolved; and the directors within thirty days after such payment must make a certificate of the fact of such payment which must be signed and acknowledged by a majority of the directors and verified by the president or vice-president and secretary or treasurer, and filed in the offices where the certificates of incorporation are filed.<sup>18</sup> “The object of the statute in requiring a certificate [of payment of capital stock] to be filed is to inform the public so that they can transact business with the corporation upon the assurance, either that the capital stock has all been paid in, or that the stockholders are severally liable for an amount equal to the stock held by them respectively.”<sup>19</sup> The “provisions of various statutes, relating to the stock of corporations, indicate very clearly that the amount of capital stock paid in and certificate therefor issued is intended for the information of the general public as to the financial condition of a corporation and that its shares necessarily represented money or property contributed for the conduct of its business.”<sup>20</sup>

**§ 93. Id.: Issue of, In General.**—The classes, kinds and rights of stock have been previously discussed.<sup>1</sup> While the

<sup>17</sup> St. Corp. L. § 54 (L. 1909, c. 61): “If by such cancellation, the amount of the capital stock is reduced below the minimum required by law, the capital stock shall be increased to the required amount within three months thereafter or an action may be brought or proceedings instituted to close up the business of the corporation as in the case of an insolvent corporation.”

<sup>18</sup> Bus. Corps. L. § 5 (L. 1909, c. 12).

<sup>19</sup> Nat. Tube Works Co. v. Gillfillan, 124 N. Y. 302, 26 N. E. 538 (1891); L. 1848, c. 40, § 10.

<sup>20</sup> People *ex rel.* Cohn Co. v. Miller, 180 N. Y. 16, 72 N. E. 525 (1904); Stock Corp. L. §§ 40, 47; Bus. Corps. L. §§ 3, 5. See now Bus. Corps. L. § 5.

<sup>1</sup> See § 62 *et seq.*, *supra*.

statute prohibits issue of corporate stock except for money, labor done or property received, yet it does not make stock issued for other consideration void or the directors issuing it or a vendor of the particular stock liable to a subsequent holder individually for a violation of the statute.<sup>2</sup> No act of negligence of an agent of a board of directors or the board itself can make the corporation liable for stock issued beyond the amount authorized by its charter.<sup>3</sup> A corporation alleging a contract of employment of one as its general manager and of issue of its stock to him to have been fraudulently obtained and therefore seeking to avoid it cannot by injunction restrain the manager in a suit against him from acting as such during the pendency of the action if the complaint ask no such relief and no facts are alleged which would warrant judgment for such relief.<sup>4</sup> If reliance is intended to be placed upon statutory or other conditions and circumstances entering into the creation of corporate shares and the issuance and acceptance of the stock certificate, so as to imply a contract, such conditions and circumstances must be plead and proven.<sup>5</sup>

Federal legislation has created a "Capital Issues Committee" which "may, under rules and regulations to be prescribed by it from time to time, investigate, pass upon, and determine whether it is compatible with the national interest that there should be sold or offered for sale or for subscription any issue, or any part of any issue, of securities hereafter issued by any person, firm, or corporation, or association, the total or aggregate par or face value of which issue and any other securities issued by the same person, firm, corporation or association since the passage of this Act is in excess of \$100,000."<sup>6a</sup>

**§ 94. Id.: Common Stock.**—The classes, kinds and rights of stock have already been discussed.<sup>6</sup> Every domestic stock

<sup>2</sup> *Ersfeld v. Exner*, 128 A. D. 135, 112 Supp. 561 (1908); *St. Corp. L. § 42* (L. 1901, c. 354). See now § 55.

<sup>3</sup> *New York & New Haven R. R. Co. v. Schuyler*, 38 Barb. 534 (1860); *aff'd* 34 N. Y. 30.

<sup>4</sup> *Maine Products Co. v. Alexander*, No. 1, 115 A. D. 109, 100 Supp. 709 (1906).

<sup>5</sup> *Milliken v. Caruso*, 205 N. Y. 559, 98 N. E. 493 (1912).

<sup>6a</sup> Act approved Apr. 5, 1918, known as "War Finance Corporation Act," B. C. N. Y.—7

tion Act," § 203. "Shares of stock of any corporation or association without nominal or par value shall for the purpose of this section be deemed to be of the par value of \$100 each. Any securities which upon the date of the passage of this Act are in the possession or control of the corporation, association or obligor issuing the same shall be deemed to have been issued after the passage of this Act within the meaning hereof."

<sup>6</sup> § 62 *et seq.*, *supra*.

corporation may issue common stock (1) if the certificate of incorporation so provides, or (2) by the unanimous consent of the stockholders expressed in writing and filed in the office of the Secretary of State and in the office of the clerk of the county in which the principal business office of the corporation is located, or (3) by the consent of the holders of record of two-thirds of the capital stock, given at a meeting called for that purpose upon notice such as is required for the annual meeting of the corporation.<sup>7</sup> A certificate of the proceedings of such meeting signed and sworn to by the president or a vice-president, and by the secretary or assistant-secretary of the corporation must be filed and recorded in the offices where the original certificate of incorporation of such corporation was filed and recorded.<sup>8</sup>

**§ 95. Id.: Preferred Stock.**—The classes, kinds and rights of stock have previously been discussed.<sup>9</sup> Every domestic stock corporation may issue preferred stock and different classes of preferred stock, (1) if the certificate of incorporation so provides, or (2) by the unanimous consent of the stockholders expressed in writing and filed in the office of the Secretary of State and in the office of the clerk of the county in which the principal business office of the corporation is located, or (3) by the consent of the holders of record of two-thirds of the capital stock, given at a meeting called for that purpose upon notice such as is required for the annual meeting of the corporation.<sup>10</sup> A certificate of the proceedings of such meeting, signed and sworn to by the president or a vice-president and by the secretary or assistant-secretary of the corporation must be filed and recorded in the offices where the original certificate of incorporation of such corporation was filed and recorded.<sup>11</sup> “In the absence of a statutory provision of law reserving such power there can be no issue of preferred stock in a corporation to the prejudice and injury of the owners of the common capital stock without their unanimous consent.”<sup>12</sup> That the law of this state at the time of the incorporation of a company does not permit the issue of preferred stock by it save through the unanimous consent of its stockholders is no objection to the issue of such stock by vote of a less number pursuant to a law later passed permitting such a course.<sup>13</sup>

<sup>7</sup> St. Corp. L. § 61 (L. 1917, c. 542).

<sup>8</sup> St. Corp. L. § 61 (L. 1917, c. 542).

<sup>9</sup> § 62 *et seq.*, *supra*.

<sup>10</sup> St. Corp. L. § 61 (L. 1917, c. 542).

<sup>11</sup> St. Corp. L. § 61 (L. 1917, c. 542).

<sup>12</sup> *Ernst v. Elmira Municipal Improvement Co.*, 24 Misc. 583, 54 Supp. 116 (1898).

<sup>13</sup> *Hinckley v. Schwarzschild & Sulzberger Co.*, 107 A. D. 470, 95

Holders of stock in a corporation not availing themselves of opportunity extended to them all to secure a preference in annual payments on their stock by contribution of a certain cash sum each to the company cannot hold a preference so given to some of their number making such contribution void if they do nothing about it for four years after the preference has been in operation and they have had full knowledge of it.<sup>14</sup>

**§ 96. Id.: Partly Paid Stock.**—The original or amended certificate of incorporation of any stock corporation may contain a provision expressly authorizing the issue of the whole or of any part of the capital stock as partly paid stock, subject to calls thereon until the whole thereof has been paid in.<sup>15</sup>

**§ 96-a. Non-Par Value Stock.**—Upon the formation or the reorganization of any stock corporation, other than a moneyed corporation, and other than a corporation under the jurisdiction of any public service commission, the certificate of incorporation may provide for the issuance of the shares of stock of such corporation, other than preferred stock having a preference as to principal, without any nominal or par value.<sup>15a</sup> The method of doing this is hereinafter discussed in connection with the reorganization of corporations.<sup>15b</sup>

**§ 97. Id.: For What.**—No corporation can issue stock except for money, labor done or property actually received for the use and lawful purposes of such corporation; and any corporation may purchase any property authorized by its certificate of incorporation, or necessary for the use and lawful purposes of such corporation, and may issue stock to the amount of the value thereof in payment therefor, and the stock so issued is full paid stock not liable to any further call, nor is the holder thereof liable for any further payment under any of the provisions of the Stock Corporation Law; and in the absence of fraud in the transaction the judgment of the directors as to the value of the property purchased is conclusive.<sup>16</sup> The purpose of the statute prohibiting the issue of corporate bonds or stock except for money, labor done or property received is to prevent reckless speculators from fraudulently issuing securities and does not inhibit the issue of bonds to corporate creditors who had theretofore delivered

Supp. 357 (1905), app. dism'd 193 N. Y. 599, 86 N. E. 1125; N. Y. Const. art. 8, § 1; St. Corp. L. § 47 (L. 1892, c. 688, as amend'd by L. 1901, c. 354). See now § 61 (L. 1917, c. 542).

<sup>14</sup> Kent v. Quicksilver Mining Co., 78 N. Y. 159 (1879).

<sup>15</sup> St. Corp. L. § 60 (L. 1909, c. 61).

<sup>15a</sup> St. Corp. L. § 19 (L. 1917, c. 500).

<sup>15b</sup> See § 507-k *et seq.*, *infra*.

<sup>16</sup> St. Corp. L. § 55 (L. 1909, c. 61).

their property to the company, which the bonds represented.<sup>17</sup> The meaning of the words "lawful purposes," in the statute prohibiting the issue of stock or bonds by a corporation except for money, labor done or property actually received for its use and lawful purposes, is "purposes not foreign to the business of the corporation and such as are not disconnected with the lawful management of that business," such as "to secure itself against ruinous competition whereby its whole business may be destroyed."<sup>18</sup> When divers persons owning property chip it into a corporation formed by them to hold it all for purposes of convenience and in which they only are stockholders, it is immaterial at what price the property was conveyed to the corporate entity.<sup>19</sup> The valuation of property, business and good will, as consideration for the issue of corporate stock therefor, is controlled by entirely different rules when it is made in the conversion of a family partnership into a family corporation than when it is made for the purpose of exploiting the public.<sup>20</sup> In determining whether property issued for stock is such as to make the stock full-paid the real question is whether the property was placed and taken at a high valuation with a fraudulent intent of evading the provisions of the statute; and an error in judgment or mistake in valuing the property, if made in good faith, will not of itself subject the stockholders to a personal liability.<sup>1</sup> Services rendered in bringing a corporation into existence is neither cash nor property for which its stock may legally be issued.<sup>2</sup> A corporation cannot issue its stock or bonds for services to be rendered in the future.<sup>3</sup> A certificate of stock, regular on its face, in the hands of the original owner, issued as consideration for his becoming president of the corporation, giving credit to it and his services as president to be rendered for one year after election, is void.<sup>4</sup>

<sup>17</sup> *Matter of Snyder*, 29 Misc. 1, 59 Supp. 993 (1899); St. Corp. L. § 42 (L. 1892, c. 688). See now St. Corp. L. § 55 (L. 1909, c. 61).

<sup>18</sup> *Rafferty v. Buffalo City Gas Co.*, 37 A. D. 618, 56 Supp. 288 (1899); St. Corp. § 42. See now St. Corp. L. § 55 (L. 1909, c. 61).

<sup>19</sup> *Seymour v. Spring Forest Cemetery Assn.*, 144 N. Y. 333, 26 L.R.A. 859, 39 N. E. 365 (1895).

<sup>20</sup> *Williams v. McClave*, 168 A. D. 192, 154 Supp. 38 (1915).

<sup>1</sup> *Thurber v. Thompson*, 21 Hun, 472 (1880); L. 1853, c. 117, § 10;

L. 1870, c. 773, § 2. Agricultural land was bought to establish a city thereon. Evidence of prices at which portions of the land had been sold for city purposes and of offers made therefor for such purposes is competent.

<sup>2</sup> *Herbert v. Duryea*, 34 A. D. 478, 54 Supp. 311 (1898); *aff'd* 164 N. Y. 596, 58 N. E. 1087; Gen. Mfg. Act (L. 1848, c. 40).

<sup>3</sup> *Morgan v. Bon Bon Co., Inc.*, 165 A. D. 89, 150 Supp. 668 (1914); St. Corp. L. § 55 (L. 1909, c. 61).

<sup>4</sup> *The B. & C. Electrical Construc-*

Stock issued in consideration of contracts made for and inuring to the benefit of a company upon its formation and providing for rendition of future services by stockholders is not issued for cash or property or services.<sup>5</sup> "The requirements of the statute with respect to the payment to be made for the capital stock of a corporation which were designed for the benefit and protection of creditors can only be satisfied as to creditors by labor *theretofore* performed, by actual payment in money or by the purchase, at what is in good faith deemed its fair and reasonable value, of property of a substantial nature having a pecuniary value capable of ascertainment and which the corporation might lawfully purchase as necessary to its business (*citations*). It is manifest that this requirement cannot be satisfied by the purchase of an executory contract for the performance of services in future."<sup>6</sup> Stock issued to a promoter ostensibly for his contribution to the corporation's capital stock used to buy realty but really for nothing because he charged the company just so much more than the realty cost as would pay his contribution to its stock is void, and one with whom he had agreed to hold part of such stock for a consideration cannot enforce the agreement.<sup>7</sup> The statute prohibiting the issue by a corporation of stock or bonds except for money, labor done or property received, is not violated by its delivery of its bonds and stock to one who has contracted to build a railway for it, and as consideration therefor, even though the delivery be made in advance.<sup>8</sup> It is not sufficient in a complaint alleging that corporate stock and bonds issued by agreement to a contractor for work done and material furnished were wrongly issued to allege that the contractor never did his work but it must unequivocally be alleged that the securities were not issued therefor or that some other facts exist justifying an inference that the corporation did not receive full value for the securities, as otherwise the conclusion will be indulged that the contractor took the securities in payment for work done and materials furnished.<sup>9</sup> "The fair value contem-

*tion Co. v. Owen*, 176 A. D. 399, 163 Supp. 31 (1917).

<sup>5</sup> *Shaw v. Ansaldi Co., Inc.*, 178 A. D. 589, 165 Supp. 872 (1917); *St. Corp. L.* §§ 55, 56.

<sup>6</sup> *Stevens v. Episcopal Church History Co.*, 140 A. D. 570, 125 Supp. 573 (1910).

<sup>7</sup> *Travis v. Travis*, 140 A. D. 191, 124 Supp. 1021 (1910).

<sup>8</sup> *Hudson River & Washington*

*County Midland R. R. Co. v. Hanfield*, 36 A. D. 605, 55 Supp. 877 (1899); *St. Corp. L.* § 42 (L. 1892, c. 688). See now *St. Corp. L.* § 55 (L. 1909, c. 61).

<sup>9</sup> *Bostwick v. Young*, 118 A. D. 490, 103 Supp. 607 (1907); *aff'd* 194 N. Y. 516, 87 N. E. 1115; *St. Corp. L.* § 42 (L. 1892, c. 688). See now § 55 (L. 1909, c. 61).

plated by the statute [requiring that corporate stock issued for property be only "at its fair value"] is that which the property had at the time of the sale and which constituted the consideration upon which the subscription to the capital stock of the company was satisfied. . . . It could not be dependent upon subsequent success or failure of the investment further than such result may have been legitimately within evidential contemplation at the time of the sale in view of the uses, for which it may have had available advantages within itself."<sup>10</sup> Once all the stockholders of a corporation have agreed, under a colorable arrangement, to the issue of all its capital stock for property the value of which is insignificant in comparison to the value of the stock, no subsequent stockholder—in whatever good faith he may have bought his stock—can question the legality of the issue or compel the return of the excess of stock issued either in behalf of the stockholders or the corporation.<sup>11</sup> A subscriber to a loan sought by a corporation proposing to give bonds therefor and also the privilege to become a stockholder in proportion to his loan, and agreeing upon payment of the loan's first installment to give certificates entitling to such capital stock, exchangeable for scrip shares on payment of the last installment, does not have only a right of election, on a fixed date, to decide whether or not to take stock, but an absolute right thereto on fulfillment of his part of the contract.<sup>12</sup> The value of a franchise controlled by one corporation operating under it to the ruin of another may be considered in determining the market value of the former's bonds and stocks on their purchase by the latter.<sup>13</sup>

**§ 98. Id.: Evidence of Value of Consideration for.**—The words "value thereof" in the statute permitting corporate trustees to purchase property "necessary for their business and to issue stock to the amount of the value thereof in payment therefor," mean the "fair valuation of the property considering the purposes for which it is to be used, the nature of the business for which it is purchased and for the prosecution of which the corporation is organized. This rule authorizes an extended and wide latitude in the determination of the question of value. While certain kinds of prop-

<sup>10</sup> *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544 (1890); L. 1875, c. 61, § 14.

<sup>11</sup> *Miller v. University Magazine Co.*, 10 Misc. 311, 30 Supp. 969 (1894).

<sup>12</sup> *Van Alen v. Illinois Central R. Co.*, 41 N. Y. (2 Keyes) 673 (1866).

<sup>13</sup> *Rafferty v. Buffalo City Gas Co.*, 37 A. D. 618, 56 Supp. 288 (1899); St. Corp. L. § 42.

erty which are employed for manufacturing purposes, such as machinery, fixtures, etc., have a specific and definite value which is readily ascertained and fixed, there are other descriptions of property where the value is dependent upon circumstances which render it quite uncertain and frequently very difficult to decide what the real fair and just value of the same actually is."<sup>14</sup> Evidence of the value of property taken by a corporation in exchange for its stock based upon comparison with other property of like kind at different places is not admissible.<sup>15</sup> In determining the value of property taken by a corporation in exchange for its stock "the books of the company were competent as evidence so far as related to any entries legitimately contained in them and so far as they were relevant to the issues on trial."<sup>16</sup> The surrender and retransfer to a corporation of a large amount of its stock issued for property, without consideration, is some evidence that the amount of stock issued was not regarded as the value of the property.<sup>17</sup> In determining if stock issued for property is full paid it is entirely inconsistent with a *bona fide* sale that the seller was willing to divide with his co-trustees, the bargainners, two-thirds of the nominal consideration he received for it.<sup>18</sup> The presumption—until the contrary is shown—is that common stock bought by the corporation and transferred to such holders of preferred stock as had no common was regularly issued for value.<sup>19</sup>

**§ 99. Id.: Of New Stock.**—A return to the holders thereof of stock improperly surrendered and illegally cancelled is not an issue of new stock so as to violate an injunction upon the directors and officers of the corporation against issuing any stock pending a new election of the acting directors and officers.<sup>20</sup> The fact that a contemplated issue of corporate stock at par to common stockholders though worth above par

<sup>14</sup> *Boynton v. Andrews*, 63 N. Y. 93 (1875); Gen. Mfg. Act, L. 1848, c. 40, § 10, as amended L. 1853, c. 333. "Mines and mining lands may properly be considered as embraced in the latter class." See now St. Corp. L. § 55.

<sup>15</sup> *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544 (1890); L. 1875, c. 611, § 14. See now St. Corp. L. § 55.

<sup>16</sup> *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544 (1890); L. 1875, c. 611, § 14. See now St. Corp. L. § 55.

<sup>17</sup> *Douglass v. Ireland*, 73 N. Y. 100 (1878); L. 1848, c. 40; L. 1853, c. 33. See now St. Corp. L. § 55.

<sup>18</sup> *Douglass v. Ireland*, 73 N. Y. 100 (1878); L. 1848, c. 40; L. 1853, c. 33. See now St. Corp. L. § 55.

<sup>19</sup> *Matter of Seneca Oil Co.*, 153 A. D. 594, 138 Supp. 78 (1912); *aff'd* 208 N. Y. 545, 101 N. E. 1121. See now St. Corp. L. § 55.

<sup>20</sup> *Matter of New York & Westchester Town Site Co.*, No. 2, 145 A. D. 630, 130 Supp. 419 (1911).

will reduce the preferred stockholders' proportionate interest in the corporation is not objectionable if the issue is from the amount of stock authorized by the charter and is not the result of an increase of the authorized capital stock.<sup>1</sup> A preferred stockholder cannot complain that his corporation's common stockholders are given the right to subscribe at par for unissued but authorized stock of the corporation worth more than par while he and other preferred stockholders are not given the same chance, if the corporation pays dividends on the preferred stock and has property left in excess of its debts and the amount of its capital stock issued, as whatever value the stock to be issued has above par represents surplus and is distributable among the common stockholders.<sup>2</sup>

**§ 100. Id.: Assessments on Holders of and Subscribers To.**—The subject of calls on stockholders to pay any amount remaining unpaid upon subscriptions to their corporation's stock has been previously considered.<sup>3</sup> A by-law imposing an annual assessment on stock already fully paid is inoperative on a non-assenting stockholder.<sup>4</sup> No assessment to pay the estimates of the expenses for conducting a corporation for the current year part of which has expired before the assessment was made can be levied on stockholders under a by-law providing that "when there are not sufficient funds in the treasurer's hands to pay the indebtedness of the corporation an assessment shall be made on the stockholders to cover the amount necessary to cancel said indebtedness, unless otherwise arranged and paid by the board of directors."<sup>5</sup> In determining how many shares of stock a person owns in order to fix his liability for assessments when it goes into liquidation the entries on the corporate stock ledger are binding unless contradicted.<sup>6</sup>

**§ 101. Id.: Exchange of Preferred for Common Stock.**—A domestic stock corporation may, upon the written request of the holders of any preferred stock, by a two-thirds vote of its

<sup>1</sup> Russell v. American Gas & Electric Co., 152 A. D. 136, 136 Supp. 602 (1912).

<sup>2</sup> Russell v. American Gas & Electric Co., 152 A. D. 136, 136 Supp. 602 (1912).

<sup>3</sup> See § 73, *supra*.

<sup>4</sup> Sullivan County Club v. Butler, 26 Misc. 306, 56 Supp. 1 (1899).

<sup>5</sup> Delaware Valley Telephone Co. v. Tiffan, 131 A. D. 343, 115 Supp. 867 (1909).

<sup>6</sup> Cuykendall v. Douglas, 19 Hun, 577 (1880); *dism'd* 95 N. Y. 314; L. 1848, c. 40, § 25.

For authorities discussing the question of assessments on paid-up stock generally, see notes in 45 L.R.A. 648; 22 L.R.A.(N.S.) 1013.

On right to make successive assessments on stockholders to pay debts, see note in 66 L.R.A. 971.

directors, exchange such preferred for common stock, and issue certificates for common stock therefor, upon such valuation as may have been agreed upon (1) in the certificate of organization of such corporation, or (2) the issue of such preferred stock, or (3) share for share; but the total amount of such capital stock must not be increased thereby.<sup>7</sup>

**§ 102. Id.: Increase of, Governing Statutes.**— Any domestic corporation may increase its capital stock, not, however, above the maximum if any prescribed by general law governing corporations formed for similar purposes, by either (1) the unanimous consent of its stockholders (a) expressed in writing and (b) filed in the office of the Secretary of State and (c) filed in the office of the clerk of the county in which the principal business office of the corporation is located, or (2) a vote of the stockholders owning at least a majority of the stock of the corporation (a) taken at a meeting of the stockholders specially called for that purpose in the manner provided by law or the by-laws, (b) after notice of the meeting, stating the time, place and object and the amount of the increase proposed, signed by the president or a vice-president and the secretary has been published once a week for at least two successive weeks in a newspaper in the county where its principal business office is located, if any is published therein, and (c) after a copy of such notice has been either duly mailed to each stockholder or member at his last-known post-office address at least two weeks before the meeting or personally served on him at least five days before the meeting.<sup>8</sup> The procedure for increasing the capital stock now differs according as the increase shall be authorized by unanimous written consent or by a vote of the stockholders in meeting called. When the unanimous consent of stockholders in writing signed by them or their duly authorized proxies has been filed the capital stock of such corporation is increased to the amount specified in such consent.<sup>9</sup> A copy of such consent must be entered upon the minutes of the corporation.<sup>10</sup> If the increase be not unanimously consented to by the stockholders, a stockholders' meeting must be held. If, at the time and place specified in the notice of such meeting the stockholders appear in person or by proxy in numbers representing at least a majority of all the shares of stock they (1) must organize by choosing from their number a president and secretary, and (2) take a vote of those present in person

<sup>7</sup> St. Corp. L. § 61 (L. 1917, c. 542).

<sup>8</sup> St. Corp. L. § 63 (L. 1909, c. 61).

<sup>9</sup> St. Corp. L. § 64 (L. 1913, c. 305).

<sup>10</sup> St. Corp. L. § 64 (L. 1913, c. 305).

or by proxy and if a sufficient number of votes is given in favor of such increase, (3) have filed in the office of the clerk of the county where its principal place of business is located, and a duplicate thereof in the office of the Secretary of State, a certificate of the proceedings showing (a) a compliance with the provisions of the Stock Corporation Law, (b) the amount of capital theretofore authorized, (c) the proportion thereof actually issued, (d) the amount of the increased capital stock, and (e) signed, verified and acknowledged by the chairman and secretary of the meeting.<sup>11</sup> When such certificate has been filed the capital stock of such corporation is increased to the amount specified in such certificate.<sup>12</sup> The proceedings of the meeting at which such increase is voted must be entered upon the minutes of the corporation.<sup>13</sup>

Any corporation formed or reorganized pursuant to the statute permitting a business corporation upon its formation or reorganization to provide in its certificate of incorporation for the issuance of shares of stock, other than preferred stock having a preference as to principal, without any nominal or par value, may amend its certificate of incorporation so as to increase the number of shares which it may issue, or so as to increase the amount of its stated capital, by filing in the manner provided for the original certificate of incorporation, a certificate of amendment under seal executed by its president or a vice-president and by its secretary or its treasurer, stating the amendment proposed and that the same has been duly authorized by a vote of a majority of the directors and also by the vote of the holders of at least three-fifths of the outstanding shares of each class issued by the corporation, at a meeting of the stockholders called for the purpose in the manner provided in section sixty-three of the Stock Corporation Law; and by filing with such certificate of amendment a copy of the proceedings of such meeting, made, signed, verified and acknowledged by the president or a vice-president and by the secretary or the treasurer of the corporation; but such an amendment cannot be made unless as so amended the certificate of incorporation could lawfully have been filed under the statute referred to, permitting a business corporation upon its formation or reorganization to provide in its certificate of incorporation for the issuance of stock without nominal or par value.<sup>13a</sup>

<sup>11</sup> St. Corp. L. § 64 (L. 1913, c. 305).

<sup>12</sup> St. Corp. L. § 64 (L. 1913, c. 305).

<sup>13</sup> St. Corp. L. § 64 (L. 1913, c. 305).

<sup>13a</sup> St. Corp. L. § 22 (L. 1912, c. 351).

§ 103. *Id.*: **In General.**—A subscriber to corporate stock does not upon receiving his stock acquire any inherent right to preserve the existing ratio between his stock and the stock issued and outstanding at that particular time.<sup>14</sup> “There is but one way in which the capital stock of a company can be increased and that is in the manner authorized by its charter, or by some express authorization of the legislature of the State. No acts of the officers or agents of the company are competent to enlarge the capital stock; nor can the stockholders do so, save in the particular manner pointed out by the statute. There is no such thing as an implied authority to increase or diminish the capital stock of a company.”<sup>15</sup> The number of shares of stock of a corporation authorized by its charter cannot be increased by any act or resolution of its board of directors or by anyone by the board’s authority.<sup>16</sup> It is doubtful if a statement in a report of a board of directors that it will not increase the corporate capital stock is sufficient to warrant the restraining of the company from doing so, if authorized by statute to do so.<sup>17</sup> “A stockholder coming into court and alleging that the increase of stock was unauthorized by the articles of association, in order to maintain his allegations, would have the burden to prove and establish that fact.”<sup>18</sup> An increase of capital stock by a resolution of the corporation’s trustees, followed by a ratification thereof by a stockholders’ meeting of which the statutory notice was not given, and of the proceedings of which no certificate was made or filed as required by statute, while illegal, is nevertheless validated as against the corporate creditors by acceptance by the stockholders of their proportions of the increased stock, their voting for such increase, their taking dividends upon it, and their holding it out to those dealing with the company as an actual component of its capital.<sup>19</sup> If a special statute permitting the incorporation of a particular corporation and giving it a charter neither requires the assent of the stockholders to an increase of stock nor provides for any public record of the action of the company in making the increase, but authorizes a majority of the directors to make the increase as its

<sup>14</sup> *Russell v. American Gas & Electric Co.*, 152 A. D. 136, 136 Supp. 602 (1912); *St. Corp. L.* § 53.

<sup>15</sup> *Einstein v. Rochester Gas & Electric Co.*, 146 N. Y. 46, 40 N. E. 631 (1895).

<sup>16</sup> *New York & New Haven R. R. Co. v. Schuyler*, 38 Barb. 534 (1860); *aff’d* 34 N. Y. 30.

<sup>17</sup> *Howell v. Chicago & Northwestern Ry. Co.*, 51 Barb. 378 (1868).

<sup>18</sup> *Williams v. Western Union Telegraph Co.*, 93 N. Y. 162 (1883).

<sup>19</sup> *Veeder v. Mudgett*, 95 N. Y. 295 (1884); *Gen. Mfg. Act*, L. 1848, c. 40, §§ 10, 11, 20, 21, 22. See now *St. Corp. L.* § 62.

business might require, their resolution that the increase be made "for the purpose of erecting and putting in operation" certain apparatus fulfills all the requirements of the statute and charter.<sup>20</sup> In an action to have an increase of corporate stock adjudged illegal and to compel certain parties holding such increase to deliver it up for cancellation it is not necessary to join all stockholders or directors as defendants.<sup>1</sup>

**§ 104. Id.: Certificate of.**—The Secretary of State collects a fee of ten dollars for filing a consent to or certificate of increase of capital stock pursuant to section six or sixty-three or sixty-four of the Stock Corporation Law.<sup>2</sup> The statute prescribing the certificate of increase of capital stock has been heretofore set forth.<sup>3</sup> A certificate of increase of capital stock required by statute to be "acknowledged" by the chairman of the meeting at which the increase was voted is sufficient if it states to the left of the chairman's signature at the end that it was "*subscribed* and sworn to before" the proper official.<sup>4</sup> A certificate that "the whole of the said capital stock of \$12,000 has been sold, and all but \$ . . . . . paid in" imports that the entire amount of the capital has been paid in, and is a sufficient compliance with the requirement of the statute prescribing that a certificate of increase of capital stock must show "the amount of capital actually paid in."<sup>5</sup>

**§ 105. Id.: Stockholder's Right to Subscribe To.**—When a corporation has power to increase its capital it is immaterial whether it does so by awarding the stock to stockholders as dividends in lieu of money (retaining the money for corporate purposes) or by paying the stockholders in cash from the corporate earnings (and selling the stock in the market for corporate use).<sup>6</sup> "A corporation may use its original unsued authorized capital stock for any legitimate or lawful purpose it sees fit . . . . Before making such use it is not obligated to give to existing stockholders an opportunity to purchase. It is only when the capital stock is increased by the issue of new shares that each holder of the original stock has a right to subscribe for and demand from the corporation

<sup>20</sup> Sutherland v. Olcott, 95 N. Y. 93 (1884); L. 1867, c. 401.

<sup>1</sup> Witherbee v. Bowles, 201 N. Y. 427, 95 N. E. 27 (1911).

<sup>2</sup> Executive L. § 26 (L. 1917, c. 69).

<sup>3</sup> See § 102, *supra*.

<sup>4</sup> Cuykendall v. Douglas, 19 Hun, 577 (1880); *dism'd* 95 N. Y. 314;

L. 1848, c. 40, § 22. See now St. Corp. L. § 64.

<sup>5</sup> Moosbrugger v. Walsh, 89 Hun, 564, 35 Supp. 550 (1895); L. 1848, c. 40, § 22. See now St. Corp. L. § 64.

<sup>6</sup> Howell v. Chicago & Northwestern Ry. Co., 51 Barb. 378 (1868).

such a proportion of the new stock as the number of shares already owned by him bears to the whole number of shares before the increase. In that case the rule simply applies when the new stock is issued for money only, and not to purchase property necessary for the purposes of the corporation, or to effect a consolidation.”<sup>7</sup> “. . . a stockholder has an inherent right to a proportionate share of new stock issued for money only and not to purchase property for the purposes of the corporation or to effect a consolidation, and while he can waive that right, he cannot be deprived of it without his consent except when the stock is issued at a fixed price not less than par and he is given the right to take at that price in proportion to his holding, or in some other equitable way that will enable him to protect his interest by acting on his own judgment and using his own resources.”<sup>8</sup> A stockholder of a corporation at the time its capital is increased has a right to subscribe to his *pro rata* share of the new stock at any time until he has declined to do so or consented that the company withhold the new shares from him, even though the time fixed for exercise of his right has passed; *provided*, always, that the stock is still in the company’s possession.<sup>9</sup> A stockholder who is given a chance, in common with other stockholders, to get his proportion of an additional issue of stock on the same terms as the others, must take advantage of the opportunity within a reasonable time or lose it.<sup>10</sup> A stockholder protesting against the sale of his share of an increase of stock of the corporation before the price was fixed, is then under no obligation to offer to take it at any price in order to preserve his rights; but to put him in default the directors or corporation must offer it to him at the price they or it offer or offers it to outsiders.<sup>11</sup> A purchase of corporate stock which secures to the buyer control of the corporation cannot be set aside by other stockholders on the ground of lack of opportunity in them to buy it if the directors’ resolution authorizing sale at a specified price was of record and open to their inspection and copies of it were sent them, as this is a complaint “not

<sup>7</sup> *Archer v. Hesse*, 164 A. D. 493, 150 Supp. 296 (1914).

<sup>8</sup> *Stokes v. Continental Trust Co.*, 186 N. Y. 285, 12 L.R.A.(N.S.) 969, 78 N. E. 1090 (1906).

<sup>9</sup> *Sommer v. Armor Gas & Oil Co.*, 71 Misc. 211, 128 Supp. 382 (1911); *aff’d* 147 A. D. 919, 131 Supp. 1144.

On right of existing stockholder to

subscribe for increase of stock, see note in 12 L.R.A.(N.S.) 969.

<sup>10</sup> *Conklin v. United Construction & Supply Co.*, 166 A. D. 284, 151 Supp. 624 (1915); *aff’d* without opinion 219 N. Y. 555, 114 N. E. 1063.

<sup>11</sup> *Stokes v. Continental Trust Co.*, 186 N. Y. 285, 12 L.R.A.(N.S.) 969, 78 N. E. 1090 (1906).

of an opportunity denied, but rather of an opportunity overlooked, and the grievance does not seem to arise over a lost investment but rather over the power of control over the corporation gained by others more vigilant.”<sup>12</sup>

§ 106. **Id.: Decrease of.**—Any domestic corporation may reduce its capital stock, not, however, below the minimum if any prescribed by general law governing corporations formed for similar purposes, or to such an amount that its debts and liabilities shall exceed the amount of its reduced capital, or so as to relieve the owner of any stock from any liability existing prior to the reduction of the capital stock of any stock corporation, by (1) the unanimous consent of the stockholders expressed in writing, or (2) by a vote of the stockholders owning at least a majority of the stock of the corporation taken at a meeting of the stockholders specially called for that purpose in the manner provided by law or by the by-laws.<sup>13</sup> The procedure if the reduction is accomplished by written and unanimous consent of the stockholders is (1) to file such consent (a) in the office of the Secretary of State and (b) in the office of the clerk of the county in which the principal business office of the corporation is located.<sup>14</sup> The consent should show (1) a compliance with the provisions of the Stock Corporation Law, (2) the amount of capital theretofore authorized, (3) the proportion thereof actually issued, (4) the amount of the reduced capital, and (5) the whole amount of the ascertained debts and liabilities of the corporation.<sup>15</sup> The consent must have endorsed on it the approval of the comptroller to the effect that the reduced capital is sufficient for the proper purposes of the corporation and is in excess of its ascertained debts and liabilities.<sup>16</sup> When the unanimous consent of stockholders in writing, signed by them or their duly authorized proxies and approved by the comptroller has been filed the capital stock of the corporation is reduced to the amount specified in such consent.<sup>17</sup> A copy of such consent must be entered on the minutes of the corporation.<sup>18</sup>

The procedure if the reduction is accomplished by a vote of the stockholders owning at least a majority of the stock is

<sup>12</sup> *Dusenberry v. Sagamore Development Co.*, 164 A. D. 573, 150 Supp. 229 (1914).

<sup>13</sup> St. Corp. L. §§ 62, 63 (L. 1909, c. 61).

<sup>14</sup> St. Corp. L. § 63 (L. 1909, c. 61).

<sup>15</sup> St. Corp. L. § 64 (L. 1913, c. 305).

<sup>16</sup> St. Corp. L. § 64 (L. 1913, c. 305).

<sup>17</sup> St. Corp. L. § 64 (L. 1913, c. 305).

<sup>18</sup> St. Corp. L. § 64 (L. 1913, c. 305).

(1) to publish once a week for at least two successive weeks in a newspaper in the county where the corporation's principal business office is located (if any is published therein) a notice of the meeting stating (a) the time, (b) place, and (c) object, (d) the amount of the reduction proposed, (e) signed by the president or a vice-president and the secretary; and (2) to duly mail a copy of such notice to each stockholder or member at his last-known post-office address at least two weeks before the meeting, or (3) to serve each such stockholder personally with such copy at least five days before the meeting.<sup>19</sup> If at the time and place specified in the notice the stockholders appear in person or by proxy in numbers representing at least a majority of all the shares of stock they must (1) organize by choosing from their number a chairman and a secretary, and (2) take a vote of those present in person or by proxy, and if a sufficient number of votes is given in favor of such reduction (3) file a certificate of the proceedings in the office of the clerk of the county where its principal place of business is located and a duplicate in the office of the Secretary of State, showing (a) a compliance with the provisions of the Stock Corporation Law, (b) the amount of capital theretofore authorized, (c) the proportion actually issued, (d) the amount of the reduced capital stock, and (e) the whole amount of the ascertained debts and liabilities of the corporation, which certificate must be signed, verified and acknowledged by the chairman and secretary of the meeting, and must have endorsed thereon the approval of the comptroller to the effect that the reduced capital is sufficient for the proper purposes of the corporation and is in excess of its ascertained debts and liabilities.<sup>20</sup> The proceedings of the meeting at which such decrease is voted must be entered upon the minutes of the corporation.<sup>1</sup> When such certificate, approved by the comptroller, has been filed the capital stock of the corporation is reduced to the amount specified therein.<sup>2</sup>

Any corporation formed or reorganized pursuant to the statute permitting a business corporation upon its formation or reorganization to provide by its certificate of incorporation for the issuance of the shares of its stock, other than preferred stock having a preference as to principal, without any nominal or par value, may amend its certificate of incorporation so as to reduce the number of shares which it may issue, or so as

<sup>19</sup> St. Corp. L. § 63 (L. 1909, c. 61).

<sup>20</sup> St. Corp. L. § 64 (L. 1913, c. 305).

<sup>1</sup> St. Corp. L. § 64 (L. 1913, c. 305).

<sup>2</sup> St. Corp. L. § 64 (L. 1913, c. 305).

to reduce the amount of its stated capital, by filing, in the manner provided for the original certificate of incorporation, a certificate of amendment under seal executed by its president or a vice-president and by its secretary or its treasurer, stating the amendment proposed and that that same has been duly authorized by a vote of a majority of the directors and also by the vote of the holders of at least three-fifths of the outstanding shares of each class issued by the corporation, at a meeting of the stockholders called for the purpose in the manner provided in the sixty-third section of the Stock Corporation Law; and by filing with such certificate of amendment a copy of the proceedings of such meeting, made, signed, verified and acknowledged by the president or a vice-president and by the secretary or the treasurer of the corporation; but such an amendment cannot be made unless as so amended the certificate of incorporation could lawfully have been filed under the statute already mentioned, permitting a business corporation upon its formation or reorganization to provide for the issuance of non-par value stock; and there must be filed with the certificate of amendment a certificate setting forth the whole amount of the ascertained debts and liabilities of the corporation, signed, verified and acknowledged by the president or a vice-president and by the secretary or the treasurer of the corporation; and such certificate of amendment itself must have endorsed on it the approval of the comptroller to the effect that as so stated the reduced amount of capital is sufficient for the proper purposes of the corporation and is in excess of its ascertained debts and liabilities.<sup>2a</sup>

However the capital stock is reduced, the amount of the capital over and above the amount of the reduced capital must, if the meeting or consent so determine or provide, be returned to the stockholders pro rata, at such times and in such manner as the directors determine.<sup>3</sup>

The reorganization of a corporation formed before passage of the statute permitting non-par value stock so as to avail itself of such statute may result in a change in its capital; but this kind of reorganization and change of capital is later considered.<sup>3a</sup>

The provisions of the statute authorizing corporations to diminish the amount of their capital stock "are all consistent with the interpretation that the act had in view only the

<sup>2a</sup> St. Corp. L. § 22 (L. 1912, c. 351).

<sup>3a</sup> See § 507-a *et seq.*, *infra*; St. Corp. L. § 24 *et seq.* (L. 1917, c. 484).

<sup>3</sup> St. Corp. L. § 64 (L. 1913, c. 305).

diminution of the amount fixed as the amount of the capital stock, and did not contemplate the distribution of any part of the actual capital;" and, certainly, "the mere diminution, by the proceedings authorized by the act . . . , of the amount of the capital stock, does not authorize the distribution among the stockholders of a sum equal to the difference between the amount originally named as the capital, and the reduced amount fixed by the vote of the stockholders, even if it appears that the original amount was actually paid in."<sup>4</sup> If the legislature does not provide that either the common or preferred stock of corporations organized under laws enacted by it may be separately reduced, but simply prescribes in general terms for stock reduction to be so done as to preserve the rights of stockholders, a domestic business corporation with preferred and common stock, each having the same voting power, cannot reduce one class against the will of the holder of some of it, as to do this reduces his voting power.<sup>5</sup> A statute covering the whole subject of reduction of corporate capital stock, not purporting to amend a former statute covering the reduction of the stock of corporations organized under it, and plainly intended to furnish the only law on the subject, will govern the reduction of the capital stock of a corporation formed under the former statute; and even though the later statute by its terms is not to affect any law then existing authorizing any corporation theretofore organized to reduce its capital stock, if the corporation in question was not organized till after the new act became law.<sup>6</sup> Under a special statute chartering a particular corporation giving no power to reduce its capital stock, an attempted reduction by vote of stockholders and directors, followed by filing a certificate of the directors' resolution and of full payment of the reduced capital is ineffective.<sup>7</sup>

**§ 107. Id.: Change of Number of Shares of Capital Stock.—**The number of shares into which the capital stock of any stock corporation is divided may be increased or reduced by a two-thirds vote of all stock duly represented at a meeting held and conducted in like manner and upon filing a like certificate

<sup>4</sup> *Strong v. Brooklyn Cross-Town R. R. Co.*, 93 N. Y. 426 (1883); L. 1878, c. 264. See now St. Corp. L. § 62 *et seq.*

<sup>5</sup> *Page v. American & British Manufacturing Co.*, 129 A. D. 346, 113 Supp. 734 (1908); St. Corp. L. § 44 (L. 1901, c. 354), now § 62.

<sup>6</sup> *People ex rel. Eden Musee B. C. N. Y.*—8

*American Co. v. Carr*, 36 Hun, 488 (1885); L. 1875, c. 611, § 15; L. 1878, c. 264.

<sup>7</sup> *Sutherland v. Olcott*, 95 N. Y. 93 (1884); L. 1867, c. 401.

As to validity of proceedings for reduction of capital stock, see note in 1 L.R.A.(N.S.) 571.

as required for the increase or reduction of its capital stock; and if such increase or reduction of the number of shares be so authorized, the corporation must issue to each stockholder certificates for as many shares of the new stock as equal in par value the shares of the old stock held by him, upon surrender and cancellation of such old stock.<sup>8</sup> The increase or reduction of the number of shares of a corporation formed or reorganized to permit issuance by it of stock without par value has already been discussed.<sup>8a</sup>

**§ 108. Id.: Certificates of, Issue and Reissue, Governing Statutes.**—The stock of every corporation must be represented by certificates (1) prepared by the directors, (2) signed by the president or vice-president and secretary or treasurer, (3) sealed with the seal of the corporation, and (4) transferable in the manner prescribed in the Stock Corporation Law and the by-laws.<sup>9</sup>

**§ 109. Id.: In General.**—“ . . . if a corporation having power to issue stock certificates does in fact issue such a certificate, in which it affirms that a designated person is entitled to a certain number of shares of stock, it thereby holds out to persons who may deal in good faith with the person named in the certificate, that he is an owner and has capacity to transfer the shares;” and such a certificate must be regarded as a continuing affirmation of the ownership of the nominee and his power over the stock until it is withdrawn in some manner recognized by law.<sup>10</sup> “To countersign an instrument [e. g., a stock certificate] is to sign what has already been signed by a superior, to authenticate by an additional signature, and usually has reference to the signature of a subordinate in addition to that of his superior by way of authentication of the execution of the writing to which it is affixed, and it denotes the complete execution of the paper.”<sup>11</sup>

**§ 110. Id.: Corporation's Liability for, By Agent, Officer, etc.**—“It is undoubtedly the general rule that a corporation is responsible for the acts of its officers in issuing certificates of stock, but the responsibility only attaches when it has power under its charter to issue certificates and the officers

<sup>8</sup> St. Corp. L. § 65 (L. 1909, c. 61). “This section does not authorize the increase or reduction of the capital stock of such corporation.”

<sup>8a</sup> St. Corp. L. § 22 (L. 1912, c. 351). See § 106, *supra*.

<sup>9</sup> St. Corp. L. § 50 (L. 1909, c. 61).

<sup>10</sup> *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616 (1874).

<sup>11</sup> *Fifth Avenue Bank of N. Y. v. Forty-Second St. & Grand St. Ferry R. R. Co.*, 137 N. Y. 231, 19 L.R.A. 331, 33 N. E. 378 (1893).

are clothed with power, apparent or real, to perform the acts complained of.”<sup>12</sup> Information by a person in charge of a corporation to brokers contemplating the receipt of a stock certificate for the purpose of sale that the certificate is in a condition for transfer is in substance an assurance that the stock will be transferred in case the brokers took it, and if they act on such assurance the corporation is estopped from denying the liability to indemnify them if it subsequently develops that the corporation’s transfer agent fraudulently had the certificate issued.<sup>13</sup> One who has bought certificates issued by the president of a corporation, upon the authority of its executive committee given no power to issue stock, is not entitled to have certificates of the company’s stock issued to him on surrender of such certificates, though they so state, if the board of directors has neither authorized nor ratified the issue of such certificates, and he is not a *bona fide* purchaser thereof.<sup>14</sup> If a corporate by-law, enacted pursuant to charter authority, permit the issuance of certificates of its stock signed by its president and treasurer and with the corporate seal affixed, without any exception as to the form or signers of certificates issued to its president or treasurer, certificates so executed in the name or favor of the president or treasurer himself are binding on the corporation.<sup>15</sup> A by-law that surrendered certificates of corporate stock should be canceled does not make the negligence of the corporation in issuing new certificates without cancellation of the old actionable if the old were seen put in the corporate safe by the president who directed their cancellation by an employee who instead negotiated them while also procuring the signature of new ones by the president.<sup>16</sup>

**§ 111. Id.: Fraud and Forgery In.**—An officer, agent or other person in the service of a domestic, or foreign (state or country) corporation who wilfully and knowingly with intent to defraud sells, pledges, signs, executes or causes to be sold, pledged, issued, signed or executed with intent to sell,

<sup>12</sup> *Reno Oil Co. v. Culver*, 60 A. D. 129, 69 Supp. 969 (1901). A complaint by a stockholder of a foreign corporation to enjoin the disposition of stock issued illegally was held demurrable because it did not allege the corporation had the right to issue the stock.

<sup>13</sup> *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652, 31 L.R.A. 776, 43 N. E. 68 (1896).

<sup>14</sup> *Ryder v. Bushwick R. R. Co.*, 134 N. Y. 83, 31 N. E. 251 (1892).

<sup>15</sup> *Titus v. President, Directors and First Company of the Great Western Turnpike Road*, 61 N. Y. 237 (1874).

<sup>16</sup> *Knox v. Eden Musee Co.*, 148 N. Y. 441, 31 L.R.A. 779, 42 N. E. 988 (1896).

pledge or issue, any certificate or instrument purporting to be a certificate or evidence of the ownership of any share or shares of such corporation, without being first thereto duly authorized by such corporation, or contrary to the charter or laws under which such corporation exists, or in excess of the power of such corporation or of the limit imposed by law or otherwise upon its power to create or issue stock; or who reissues, sells, pledges or disposes of, or causes to be reissued, sold, pledged or disposed of any surrendered or canceled certificates or other evidence of the transfer or ownership of any such share or shares is punishable by imprisonment for a term not exceeding seven years or by a fine not exceeding three thousand dollars or both.<sup>17</sup> The acts of a corporate officer, entrusted with the authority to make the final declaration as to the validity of the shares of stock the corporation might issue (e. g., its secretary, treasurer and transfer agent countersigning the stock certificates), done in the apparent exercise of such authority, when accompanied with all the indicia of genuineness, bind the corporation to all persons acting on the faith thereof, whether the indicia are true or not.<sup>18</sup> A corporation is bound by a certificate of its stock issued by its transfer agent, who forges the signatures of the president and treasurer thereto.<sup>19</sup> Certificates of corporate stock fraudulently issued by the corporation's transfer agent after its whole authorized stock had been issued give no right to a holder in good faith deriving title thereto through the one to whom they were originally issued by the agent, with knowledge of the latter's fraud.<sup>20</sup> A corporation may in equity have canceled certificates of its stock fraudulently issued by its officer in excess of the authorized capital which are indistinguishable from its valid certificates.<sup>1</sup> " . . . in case the officers of a corporation authorized to issue share certificates fraudulently issue certificates for shares in excess of the number of shares the corporation is authorized to issue, the cor-

<sup>17</sup> Penal L. § 662 (L. 1909, c. 88).

<sup>18</sup> Fifth Avenue Bank of N. Y. v. Forty-second St. & Grand St. Ferry R. R. Co., 137 N. Y. 231, 19 L.R.A. 331, 33 N. E. 378 (1893). The transfer agent forged the president's signature to a certificate taken from the corporate stock book, put on the corporate seal, countersigned it and issued it to a *bona fide* purchaser for valuable consideration in the ordinary course of business.

<sup>19</sup> Mutual Life Insurance Co. v. Forty-second St. R. R. Co., 74 Hun, 505, 26 Supp. 545 (1893); Hellman v. Forty-second St. R. R. Co., 74 Hun, 529, 26 Supp. 553; *aff'd* 148 N. Y. 727, 42 N. E. 723.

<sup>20</sup> Mechanics' Bank v. New York & New Haven R. R. Co., 13 N. Y. 599 (1856).

<sup>1</sup> New York & New Haven R. R. Co. v. Schuyler, 17 N. Y. 592 (1858).

poration is liable in damages for such overissue to an innocent holder for value of the overissued shares.”<sup>2</sup> A corporation cannot be held liable for a forged certificate of its stock issued by its president in the names of officers not in office when issued but in office at the time he ante-dated the certificate.<sup>3</sup> The officers of a corporation, authorized to issue certificates to the stockholders as evidence of title to stock, are liable not only to the immediate purchaser of spurious stock falsely and fraudulently certified by them, but also to any subsequent purchaser buying upon the faith of the false certificate.<sup>4</sup>

**§ 112. Id.: Loss, Destruction or Theft of, Governing Statutes.**—The owner of (a) a lost or (b) destroyed certificate of stock may apply to the supreme court at any special term held either in the district where he resides or in which the principal business office of the corporation is located, for an order requiring the corporation to show cause why it should not be required to issue a new certificate in place of the one lost or destroyed, but only if the corporation refuses to issue a new certificate of stock.<sup>5</sup> Further provisions of the governing statutes are found in the three immediately following sections of this book.

**§ 113. Id.: In General.**—The statute giving one who has lost his certificate of stock which the corporation is unwilling to replace the right to have the supreme court on his application order the issuance of a new certificate if the facts justify this step does not restrain the jurisdiction of equity to award specific relief in such a case but gives a cumulative, additional and summary remedy of a purely equitable character to be administered by an equity court.<sup>6</sup> “. . . no case . . . denies to the owner of a stock certificate which has been lost without his negligence, or stolen, the right to reclaim it from the hands of any person in whose possession it subsequently comes, although the holder may have taken it in good faith and for value.”<sup>7</sup> The title of one acquiring certificates of

<sup>2</sup> *Archer v. Dunham*, 89 Hun, 387, 35 Supp. 387 (1895).

<sup>3</sup> *Manhattan Life Insurance Co. v. Forty-second St. & Grand St. Ferry R. R. Co.*, 139 N. Y. 146, 34 N. E. 776 (1893).

<sup>4</sup> *Shotwell v. Mali*, 38 Barb. 445 (1862).

On liability of corporations for fraud or forgery of officers in issue of stock, see notes in 19 L.R.A. 331; 41 L.R.A.(N.S.) 187.

<sup>5</sup> St. Corp. L. § 67 (L. 1909, c. 61).

<sup>6</sup> *Kinman v. Forty-second St., M. & St. N. Ave. Ry. Co.*, 140 N. Y. 185, 35 N. E. 498 (1893); L. 1873, c. 1151. See now St. Corp. L. § 67.

<sup>7</sup> *Knox v. Eden Musee Co.*, 148 N. Y. 441, 31 L.R.A. 779, 42 N. E. 988 (1896). An employee of the corporation trusted for years was directed by its president to cancel surrendered stock certificates which

stock from another who stole them is not good.<sup>8</sup> One buying stock from a lad of sixteen for one-third its market value through the conduit of a clerk may be held for its value by the true owner from whom the lad stole it, even though the stock certificate was endorsed in blank by the true owner.<sup>9</sup> One purchasing a voting trust certificate endorsed in blank by him in whose name it stands who intrusts it to another to have it transferred to the purchaser's name, is estopped from contesting the title of a holder thereof for value who acquired the certificate in due course from him to whom it was entrusted, even though the last mentioned individual was guilty of larceny in appropriating the instrument to his own use; because a voting trust certificate possesses elements of negotiability like a certificate of stock which are sufficient to protect the holder for value who acquires it without notice of any infirmity in the title of the holder.<sup>10</sup>

**§ 114. Id.: Indemnity Bond.**—The bond required by court order of the petitioner seeking issue of a new certificate by the corporation for his lost or destroyed stock must be in such form and with such sureties as to the court appears sufficient to indemnify any person other than the petitioner who thereafter is found to be the lawful owner of the certificate lost or destroyed.<sup>11</sup> The penalty of the bond required on an application for a new to supplant a lost certificate of corporate stock should be at least equal to its market value.<sup>12</sup> Those entitled to ownership of a lost negotiable certificate of a corporation entitling to an extra dividend may compel the corporation to pay them on giving it full indemnity, in analogy to

the president saw were put in the safe. The president, signed new certificates not knowing whether the old had been canceled or not and ignorant that the employee had abstracted them from the safe and negotiated them. The by-laws provided no new certificate should be issued till the corresponding old had been surrendered. The corporation was held blameless.

<sup>8</sup> *Knox v. Eden Musee American Co.*, 17 A. D. 365, 45 Supp. 255 (1897).

<sup>9</sup> *Anderson v. Nicholas*, 28 N. Y. 600 (1864).

<sup>10</sup> *Union Trust Co. v. Oliver*, 214 N. Y. 517, 108 N. E. 809 (1915).

The voting trust certificate was an instrument certifying that the transferee named therein would on a certain date be entitled to receive certificates for a stated number of shares of a corporation's stock, and in the meantime to receive certain dividends; and recited that it was issued pursuant to a written agreement between the stockholders and the voting trustees, whose signature it bore.

<sup>11</sup> *St. Corp. L.* § 68 (L. 1909, c. 61).

<sup>12</sup> *Matter of Speir*, 69 A. D. 149, 74 Supp. 555 (1902); *St. Corp. L.* §§ 50, 51 (L. 1892, c. 688). See now §§ 67, 68.

the common practice in cases of lost commercial paper.<sup>13</sup> Any person claiming any rights under the certificates alleged to have been lost or destroyed has recourse to such indemnity, and the corporation issuing such certificate is discharged from all liability to such person upon compliance with such order; and obedience to the order may be enforced by attachment against the officer or officers of the corporation on proof of his or their refusal to comply with it.<sup>14</sup>

**§ 115. Id.: Pleading, Practice, Evidence and Proof.**—The application must be by petition (1) duly verified by the owner, (2) stating (a) the name of the corporation, if known, or if it can be ascertained by the petitioner, the (b) number and (c) date of the certificate, (d) the number of the shares named therein, (e) to whom issued, (f) as particular a statement of the circumstances attending the loss or destruction as the petitioner can give, and (g) the refusal of the corporation to issue a new certificate in place thereof, and (3) praying an order requiring the corporation to show cause why it should not be required to issue a new certificate in place of the one lost or destroyed.<sup>15</sup> Upon the presentation of the petition the court must make an order requiring the corporation to show cause at a time and place therein mentioned why it should not issue a new certificate of stock in place of the one described in the petition; and a copy of the petition and such order must be served on the president or other head of the corporation, or on the secretary or treasurer thereof, personally, at least ten days before the time for showing cause.<sup>16</sup> Upon (1) the return of the order with (2) proof of due service thereof, the court must (a) in a summary manner, and (b) in such mode as it may deem advisable, (c) inquire into the truth of the facts stated in the petition, and (d) hear the proofs and allegations of the parties in regard thereto, and (e) if satisfied that the petitioner is the lawful owner of the number of shares, or any part thereof, described in the petition and (f) that the certificate therefor has been lost or destroyed, and (g) cannot after due diligence be found, and (h) that no sufficient cause has been shown why a new certificate should not be issued, it must make an order.<sup>17</sup> The order must (1) require the cor-

<sup>13</sup> *Butler v. Glen Cove Starch Co.*, 18 Hun, 47 (1879).

<sup>14</sup> St. Corp. L. § 68 (L. 1909, c. 61).

<sup>15</sup> St. Corp. L. § 67 (L. 1909, c. 61).

<sup>16</sup> St. Corp. L. § 67 (L. 1909, c. 61).

<sup>17</sup> St. Corp. L. § 68 (L. 1909, c. 61).

poration (a) within such time as is therein designated (b) to issue and deliver to the petitioner a new certificate (c) for the number of shares specified in the order, (d) upon depositing such security or filing a bond in such form and with such sureties as to the court appears sufficient to indemnify any person other than the petitioner who thereafter is found to be the lawful owner of the certificate lost or destroyed; and may (2) direct the publication of such notice as it deems proper either before or after making such order.<sup>18</sup> In order to warrant the application to the court provided by statute to compel a corporation to issue a new stock certificate in the stead of one lost or destroyed there must be proven a distinct demand of and refusal by the corporation to issue a new certificate in lieu of particularized stock.<sup>19</sup> In order to obtain an order by the court for the issue of new certificates of stock, under a statute permitting such issue in place of certificates lost or destroyed, "two facts must be maintained, that the petitioner is the owner of the shares, and that such shares have been lost or destroyed and cannot after due diligence be found;" and these facts are not shown by proof that a receiver of an association owning some of such certificates sold them to the petitioner and that they were not in the receiver's possession, or that trustees for others of such certificates refused to deliver them to the petitioner because their *cestuis* objected.<sup>20</sup> When, on an application for issue of a new stock certificate for one lost the petition's allegations are denied by affidavit of the corporation, the court should not grant the application until proof has been made by witnesses subject to cross-examination by the corporation of the essential facts, and notice of the application has been given by such publication as would give an opportunity to anyone claiming an interest in the stock to appear and be heard.<sup>1</sup> On return of an order to show cause why a new certificate should not be issued in lieu of a lost or destroyed one proof of the facts stated in the petition must be taken: the court cannot make an order on the papers alone and without publication of any notice.<sup>2</sup> Testimony by

<sup>18</sup> St. Corp. L. § 68 (L. 1909, c. 61).

<sup>19</sup> Matter of Coats, 75 A. D. 469, 78 Supp. 425 (1902); St. Corp. L. §§ 50, 51 (L. 1892, c. 688). See now §§ 67, 68.

<sup>20</sup> Matter of Biglin v. Friendship Assn., 46 Hun, 223 (1887); L. 1872, c. 151. See now St. Corp. L. § 67 *et seq.*

<sup>1</sup> Matter of Speir, 69 A. D. 149, 74 N. Y. Supp. 555 (1902); St. Corp. L. §§ 50, 51 (L. 1892, c. 688). See now §§ 67, 68.

<sup>2</sup> Matter of Coats, 75 A. D. 469, 78 Supp. 425 (1902); St. Corp. L. §§ 50, 51 (L. 1892, c. 688). See now §§ 67, 68.

witnesses that lost stock certificates were signed by the corporation's officers is not essential to the issuance of new ones if they are described by a competent witness as certificates of the company.<sup>3</sup>

**§ 116. Id.: As Evidence of Title.**—"The capital stock of an incorporated company is personal property; and it has not, neither has the certificate or other evidence of title or ownership, any of the qualities of commercial or negotiable paper. As a rule, the purchaser or assignee of shares of the capital stock in a corporation acquires no other or better title than the seller or assignor has, and takes it subject to the legal and equitable rights of third persons. . . . The property in the capital stock of a corporation is not distinguishable from other personal property; and the owner cannot be divested of his property except by his own voluntary act and consent, or by some act which would be effectual to give title as against him to other movable property and choses in action."<sup>4</sup> "The certificates are not the stock, but the evidence of its ownership."<sup>5</sup> "Certificates of stock are not securities for money in any sense, much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation of which he is a member."<sup>6</sup> "Mere possession of a non-negotiable instrument [a certificate of corporate stock], does not carry a presumption of ownership in the possessor."<sup>7</sup> While possession of an assigned stock certificate—though in blank—justifies a presumption of ownership, yet it is open to the corporation denying the possession to introduce evidence that the certificate was not delivered or was not delivered with intent to pass title.<sup>8</sup> A certificate of stock is evidence of the stock entitling the lawful holder to have his stock entered of record in the corporate books and to all the privileges of the corporation, but it does not prevent a person in interest from showing that the holder of the certificate is not the owner of the stock.<sup>9</sup> A stock certificate

<sup>3</sup> *Kinman v. Forty-second St., M. & St. N. Ave. Ry. Co.*, 140 N. Y. 183, 35 N. E. 498 (1893); L. 1873, c. 151. See now *St. Corp. L.* § 67 *et seq.*

<sup>4</sup> *Weaver v. Barden*, 49 N. Y. 286 (1872).

<sup>5</sup> *Francis v. N. Y. & B'klyn El. R. R. Co.*, 108 N. Y. 93, 15 N. E. 192 (1888).

<sup>6</sup> *Mechanics' Bank v. New York*

& New Haven R. R. Co., 13 N. Y. 599 (1856).

<sup>7</sup> *Matter of Perry*, 129 A. D. 587, 114 Supp. 246 (1908).

<sup>8</sup> *Hannahs v. Hammond Typewriter Co.*, 158 A. D. 620, 143 Supp. 939 (1913).

<sup>9</sup> *O'Dwyer v. Verdon*, 115 A. D. 37, 100 Supp. 588 (1906); *aff'd* 190 N. Y. 505, 83 N. E. 1128.

of itself is merely evidence tending to show the ownership of the shares and, although on its face in due form, may be the subject of inquiry to ascertain whether it was fraudulently issued; and the resolutions, book of minutes, annual reports and other proceedings may be looked to for the purpose of showing the real character of the transaction and as part thereof.<sup>10</sup> A certificate of corporate stock fifty years old is not admissible in evidence without direct proof of its execution as an ancient document to prove the title thereto of its assignee if the corporation went out of existence ten months after its date, and the sole evidence as to it is that it was found among plaintiff's grandfather's papers on his death nineteen years before the trial, and no proof is given of any connection between its nominal holder and the deceased grandparent as assignee thereof or of the custodian thereof.<sup>11</sup> A stock subscription paper is relevant and competent evidence upon a question whether a person is a stockholder.<sup>12</sup> Neither the doctrine in equity of notice of *lis pendens* nor the law of negotiable instruments applies to shares of corporate stock.<sup>13</sup> Pendency in another state of an action to determine the ownership of stock cannot be regarded as constructive notice that the ostensible absolute owner of stock holds it in trust.<sup>14</sup>

**§ 117. Id.: Determination of Conflicting Claims To.**—When a corporation is confronted by two adverse claims to a certificate of its stock it is entitled to interplead the claimants and to restrain one of them from suing it for conversion of or to establish his rights in the stock.<sup>15</sup> One being on the facts alleged by him entitled to possession of a certificate of stock held by the corporation itself must sue at law for its recovery and cannot sue in equity in the form of an interpleader, joining another asserting a right to possession of the certificate under its pledge to secure a loan to plaintiff's husband alleged by the latter to have been paid.<sup>16</sup>

**§ 118. Id.: Transfers of, Definitions, Distinctions and Nature.**—"The issuing of the original certificates is in no

<sup>10</sup> Boardman v. Lake Shore & Michigan Southern Ry. Co., 84 N. Y. 157 (1881).

<sup>11</sup> Longworth v. East River National Bank, 160 A. D. 737, 145 Supp. 1051 (1914).

<sup>12</sup> Partridge v. Badger, 25 Barb. 146 (1857).

<sup>13</sup> American Press Assn. v. Brantingham, 75 A. D. 435, 78 Supp. 305 (1902).

<sup>14</sup> Holbrook v. New Jersey Zinc Co., 57 N. Y. 616 (1874).

<sup>15</sup> American Press Assn. v. Brantingham, 57 A. D. 399, 68 Supp. 285 (1901).

<sup>16</sup> Brown v. Arbogast & Bastian Co., 162 A. D. 603, 147 Supp. 998 (1914). "The remedy by an action of interpleader is given only to the stakeholder . . ." C. C. P. §§ 820, 820a.

sense a transfer of stock. The interest of the parties to whom they are issued is the same before as after such issue. The certificate is simply a written acknowledgment by the company of the interest of the subscribers in its property and franchises."<sup>17</sup>

**§ 119. Id.: Governing Statutes.**—Every corporation as such has power, though not specified in the law under which it is incorporated, to make by-laws, not inconsistent with any existing law, for the transfer of its stock.<sup>18</sup> Stock of a corporation is transferable in the manner prescribed by the Stock Corporation Law and the corporation's by-laws.<sup>19</sup> No share of stock is transferable until all previous calls thereon have been fully paid in.<sup>20</sup> No transfer of stock is valid as against the corporation, its stockholders and creditors for any purpose except to render the transferee liable for the debts of the corporation to the extent provided in the Stock Corporation Law until it has been entered in the corporation's stock book, as required by the statute, by an entry showing from and to whom transferred.<sup>1</sup> If a stockholder is indebted to the corporation the directors may refuse to consent to a transfer of his stock until such indebtedness is paid, provided a copy of the fifty-first section of the Stock Corporation Law is written or printed upon the certificate of stock.<sup>2</sup> No stockholder can make any transfer or assignment of his stock to any person in contemplation of his corporation's insolvency, and every such transfer or assignment is void except in the hands of a purchaser for a valuable consideration without notice.<sup>3</sup> Transfers in contemplation of insolvency are discussed in their general aspect hereinafter.<sup>4</sup> Every corporation (1) engaged in whole or in part in the making or negotiating of sales, agreements to sell, deliveries or transfers of shares or certificates of stock, or (2) conducting or transacting a stock brokerage business, and (3) every stock corporation which maintains a

<sup>17</sup> *Burr v. Wilcox*, 22 N. Y. 551 (1860). Determining the liability of one as stockholder for corporate debts up to the amount of his holdings, under Gen. Mfg. Act, L. 1848, c. 40, § 10.

<sup>18</sup> Gen. Corp. L. § 11 (L. 1909, c. 28).

<sup>19</sup> St. Corp. L. § 50 (L. 1909, c. 61).

<sup>20</sup> St. Corp. L. § 50 (L. 1909, c. 61).

<sup>1</sup> St. Corp. L. § 32 (L. 1916, c. 127).

<sup>2</sup> St. Corp. L. § 51 (L. 1909, c. 61).

<sup>3</sup> St. Corp. L. § 66 (L. 1909, c. 61): "Every director or officer of a corporation who shall violate or be concerned in violating any provisions of this section shall be personally liable to the creditors and stockholders of the corporation of which he shall be director or an officer to the full extent of any loss they may respectively sustain by such violation."

<sup>4</sup> See § 402 *et seq.*, *infra*.

principal office or place of business within New York State or keeps or causes to be kept within New York State a place for the sale, transfer or delivery of its stock, must file in the office of the comptroller a certificate stating (a) its said principal office or place of business and (b) when and (c) where incorporated; and such certificate must be (d) executed and (e) duly acknowledged by the president or secretary of the corporation; and in the event of a change in the address of any such corporation, a like certificate setting forth the facts with respect to such change must within ten days thereafter be filed in the office of the comptroller; and any such corporation failing to comply with the statute is guilty of a misdemeanor and upon conviction thereof must pay a fine of not less than one hundred nor more than five hundred dollars (or imprisonment for not more than six months, or both such fine and imprisonment, in the discretion of the court).<sup>4a</sup> Taxes imposed by law on transfers of corporate stock are herein-after discussed.<sup>4b</sup>

**§ 120. Id.: In General.**—The presumption is that stock is transferred in the course of business, unless there is some evidence to the contrary.<sup>5</sup> “Stock received and transferred on the same day should, in equity, be considered as received before it was transferred, although the numbers of the transfer may be such as to make the transfer by the transferrer appear earlier than the transfer to him; unless it was proven that such transfer was made prior to the one by which the stock was consigned to the transferrer.”<sup>6</sup> A transfer of corporate stock by one who at the time held no shares on the company’s books passes no title—not even to stock later acquired; and cannot be made good by a transfer of such subsequently acquired stock to the person making the transfer.<sup>7</sup> Transfer of stock may be proven by means of an acknowledgment made by the subscribing witness before a notary long after the power of attorney to transfer was executed and shortly before it is offered in evidence.<sup>8</sup> Cancellation of a revenue stamp on a power of attorney on a stock certificate leads to the presumption that the power itself was executed

<sup>4a</sup> Tax L. § 275-a (L. 1914, c. 206).

<sup>4b</sup> See § 678 *et seq.*, *infra*.

<sup>5</sup> *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616 (1874).

<sup>6</sup> *New York & New Haven R. R. Co. v. Schuyler*, 38 Barb. 534 (1860); *aff’d* 34 N. Y. 30.

<sup>7</sup> *New York & New Haven R. R. Co. v. Schuyler*, 38 Barb. 534 (1860); *aff’d* 34 N. Y. 30.

<sup>8</sup> *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616 (1874); L. 1833, c. 271, § 9.

as of the date of such cancellation.<sup>9</sup> Delivery of a certificate of stock is to be presumed from the fact that it, with the proper endorsement, is in the possession of the holder.<sup>10</sup> A corporation cannot have an injunction against persons holding its certificates of stock which shall prevent them from disposing thereof or prosecuting any action against the corporation for its refusal to transfer them upon its books as an incident to a suit by it to determine what rights those persons have to such certificates, if the fault in issuing the certificates is the corporation's.<sup>11</sup> One to whom stock of a corporation has been assigned by others under agreement by him not to sell it and to give them three-fourths of the profits will be enjoined, together with another to whom he has transferred it without consideration, from making any transfer thereof pending an action against him for an accounting.<sup>12</sup> No presumption arises that a person is still stockholder of a corporation because he once had been, he has transferred his stock and he alleges that such transfer was obtained without consideration or by false representations.<sup>13</sup> Stock of a company may lawfully be surrendered or transferred to it under a resolution of its directors privileging its debtor stockholders on stock notes to pay their indebtedness in its capital stock at a specified rate.<sup>14</sup>

**§ 121 Id.: Consideration of and for.**—The mere existence of a precedent debt is not a sufficient consideration to support a transfer of stock by the debtor to the creditor as against one who has furnished the consideration for the stock originally, though it has been transferred into such debtor's name instead of his; and he may follow the stock into the hands of such creditor.<sup>15</sup> The transfer of corporate stock is sufficient consideration for a cheque.<sup>16</sup> A transferee without consideration of corporate stock from the wife of one in whose name it stood always on the corporate books, who in turn had received the unrecorded transfer thereof from her husband without consideration, cannot set aside a trust agreement, made by

<sup>9</sup> *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616 (1874).

<sup>10</sup> *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616 (1874).

<sup>11</sup> *Buffalo Grape Sugar Co. v. Alberger*, 22 Hun, 349 (1880).

<sup>12</sup> *Weston v. Goldstein*, 26 Misc. 171, 56 Supp. 755 (1899); *aff'd* 39 A. D. 661, 57 Supp. 311; C. C. P. § 604, subd. 1.

<sup>13</sup> *Thompson v. Stanley*, 73 Hun,

248, 25 Supp. 890 (1893); *aff'd* 147 N. Y. 713, 42 N. E. 726.

<sup>14</sup> *City Bank of Columbus v. Bruce & Fox*, 17 N. Y. 507 (1858).

<sup>15</sup> *Weaver v. Barden*, 49 N. Y. 286 (1872).

<sup>16</sup> *Avon Springs Sanitarium Co. v. Kellogg*, 125 A. D. 51, 109 Supp. 153 (1908); *aff'd* 194 N. Y. 567, 88 N. E. 1132.

all stockholders of record and interested in the corporate property before he became such transferee, intended to rehabilitate the hopelessly insolvent and involved corporation, if this transferrer (the wife of the stockholder of record) held the stock for three years, while all the negotiations for rehabilitation were going on, and did nothing.<sup>17</sup>

**§ 122. Id.: By Power of Attorney.**—“ We know how, as a usual thing a transfer of stock is made. . . . An assignment of the stock in writing, is made by the former owner of it, with a power of attorney to transfer it on the books of the corporation. Books of transfer are kept for that purpose, and on the production of these papers, the nominated attorney makes the formal transfer, the old certificate is cancelled, and a new certificate is issued to the new owner.”<sup>18</sup> “ A blank transfer of a certificate of stock with an irrevocable power of attorney to transfer signed by the person who appears by the certificate to be the owner, confers upon the holder of the certificate apparent title to the stock and the *bona fide* transferee of such stock from the holder can hold the stock against the real owner, who is estopped from asserting his title (*citations*). The reason for this well-settled rule is that where one has conferred upon another apparent ownership, it is contrary to justice and good conscience to permit him to assert his real title against an innocent purchaser from one clothed by him with all the indicia of ownership and power of disposition. Another reason for the rule is that such a case calls for the application of the legal maxim that, where one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one, if either, whose act has enabled such fraud to be committed.”<sup>19</sup> “ Certificates of stock in business corporations, . . . are not negotiable in form, they represent no debt and are not securities for money. But the courts . . . have given to them some of the elements of negotiability. The owner of shares may transfer his title by delivery of the certificate with a blank power of attorney indorsed thereon signed by the owner of the shares named in the certificate. Such a delivery transfers the legal title to the shares as between the parties to the transfer, and not a mere equitable right (*citation*). The transferee

<sup>17</sup> *Marbury v. Stone*, 17 A. D. 352 (1897).

<sup>18</sup> *Burrall v. Bushwick R. R. Co.*, 75 N. Y. 211 (1878).

<sup>19</sup> *Fisher v. Mechanics & Metals Nat. Bank*, 89 Misc. 587, 153 Supp.

786 (1915). The exception to the rule when the instrument claimed to create the estoppel is obtained by common-law larceny does not hold when the larceny is by false pretences.

in good faith and for value, holds his title free from latent equities between prior parties in the line of transmission.”<sup>20</sup> The rule is well settled that one who takes a certificate with the usual power of attorney as between him and the transferor takes the whole title, both legal and equitable, and it makes no difference that the blanks are not filled up.”<sup>21</sup> “It was only necessary to a valid transfer [of corporate stock] as between the parties, that the assignment and power should be in writing. The common practice of passing the title of stock by delivery of the certificate with blank assignment and power has been repeatedly shown and sanctioned in cases which have come before our courts.”<sup>22</sup> A power of attorney on a stock certificate is not incomplete because there are blanks for the number of shares and for the name of the attorney, as any holder may fill up the blanks and constitute himself the attorney.<sup>23</sup> “. . . a blank transfer of a certificate of stock with an irrevocable power of attorney to transfer, signed by the person who appears by the certificate to be the owner, confers upon the holder of the certificate apparent title to the stock and . . . the *bona fide* purchaser of such stock from such holder can hold the stock against the real owner who is estopped from asserting his title,” in the absence of fraud, crime or exceeded authority of an agent, even though the transfer and power of attorney are not endorsed on the back of the certificate but are in a separate paper; so that one putting it in the power of an agent to sell stock in this way cannot complain if the brokers making the sale pay the agent the proceeds or credit them to his account.<sup>24</sup> One loaning money on the security of a certificate of stock in the name of one not the borrower with a customary blank on the back for assignment and power of attorney not in any way filled in but with a separate slip pinned thereto in the same form, signed by the one in whose name the certificate is made out and with the signature guaranteed and received in the ordinary course of business, but without the name of the stock thereon, is entitled to use such slip as a valid transfer and power.<sup>25</sup> “Where stock is transferred under a power of attorney attached to a certificate, which

<sup>20</sup> Knox v. Eden Musee Co., 148 N. Y. 441, 31 L.R.A. 779, 42 N. E. 988 (1896).

<sup>21</sup> Cutting v. Damerel, 88 N. Y. 410 (1882).

<sup>22</sup> McNeil v. The Tenth Nat. B'k, 46 N. Y. 325 (1871). The pledgee of stock certificates in blank pledged it.

<sup>23</sup> Holbrook v. New Jersey Zinc Co., 57 N. Y. 616 (1874).

<sup>24</sup> Mitchell v. Boyer, 160 A. D. 565, 145 Supp. 715 (1914).

<sup>25</sup> Talcott v. Standard Oil Co., 149 A. D. 694, 134 Supp. 617 (1912).

power also contained an assignment of the shares, and authority to transfer the said shares, the power did not authorize the transfer of any shares acquired after the date of the power.”<sup>6</sup> One accepting a certificate of stock in the name of another in trust, and endorsed in the same way as security for a loan to such other, without any investigation save the assurance of such other that he owned the stock or had control over it and could transfer it if necessary, can not enforce any claim to it as against its true owner.<sup>7</sup> “. . . an agent to whom the owner has delivered a certificate of stock duly indorsed for transfer, with a limited power of disposition for a special purpose, may bind the title thereto as against the true owner by transferring it to a *bona fide* transferee who has no notice of the limitations of the agent’s authority, although the transfer was made for an unauthorized purpose and with the intention on the part of the agent to commit a fraud upon his principal.”<sup>8</sup>

**§ 123. Id.: Of Stock of Decedent.**—A writing by a decedent to another in whose possession it is found at the former’s death, annexed to certain stock certificates and reciting that the decedent holds such stock in trust for his daughter to be delivered to her at his death, he however retaining the dividends during life, but directing such other to hand such certificates to his daughter at his death, transfers irrevocally the stock to the daughter on the decedent’s death.<sup>9</sup> Possession of a certificate of stock in the name of a decedent endorsed by him in blank gives room to a presumption of ownership, which may, however, be crowded out and rebutted by the stronger presumption of continued ownership in the one to whom the certificate was made out.<sup>10</sup> A corporation which has, after a person’s death, issued certificates of its stock to an individual, “attorney for” the deceased, properly refuses, on the latter’s subsequent request, to transfer the certificates formally on its books to the same individual “as attorney of” the decedent, solely upon transfers signed by him with his name “as attorney of” the dead person and a paper purporting to be executed by one as executor of the decedent’s will and

<sup>6</sup> *New York & New Haven R. R. Co. v. Schuyler*, 38 Barb. 534 (1860); *aff’d* 34 N. Y. 30.

<sup>7</sup> *Budd v. Munroe*, 18 Hun, 316 (1879).

<sup>8</sup> *McNeil v. Tenth National Bank*, 46 N. Y. 325, as interpreted in *Knox v. Eden Musee Co.*, 148 N. Y. 441, 31 L.R.A. 779, 42 N. E. 988 (1896).

<sup>9</sup> *Matter of King*, 115 A. D. 751, 100 Supp. 1089 (1906); *aff’d* 188 N. Y. 626, 81 N. E. 1167.

<sup>10</sup> *Richards v. Wells-Fargo Express Co.*, 156 A. D. 268, 141 Supp. 306 (1913); *aff’d* 216 N. Y. 645, 110 N. E. 1048.

the decedent's daughter requesting and authorizing the transfer.<sup>11</sup> One having possession of a certificate of stock signed by the executors of the deceased owner thereof has the right to have the transfer entered on the corporation's books in spite of the facts that the executors are foreign and have not taken out letters testamentary in this state, and that the charter of the corporation provides that every transfer shall be signed by the shareholder, his attorney or legal representatives.<sup>12</sup> A corporation is not protected from liability for a transfer made by it of shares of stock standing on its books in the name of its deceased stockholder to his personal representative without presentation of a certificate therefor in the name of the decedent, as such certificate is transferable only on production of the original.<sup>13</sup> An executor of a deceased owner of stock in a corporation by transfer thereof by instrument under seal not evidenced by any certificate may in his individual name transfer such stock by assignment so as to give good title to the transferee.<sup>14</sup> One taking an assignment of a certificate of stock from an executor in payment of the latter's personal debt acquires no rights over the prior title or equities of other persons.<sup>15</sup> The identity of the name of a decedent with that in which corporate stock has stood for many years unclaimed is not of itself sufficient to establish the right of his estate thereto.<sup>16</sup>

**§ 124. Id.: Necessity and Effect of Corporation's Recognition of.**—The question of the liability of a corporation for a wrongful or delayed transfer on its books of corporate stock is hereinafter considered;<sup>17</sup> as well as charter or by-law

<sup>11</sup> *Spellissy v. Cook & Bernheimer Co.*, 58 A. D. 283, 68 Supp. 995 (1901). The presentation of those papers gave the corporation notice that the plaintiff individually was not the absolute owner of the stock, and "there was no proof that the person signing that consent was the executor of" the decedent.

<sup>12</sup> *Middlebrook v. Merchants' Bank*, 42 N. Y. (3 Keyes) 135 (1866).

<sup>13</sup> *Brisbane v. Delaware, Lackawanna & Western R. R. Co.*, 94 N. Y. 204 (1883).

<sup>14</sup> *Mahaney v. Walsh*, 16 A. D. 601, 44 Supp. 969 (1897).

<sup>15</sup> *White v. Price*, 39 Hun, 394 (1886); *aff'd* 108 N. Y. 661; 15 N. E. 427.

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<sup>16</sup> *Moss v. Manhattan Co.*, 48 A. D. 561, 62 Supp. 936 (1900). No proof was given that he ever dealt or had connections with the corporation or the person who transferred the stock to his name. The certificate was not produced or proof given that he ever possessed it. He lived in the city of the corporation 25 years after the transfer, but never claimed a dividend, though dividends were always declared and advertised. He never spoke of his stock; died destitute, leaving a large family which made no claim for 40 years. Advertisement was made by the bank for unclaimed dividends.

<sup>17</sup> See § 129, *infra*.

limitations on such transfer.<sup>18</sup> "In this state it is well-settled that the delivery of the certificate with a power of attorney to transfer, passes the entire title, legal and equitable, in the shares as between the parties, and that the provisions . . . [of statute, charter and by-laws that stock shall be transferred only on the corporate books and by certificates signed in certain ways] are for the protection of the corporation, in securing its interests in its relations and dealings with stockholders . . . It has never been held that a corporation can avail itself of its own negligence as a basis of a cause of action against a stockholder, nor that it is not competent to waive a performance of its own rules, nor that it may not be estopped by its own acts and official declarations, the same as natural persons. If it did not provide a transfer book or did not transfer the stock according to the prescribed forms, the fault was its own. . . . It could waive the observance of any other rules which it had adopted."<sup>19</sup> When stock standing in one person's name on a corporation's books had been sold and assigned validly in writing, with the certificates, upon presentation of such certificates and assignment by the transferee to the corporation with a demand for transfer on its books, and a refusal so to do, and a return of the certificates and assignment, the transferee is vested with the entire legal and equitable title, and the corporation is as bound to recognize the transferee's title as if it had made the transfer, as "the requirement of a registry, existing only for its own protection and convenience, must be deemed waived and non-essential when it wrongfully refuses to obey its own rule."<sup>20</sup> Recognition by a corporation of a transfer of its stock ensues from payment by it of dividends thereon, and crediting them on its books to the transferee, though no change in the name of the holder be made in its stock book.<sup>1</sup> "The delivery of the certificate, as between the owner and assignee, with the assignment and power indorsed, passes the entire legal and equitable title in the stock, subject only to such liens or claims as the corporation may have upon it (*citations*). Any act suffered by the corporation that invested a third party with the ownership of the shares, without due production and surrender of the certificate, rendered it liable to the owner; and it was its duty to resist any transfer on the books without such production and surrender."<sup>2</sup>

<sup>18</sup> See § 128, *infra*.

<sup>19</sup> *Isham v. Buckingham*, 49 N. Y. 216 (1872).

<sup>20</sup> *Robinson v. National Bank of Berne*, 95 N. Y. 637 (1884).

<sup>1</sup> *Cutting v. Damerel*, 88 N. Y. 410 (1882).

<sup>2</sup> *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365 (1879).

**§ 125. Id.: On Corporation's Books, Governing Statutes.—**

No transfer of stock is valid as against the corporation, its stockholders and creditors for any purpose except to render the transferee liable for the debts of the corporation to the extent provided in the Stock Corporation Law until it has been entered in the corporation's stock book, as required by the statute, by an entry showing from and to whom transferred.<sup>3</sup> Other statutes governing the transfer of stock have been heretofore noted.<sup>4</sup> The statute making invalid any transfer of stock for any purpose except to render the transferee liable for the company's debts, unless made on its books, was enacted "to guard against secret and unavowed sales and assignments . . . by holding the vendor still liable until the transfer of his stock was avowed and made known in the mode prescribed, and to hold the vendee also liable as the real owner;" and the law will imply an obligation from the transferee to the transferrer that the burdens and liabilities consequent on holding stock will be assumed by the former, and will make good the latter's claim for such liabilities.<sup>5</sup> A statutory provision that corporate stock shall be transferable as provided by by-law, which stipulated that such transfer should only be on the transfer book on surrender of the certificate, "has reference solely to the transfer of stock from one stockholder to another, and not at all to the original issue of the certificates of stock by the company to its subscribers."<sup>6</sup>

**§ 126. Id.: Who May Compel, and How.—**"When no discretionary power is reserved to that effect there is not, nor should there be any rule of law which will enable a corporation or company whose stock is on sale in the open market to so discriminate between *bona fide* purchasers who invest money in it for their own benefit, as to deny to some of them the right to make their title effectual for recognition by the company in the manner provided by it for that purpose. The perfection in such case of the transfer is one of apparent right incident to the purchase, and which the holder who thus acquires the stock in the market is permitted to assume will be effectuated."<sup>7</sup> ". . . where a certificate of stock shows

<sup>3</sup> St. Corp. L. §. 32 (L. 1916, c. 127).

<sup>4</sup> See § 119, *supra*.

<sup>5</sup> Johnson v. Underhill, 52 N. Y. 203 (1873); Gen. Mfg. Act, L. 1848, c. 40, § 25. See now St. Corp. L. § 32.

<sup>6</sup> Burr v. Wilcox, 22 N. Y. 551 (1860). Determining the liability

of one as stockholder for corporate debts to an amount equal to his holdings, under Gen. Mfg. Act, L. 1848, c. 40, § 10. See now Gen. Corp. L. § 11.

<sup>7</sup> Rice v. Rockefeller, 134 N. Y. 174, 17 L.R.A. 237, 31 N. E. 907 (1892).

apparently all the essentials of genuineness, a *bona fide* holder thereof is entitled to recognition as a stockholder if a new certificate can be legally issued to him, or to indemnity if this cannot be done."<sup>8</sup> One holding a certificate for a certain number of shares of stock in his name, or in the name of another with a power of attorney from the latter directing the transfer by the corporation of such shares to such one, is entitled to have the corporation issue new certificates therefor in his name, split up as he likes, and the fact that the president of the corporation is claimed to own the latter kind of stock by assignment from the record owner does not justify the corporation in refusing to issue the new certificates.<sup>9</sup> One owning half the capital stock of a corporation may sue in equity the corporation to have a certificate issued to him to complete his holdings if, after surrender of his one certificate for all his shares in order that smaller certificates might be issued instead, the corporate officers refuse to give him certificates representing his full holdings; and he may have a temporary injunction to restrain the transfer of those shares pending settlement of the corporation's claim that he surrendered so much of the stock as is refused him for the benefit of the corporation.<sup>10</sup> "When a corporation refuses to transfer stock, the person entitled to demand such a transfer has a cause of action against the corporation;" and not against the officer individually who refuses to make the transfer.<sup>11</sup> ". . . an equitable action will lie to compel a transfer of stock by a corporation to the owner of the same;" because mandamus will not lie and an action for damages does not give adequate relief.<sup>12</sup> ". . . mandamus will not lie to compel a corporation to transfer stock on its books . . . [the] remedy is by action. . . . If a corporation refuses to transfer, it is but the denial to the holder of an individual right and no one is affected but himself. The remedy by mandamus . . . is a writ issuing in behalf of the People . . ."<sup>13</sup> Persons who are both the legal and equitable owners of stock are entitled to have entered on the books of

<sup>8</sup> *Jarvis v. Manhattan Beach Co.*, 75 Hun, 100, 26 Supp. 1061 (1894); *aff'd* 148 N. Y. 652, 31 L.R.A. 776, 43 N. E. 68.

<sup>9</sup> *Powers v. Universal Film Mfg. Co.*, 162 A. D. 806, 148 Supp. 114 (1914).

<sup>10</sup> *Bedford v. American Aluminum Co.*, 51 A. D. 537, 64 Supp. 856 (1900).

<sup>11</sup> *Cooley v. Curran*, 54 Misc. 221, 104 Supp. 424 (1907).

<sup>12</sup> *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 356 (1879).

<sup>13</sup> *People ex rel. Rottenberg v. Utah Gold & Copper Mines Co.*, 135 A. D. 418, 119 Supp. 852 (1909).

the corporation the transfer by which they became such and to have new certificates made out to them; and they may in one action compel this and enjoin an issue of stock which will materially depreciate the value of their holdings.<sup>14</sup> Upon the refusal of two surviving out of three directors of a corporation to meet and elect a secretary and treasurer vice the deceased director who was such so that a transfer of stock may be lawfully made upon the corporate books, action may properly be brought to require the corporation to transfer the stock and to compel such two directors as individual defendants to take such action as is necessary to bring about the election of the officer needed to sign the new certificate.<sup>15</sup> To constitute a cause of action for the issue and delivery by a corporation of a share of its stock there must be shown that the complainant is the owner of the certificate thereof and of the right which it evidences; and that the corporation has unjustly refused to take from him a surrender of the paper and issue to him a new certificate.<sup>16</sup>

**§ 127. Id.: Who May Question.**—Any stockholder may raise the point that a transfer of stock is the result of an illegal transaction connected with an effort to control a corporate election.<sup>17</sup>

**§ 128. Id.: Limitations by Charter, By-Laws or Regulations.**—The necessity and effect of a corporation's recognition of a transfer of its stock have been heretofore discussed;<sup>18</sup> and the effect of such a transfer is later considered.<sup>19</sup> Every corporation as such has power, though not specified in the law under which it is incorporated, to make by-laws, not inconsistent with any existing law, for the transfer of its stock.<sup>20</sup> Stock of a corporation is transferable in the manner prescribed by the Stock Corporation Law and the corporation's

<sup>14</sup> *Ernst v. Elmira Municipal Improvement Co.*, 24 Misc. 583, 54 Supp. 116 (1898).

<sup>15</sup> *Orvis v. Lorraine Co.*, — Misc. — (1918); N. Y. L. J. Mech. 9, p. 1843.

<sup>16</sup> *Burrall v. Bushwick R. R. Co.*, 75 N. Y. 211 (1878).

On right to the aid of equity to compel a corporation to transfer on its books stock acquired in aid of a conspiracy, see note in 24 L.R.A. (N.S.) 108.

On the question of removal for separable controversy of action to

compel transfer, see note in 5 L.R.A. (N.S.) 85.

<sup>17</sup> *Matter of Glen Salt Co.*, 17 A. D. 234, 45 Supp. 568 (1897); aff'd 153 N. Y. 688, 48 N. E. 1104.

On right of corporation to refuse to transfer stock on its books because of objections of former holder, see note in 27 L.R.A. (N.S.) 200.

<sup>18</sup> See § 124, *supra*.

<sup>19</sup> See §§ 130-1, *infra*.

<sup>20</sup> Gen. Corp. L. § 11 (L. 1909, c. 28).

by-laws.<sup>1</sup> No share of stock is transferable until all previous calls thereon have been paid.<sup>2</sup> If a stockholder is indebted to the corporation the directors may refuse to consent to a transfer of his stock until such indebtedness is paid, provided a copy of the fifty-first section of the Stock Corporation Law is written or printed upon the certificate of stock.<sup>3</sup> No by-law, but only a certificate of incorporation, can limit the right of a stockholder to transfer his stock (on its books if desired), or to vote such stock.<sup>4</sup> It is questionable if a corporate by-law is valid which prohibits a holder of an original issue of stock from transferring it till he has given written notice to the secretary, the latter has given written notice to the board and the holders of other original issue of stock and these persons have bid therefor, if they wish.<sup>5</sup> "The by-laws of the company, requiring a surrender of the certificate before making a transfer, are not binding on third persons so as to affect their rights, or deprive them of their property."<sup>6</sup> ". . . as between the parties, the delivery of the [stock] certificate, with assignment and power indorsed, passes the entire title, legal and equitable, in the shares, notwithstanding that, by the terms of the charter or by-laws of the corporation, the stock is declared to be transferable only on its books; . . . such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and . . . no effect is given to them except for the protection of the corporation; . . . they do not incapacitate the shareholder from parting with his interest, and . . . his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections, etc."<sup>7</sup> "The managing agents of a corporation may prescribe reasonable rules and formalities, regulating the transfer of shares; but they could have no discretionary power to refuse to register a proposed transfer."<sup>8</sup>

**§ 129. Id.: Corporation's Liability for Wrongful or Delayed.**  
—The necessity and effect of a corporation's recognition of a

<sup>1</sup> St. Corp. L. § 50 (L. 1909, c. 61).

<sup>2</sup> St. Corp. L. § 50 (L. 1909, c. 61).

<sup>3</sup> St. Corp. L. § 51 (L. 1909, c. 61).

<sup>4</sup> *Kinnan v. Sullivan County Club*, 26 A. D. 213, 50 Supp. 95 (1898).

<sup>5</sup> *Matter of David Jones Co.*, 67 Hun, 360, 22 Supp. 318 (1893).

<sup>6</sup> *New York & New Haven R. R. Co. v. Schuyler*, 38 Barb. 534 (1860); *aff'd* 34 N. Y. 30.

<sup>7</sup> *McNeil v. The Tenth Nat. B'k*, 46 N. Y. 325 (1871). The pledgee of stock certificates in blank pledged it.

<sup>8</sup> *Simpson v. Jersey City Improvement Co.*, 165 N. Y. 193, 55 L.R.A. 796, 58 N. E. 896 (1900).

transfer of its stock have been heretofore discussed;<sup>9</sup> and the effect of such a transfer is later considered.<sup>10</sup> “. . . persons holding certificates of stock, valid when they were issued, accompanied by an assignment and power, on which they have advanced money, may recover damages against the company when such certificates have been rendered of no value by the allowance of transfers on the books of the company, without requiring the surrender of the certificates.”<sup>11</sup> Persons who have received transfers of spurious stock by the acts of a corporation’s transfer agent, or certificates of spurious stock from him, without knowledge or ground of suspicion of fraud or irregularity, and have advanced money thereon, or who have been misled by the acts or negligence of its officers, and have advanced money in consequence thereof, are entitled to recover damages against the company in a proper action.<sup>12</sup> One receiving stock of a foreign corporation only after a delay because of the refusal of the corporation’s transfer agent in this state to transfer the stock for some time cannot hold the transfer agent for the difference between the market value of the stock when transfer was refused and when received and sold, as the transfer agent was the agent of the foreign corporation and not of the complaining stockholder.<sup>13</sup> Holders of corporate stock transferred by the corporation on receipt and cancellation of the original certificates under a forged power of attorney may compel the corporation to issue new certificates and account for the dividends, or to pay them the value of the shares if it has no stock it can issue to them.<sup>14</sup> A corporation which has permitted a stockholder to sell stock covered by certificates when there was stock standing to his credit sufficient to cover such certificates is bound to make good such certificates to the extent of any shares owned by the company, within its capital stock.<sup>15</sup>

§ 130. *Id.*: **Effect of, In General.**—The necessity and effect of a corporation’s recognition of transfer of its stock have already been considered.<sup>16</sup> The effect of transfer of stock by giving a power of attorney has been already discussed.<sup>17</sup> “Ordinarily, when the holder of stock sells it, and delivers to

<sup>9</sup> See § 124, *supra*.

<sup>10</sup> See §§ 130, 131, *infra*.

<sup>11</sup> *New York & New Haven R. R. Co. v. Schuyler*, 38 Barb. 534 (1860); *aff’d* 34 N. Y. 30.

<sup>12</sup> *New York & New Haven R. R. Co. v. Schuyler*, 38 Barb. 534 (1860); *aff’d* 34 N. Y. 30.

<sup>13</sup> *Dunham v. City Trust Co.*, 115

A. D. 584, 101 Supp. 87 (1906); *aff’d* 193 N. Y. 642, 86 N. E. 1123.

<sup>14</sup> *Pollock v. National Bank*, 7 N. Y. 274 (1852).

<sup>15</sup> *New York & New Haven R. R. Co. v. Schuyler*, 38 Barb. 534 (1860); *aff’d* 34 N. Y. 30.

<sup>16</sup> See § 124, *supra*.

<sup>17</sup> See § 122, *supra*.

the vendee the certificate therefor, with an executed power of attorney to transfer upon the books of the company, the vendee becomes the owner of all title, legal and equitable, thereto (*citation*). But until the transfer upon the books is in fact made, the vendor is still the nominal owner; and he is, while such, to be treated as the trustee of the stock for his vendee."<sup>18</sup> Certificates of corporate stock are not "to be regarded as negotiable instruments . . . so that by their endorsement and delivery to a purchaser in good faith, a title to the stock they profess to represent may be acquired, although in the hands of the vendor they are spurious and void, and although the company itself has never recognized the transfer."<sup>19</sup> Transfer of his shares of stock by a stockholder vests legal title thereto in the transferee although they are not transferred on the books of the corporation and the certificate of stock provides that the stock is "transferable only on the books of said company by her or her attorneys or the surrender of the certificate," as this provision regulates only the relation between the holder of the certificate and the corporation.<sup>20</sup> "Until a transfer out of his name, the stockholder of record is to the world the owner of the stock and the assignee [thereof] must abide by his action in the management of corporate affairs."<sup>1</sup> ". . . the rule that a corporation acting in good faith and without notice of the rights of others may treat registered shareholders as the actual owners of the shares standing in their names . . . is only applicable to such transactions as are within the express or implied powers conferred upon the company or its shareholders. Collective or corporate powers common to all stockholders may usually be exercised by a registered shareholder, though he has assigned all of his shares, and his action will bind his assignee holding under an unregistered transfer and all others. These powers being conferred on corporations and their shareholders, purchasers are bound to know that they may be exercised by their assignors until the transfers are registered in their names. But the assignee of shares having

<sup>18</sup> *Johnson v. Underhill*, 52 N. Y. 203 (1873); Gen. Mfg. Act, L. 1848, c. 40, § 25.

<sup>19</sup> *Mechanics' Bank v. New York & New Haven R. R. Co.*, 13 N. Y. 599 (1856).

<sup>20</sup> *Matter of Petition of Argus Co.*, 138 N. Y. 557, 34 N. E. 388 (1893).

<sup>1</sup> *Elyea v. Lehigh Salt Mining Co.*, 169 N. Y. 29, 61 N. E. 992 (1901).

The record owner of stock had pledged it. An agreement between all stockholders of record resulted in the corporation selling and going out of business. The pledgee sought unsuccessfully to set aside the sale. The charter allowed a pledger of stock still to represent it at meetings and vote it.

possession of the certificates, though holding under unregistered transfers, are not bound by contracts between the registered shareholder, the corporation and all other shareholders which are not within the express or implied powers of corporations, or of their shareholders," such as a change in the relative value of shares which the corporation and its registered shareholders seek to effect.<sup>2</sup> Property of a corporation subject to a creditor's lien at the time of the transfer of some of its stock remains subject to the lien after the transfer.<sup>3</sup> A sale by instrument under seal by the owner of shares of stock in a corporation, evidenced by one certificate for the whole thereof, of part of such shares, confers upon the transferee the legal title thereto without any delivery of the stock or transfer of the stock upon the books of the corporation, though such transfer is essential to entitle the buyer to dividends and enjoyment of the benefit of the stock transferred, and until such transfer is made the holder of record continues the nominal owner of the stock and is treated as trustee thereof for his transferee.<sup>4</sup>

**§ 131. Id.: On Books.**—The transfer of stock on a corporation's books has already been treated.<sup>5</sup> No transfer of stock is valid as against the corporation, its stockholders and creditors for any purpose except to render the transferee liable for the debts of the corporation to the extent provided in the Stock Corporation Law until it has been entered in the corporation's stock book, as required by the statute, by an entry showing from and to whom transferred.<sup>6</sup> " . . . one who authorizes and permits a transfer to himself of shares of stock upon the books of a corporation must be held to be a stockholder, whether in truth the real owner or not, when the rights of corporate creditors are involved, and is equitably estopped from denying the apparent relation;" but "if the act done, the false appearance created, is the act, not of the party, but of some third person, such party is in no manner bound or affected by it unless he either originally authorized it or subsequently ratified it."<sup>7</sup> One who has accepted corporate

<sup>2</sup> *Campbell v. American Zylonite Co.*, 122 N. Y. 455, 11 L.R.A. 596, 25 N. E. 853 (1890).

<sup>3</sup> *Hastings v. Drew*, 76 N. Y. 9 (1879).

<sup>4</sup> *Mehaney v. Walsh*, 16 A. D. 601, 44 Supp. 969 (1897).

As to effect on statutory liability of stockholder who sells his shares of a technical failure to record the

transfer, see notes in 11 L.R.A. (N.S.) 818; 46 L.R.A. (N.S.) 669.

<sup>5</sup> See § 125 *et seq.*, *supra*.

<sup>6</sup> *St. Corp. L.* § 32 (L. 1916, c. 127).

<sup>7</sup> *Glenn v. Garth*, 133 N. Y. 18, 30 N. E. 649, 31 N. E. 344 (1892). Brokers directed an agent to buy the corporate stock for a customer. The agent had it transferred by

stock in consideration of a transaction with another individual and had it transferred on the corporate books into the names of infants cannot avoid the transaction for fraud without returning the stock, which he cannot do after the transfer even though he said nothing to the infants about the transfer, as the other individual cannot be put to the risk of a claim by them to the stock as a gift on becoming majors.<sup>8</sup> One receiving a stock certificate with transfer and power of attorney endorsed thereon gets no legal title until it is transferred on the corporation's books; so that a transfer thereof on the books to a *bona fide* holder gives the latter legal title though the transferrer's certificate is not surrendered when the book transfer is made and is pledged as security to such other.<sup>9</sup> A suit in equity lies by a stockholder against a corporation to compel it to transfer his stock on its books or to issue him a certificate of stock when it has wrongfully canceled his certificate; and he need not make a party one whom it alleges is owner of the stock and forbade it to transfer the stock to the plaintiff and demanded, instead, that it be delivered to him; although the corporation may interplead him if it wishes.<sup>9a</sup>

**§ 132. Id.: Purchase and Sale of, By Corporation of Own Stock.**—The purchase of the stock of a corporation by it from one of its stockholders is legal if no creditor is affected, all stockholders and directors concur in the purchase and the stock is received by it into its treasury for sale to others.<sup>10</sup> A contract by a corporation by which it agrees after purchase by an individual of its stock on the installment plan to refund the purchase price within a stated period at the buyer's option is not such a contract as is prohibited by the Penal Law as a contract to purchase its own stock.<sup>11</sup> In the absence of any evidence as to how a corporation acquired some of its stock which it agrees to sell below par, the agreement will be enforced.<sup>12</sup> A corporation seeking to free itself from a con-

mistake on the company's books into the brokers' names. They repudiated it and in order to enable the agent to sell the stock and undo the mischief signed and executed the usual assignment in blank under which the agent sold it, but the transfer was not entered on the corporate books. The brokers were held not liable for unpaid subscriptions on the stock.

<sup>8</sup> Francis v. N. Y. & B'klyn El. R. R. Co., 108 N. Y. 93, 15 N. E. 192 (1888).

<sup>9</sup> New York & New Haven R. R. Co. v. Schuyler, 38 Barb. 534 (1860); aff'd 34 N. Y. 30.

<sup>9a</sup> Selwyn-Brown v. Superno Co., Inc., 181 A. D. 420 (1918).

<sup>10</sup> Moses v. Soule, 63 Misc. 203, 118 Supp. 410 (1909); aff'd 136 A. D. 904, 120 Supp. 1136.

<sup>11</sup> Hyman v. New York Urban Real Estate Co., 79 Misc. 439, 140 Supp. 138 (1913); Penal L. § 664.

<sup>12</sup> Otter v. Brevoort Petroleum Co., 50 Barb. 247 (1867).

tract to purchase its own stock by reason of the statute making it a misdemeanor for a director concurring in the act of the other directors to apply any portion of the corporate funds except surplus profits to the purchase of shares of its own stock must show that it did not possess surplus profits out of which the stock could be purchased, as the law will not presume an intent to do an illegal act.<sup>13</sup>

**§ 133. Id.: By Corporation of Another Corporation's Stock.**—The power of one corporation to buy stock of another corporation is discussed in the four hundred and fifteenth section of this book. Any stock business corporation may purchase, acquire, hold and dispose of the stocks of any corporation and issue in exchange therefor its stock, bonds or other obligations if authorized to do so by a provision in the certificate of incorporation of such stock corporation or in any certificate amendatory thereof or supplementary thereto, filed in pursuance of law, or if the corporation, the stock of which is so purchased, acquired, held or disposed of is engaged in a business similar to that of such stock corporation, or engaged in the manufacture, use or sale of the property, or in the construction or operation of works necessary or useful in the business of such stock corporation, or in which or in connection with which the manufactured articles, product or property of such stock corporation are or may be used, or is a corporation with which such stock corporation is or may be authorized to consolidate.<sup>14</sup>

**§ 134. Id.: By Officer or Director or Stockholder of His Corporation's Stock.**—The fact that a purchaser of corporate stock is president of the corporation does not disqualify him as a buyer.<sup>15</sup> One selling stock to a director of the corporation cannot demand to be placed *in statu quo* because the buyer did not disclose all facts he knew which were material to the question of value, as there is no such trust relation between a stockholder and a director as to demand this.<sup>16</sup> No stockholder of a corporation which has refused to pay any of

<sup>13</sup> Richards v. Wiener Co., 207 N. Y. 59, 100 N. E. 592 (1912); Penal L. § 664.

On right of corporation to purchase its own shares of stock, see notes in 18 L.R.A. 254; 61 L.R.A. 621; 25 L.R.A. (N.S.) 50; 30 L.R.A. (N.S.) 694; 44 L.R.A. (N.S.) 156; L.R.A. 1916F, 286.

<sup>14</sup> St. Corp. L. § 52 (L. 1909, c. 61).

On power of corporation to deal in stock of other corporations, see note in 18 L.R.A. 252.

<sup>15</sup> Dusenberry v. Sagamore Development Co., 164 A. D. 573, 150 Supp. 229 (1914).

<sup>16</sup> Carpenter v. Danforth, 52 Barb. 581 (1868).

its notes or other obligations in lawful money of the United States when due or which is insolvent or the insolvency of which is imminent must make any transfer or assignment of his stock therein to any person in contemplation of its insolvency; and such a transfer or assignment, if made, is void, provided that such a transfer to a purchaser for valuable consideration without notice is not void.<sup>17</sup>

§ 135. **Id.: Agreements for, In General.**—An executory agreement by a stockholder of record to sell his stock, conditioned on payment by the vendee, does not prevent him from voting it if the condition has neither been performed nor waived when voting time comes around.<sup>18</sup> An agreement for purchase of stock at a certain price and so much more as should be paid for like stock to anyone else contemplates the voluntary purchase of stock and not amounts paid for stock in order to obtain a settlement of actions which might have injured the company's credit.<sup>19</sup> "While the delivery and acceptance of treasury stock would raise an implied obligation to pay, no such obligation . . . is raised by the delivery of certificates of unissued stock to one man on the request of a third."<sup>20</sup> A written contract by which one who is a majority stockholder agrees to sell to another some of his holdings in certain corporations and to make the latter manager and principal officer therein at a stated salary for the first year and a larger salary thereafter, with half-representation on the corporations' boards of directors, and by which each party agreed to offer the other his holdings before selling them to anyone else, should either desire to sell, is void.<sup>1</sup>

§ 136. **Id.: Involving Questions of Time and Notice.**—" . . . upon holidays other than Sunday, all transactions may be carried on as on any other day," except "that a negotiable instrumental maturing on a holiday is payable on the next succeeding business day (Laws 1887, chapter 289), and . . . that holidays shall be considered as Sunday for all purposes whatsoever, as regards the transaction of

<sup>17</sup> St. Corp. L. § 66 (L.1909, c. 61).

<sup>18</sup> Matter of Petition of Argus Co., 138 N. Y. 557, 34 N. E. 388 (1893).

<sup>19</sup> Stewart v. Huntington, 124 N. Y. 127, 26 N. E. 289 (1891).

<sup>20</sup> Sanders v. Proctor, 172 A. D. 713, 158 Supp. 433 (1916).

<sup>1</sup> Fennessy v. Ross, 5 A. D. 342, 39 Supp. 323 (1896).

Specific performance of contract for sale of corporate stock, see notes in 50 L.R.A. 501; 31 L.R.A.(N.S.) 491; L.R.A.1915D, 300.

Contract by selling shareholder not to engage in business in competition with the corporation, see note in 23 L.R.A.(N.S.) 506.

business in the public offices of the State or of the counties of the State (Laws 1897, chapter 614, section 1);" and an agreement requiring one, if requested by another, to take the latter's stock on January 1st, is not, therefore, fulfilled by a tender of the stock and request for payment made January 3d, even though January 1st was a holiday, and January 2d a Sunday.<sup>2</sup> An agreement to purchase a certain number of shares of corporate stock on a certain number of days' notice is not satisfied by a notice given the day before the last day on which it may be given under the contract or by a notice to purchase a less than the stated number of shares.<sup>3</sup> One agreeing to buy within a stated time half of a subscription to stock if another would make the subscription must fulfill his promise though the latter do not tender one-half of the securities subscribed to within that time.<sup>4</sup>

**§ 137. Id.: Conditional.**—A sale of stock to be absolute only when the stock should be transferred on the books is a conditional sale; and if payment is made by check on agreement that the money is not to be drawn until the condition is fulfilled, the payment is nevertheless a cash one.<sup>5</sup> One contracting to sell corporate stock to another provided a certain percentage of the stockholders should vote to increase the capital stock is not bound to perform if the increase is enjoined at the instigation of the one agreeing to buy the stock.<sup>6</sup> Whether a provision for forfeiture of stock by one corporate party to an agreement on failure to pay a certain share of rental has the effect of a condition absolute is to be determined by the expressed contractual intent.<sup>7</sup>

**§ 138. Id.: Involving Questions of Holding Stock in Escrow.**—When corporate stock is to be held by one in escrow till a certain date, no action can be successfully maintained against such one for delivery of the stock unless a demand therefor shall have been made after the expiration of such date.<sup>8</sup> If it be agreed by the holders, ostensibly, of all a corporation's stock to put the stock of a new company in escrow with a trust company to be issued as against the old company's stock on

<sup>2</sup> Page v. Shainwald, 169 N. Y. 246, 57 L.R.A. 173, 62 N. E. 356 (1901).

<sup>3</sup> Baird v. Hagen, 143 A. D. 679, 128 Supp. 217 (1911).

<sup>4</sup> Hendrickson v. Callan, 147 A. D. 480, 131 Supp. 839 (1911); aff'd 210 N. Y. 543; 103 N. E. 1124. The agreement was to buy half the subscription "within one year from

Jan. 1, 1909." The only tender of such half was on Jan. 3, 1910.

<sup>5</sup> Gould v. Town of Oneonta, 71 N. Y. 298 (1877).

<sup>6</sup> Lovell v. Jacobs, 150 N. Y. 84, 44 N. E. 792 (1896).

<sup>7</sup> West v. Guaranty Trust Co., 162 A. D. 301, 147 Supp. 421 (1914).

<sup>8</sup> Delahunty v. Hake, 10 A. D. 230, 41 Supp. 896 (1896).

presentation of certificates therefor at a certain time, but, in fact, one stockholder of the old company signed the agreement as holder not only of his own stock but of that of another stockholder without the latter's knowledge, the latter cannot hold the trust company responsible for issuing a certificate of stock in the new company to such signer not only for his shares but for those of the other stockholder, when the old company's officer's duly certified to the trust company that such signer was entitled thereto.<sup>9</sup> An agreement by which each of several persons deposits in escrow with a corporation to be formed a certain number of shares of its stock for three years, at the end of which time the aggregate of such shares is to be parcelled out among such parties and in such amounts as is decided upon by those holding a majority of the corporation's stock, amounts "to no more than a prohibition of division of the stock for three years," and none of the depositaries can object to any kind of division thereof pursuant to their agreement, however much it may imperil his control of the corporation.<sup>10</sup>

**§ 138-a. Id.: Joint and Several.**—An agreement by three "to carry for Mr. M's benefit one thousand shares of the capital stock" of a corporation is an agreement by each of the three to carry a stated portion of such stock and a several agreement.<sup>11</sup> When several persons contract that one of them shall buy corporate stock from another who shall sell it and that the others shall be released from their agreements to buy respectively certain portions of such stock and that on performance of the contract all parties but the seller should be released from any obligation to him, all but the seller are jointly bound to him under the contract.<sup>12</sup>

**§ 139. Id.: By Seller to Buy Back.**—The statute of limitations does not run against a suit on an agreement by a seller of corporate stock to buy it back whenever the buyer wished him to from the date of the agreement.<sup>13</sup> A complaint in an action to recover damages for breach of an agreement to repurchase stock must allege a tender or offer of the stock at the time of the demand to repurchase."<sup>14</sup> A condition

<sup>9</sup> *Bean v. American Loan & Trust Co.*, 122 N. Y. 622, 26 N. E. 11 (1890).

<sup>10</sup> *Gideon v. Hinds, Noble & El-dredge*, 172 A. D. 478, 158 Supp. 774 (1916). Same case in 219 N. Y. mem. 4.

<sup>11</sup> *Villard v. Moyer*, 123 A. D. 629, 107 Supp. 1054 (1908).

<sup>12</sup> *Walter v. Rafalsky*, 113 A. D. 223, 98 Supp. 915 (1906); *aff'd* 186 N. Y. 543, 79 N. E. 1118.

<sup>13</sup> *Oaks v. Taylor*, 30 A. D. 177, 51 Supp. 775 (1898); C. C. P. § 410.

<sup>14</sup> *Ketchum v. Alexander*, 168 A. D. 38, 153 Supp. 864 (1915). An allegation that "plaintiff has

precedent to the enforcement of an agreement to repurchase corporate stock at the end of the year from its purchase is an offer or tender of a transfer of the shares at the time stipulated.<sup>15</sup>

**§ 140. Id.: By Stockholders Inter Sese.**—It seems that a provision in a corporation's certificate or by-laws that a stockholder shall not sell his stock without first giving a stated period within which the corporation and the other stockholders may have opportunity to purchase, is not against public policy.<sup>16</sup> It is legal for two persons who with others transfer property to a corporation organized to hold it to agree not to dispose of their stock holdings for a stated number of years without mutual consent and that a power of attorney to a third person to vote such holdings be irrevocable for such period.<sup>17</sup> An agreement by stockholders in a corporation by which each promises not, at any time or place, to sell his shares unless all the others assent is invalid.<sup>18</sup> An agreement between stockholders of a corporation to give preference to each other in the purchase of any of their holdings they might wish to sell does not deprive them of the right to dispose of their stock as an incident to ownership nor the purchaser from getting good title though he knew his purchase violated the agreement, as the only effect of a violation of the agreement is to give the other stockholders than those who violate it an action for damages.<sup>19</sup> An executory agreement between individual stockholders not to transfer their holdings without giving each other a prior right to purchase vests in contract and does not disenable any of them from giving legal title to his stock by transfer to a third person without the consent of the other parties to the agreement,

duly performed all conditions on his part to be performed," under C. C. P. § 533, is not sufficient.

<sup>15</sup> Taylor v. Blair, 59 Hun, 347, 13 Supp. 154 (1891).

<sup>16</sup> Moses v. Soule, 63 Misc. 203, 118 Supp. 410 (1909); aff'd 136 A. D. 904, 120 Supp. 1136.

<sup>17</sup> Hey v. Dolphin, 92 Hun, 230, 36 Supp. 627 (1895).

<sup>18</sup> Fisher v. Bush, 35 Hun, 641 (1885). The agreement read: "For value received from and paid to each other, we, the undersigned stockholders of the G. V. C. R. R. Co., mutually agree with the other, and to all, that we will not sell, assign, set over, pledge or give power

of attorney to vote, or agree to sell, assign, transfer, set over, pledge or give power of attorney to vote in any way, shape or manner the stock which we respectively and individually own, hold or possess in said company, without the concurrent consent of all signers to this instrument. And either of the parties who shall be guilty of a breach of this agreement, shall be liable to each of the other parties hereto for the full value of the stock held by each respectively, which full value shall be deemed the liquidated damages and not as a penalty."

<sup>19</sup> Brown v. Britton, 41 A. D. 57, 58 Supp. 353 (1899).

whose remedy is in damages at law, save in the sound discretion of the court to grant the equitable relief of specific performance of the contract.<sup>20</sup> An agreement seeking to control the stock of a corporation for purposes of management by which the holders of the stock agree that on their deaths or sale of their holdings each shall give the survivor or other the right to purchase his holdings at a stipulated price or at the same price as is offered by the would-be purchaser, as the case may be, is valid and is not in the nature of a wager upon life or illegal interference with the right of testamentary disposition, or void as a prohibition of the right of alienation of property.<sup>1</sup> A clause in an agreement between individual stockholders for options *inter sese* to purchase each other's holdings on disposal thereof, that a disposition by either of the parties to the agreement of all the shares held by him should terminate the agreement, means a disposition pursuant to the agreement's provisions and does not intend to provide that a party transferring his shares in violation of the agreement should thereby be released from its obligations; but a transfer made with the consent of the other parties, express or implied, would give effect to the condition.<sup>2</sup> It is not true "that when one stockholder contracts with another stockholder of a corporation for the purchase and sale of shares of stock at the book value as shown on the accounts of the corporation, such a contract requires or justifies the intervention of a court of equity in the management and control of the books of account of the corporation . . . , there being no diversion or waste of assets:" if the contingency, pursuant to which by the contract the one stockholder is entitled to have the other purchase his stock at the book value, arise, and the stockholder having the option to sell desire to avail himself of that right, there would seem to be no reason why an action in equity against the purchasing stockholder to ascertain the true book value of the stock instituted at that time would not be as efficacious to protect the rights of the stockholder with the option as the action in question.<sup>3</sup> A stockholder seeking to hold a corporation liable

<sup>20</sup> Matter of Petition of Argus Co., 138 N. Y. 557, 34 N. E. 388 (1893).

<sup>1</sup> Scruggs v. Cotterill, 67 A. D. 583, 73 Supp. 882 (1902).

<sup>2</sup> Matter of Petition of Argus Co., 138 N. Y. 557, 34 N. E. 388 (1893).

<sup>3</sup> Drucklieb v. Harris, 209 N. Y. 211, 102 N. E. 599 (1913). After the contract was made, the stock-

holder who might be compelled to buy the stock at its book value reduced the book value of the corporation's assets so as to decrease the book value of the stock and impoed the stockholder with the option to sell his holdings at less than he paid therefor.

for sale of its stock to a third person without his knowledge, contrary to an agreement between himself and other incorporators giving them first chance to buy such stock, cannot succeed if he bring the action in a representative capacity unless he show an injury to the corporation from the sale, as "a plaintiff who asserts a derivative cause of action must establish the existence of a cause of action in the party whose rights are sought to be enforced;" his remedy is to enforce his personal right of action.<sup>4</sup>

§ 141. **Id.: Fraud and Deceit In, In General.**—Actionable deceit in inducing purchases of corporate stock cannot be practiced without an actual intention to deceive, resulting in actual deception and consequent loss.<sup>5</sup> "A false and fraudulent representation as to the property of a corporation of material facts which necessarily affect the value of shares of stock therein, constitutes a cause of action against a party inducing another by means of such fraudulent misrepresentation to purchase such shares quite as sufficient as if the purchase had been of the property of the company with regard to which the representation was made."<sup>6</sup> Ordinarily a vendor's statement that his wares are "of great value" will be held an expression of opinion rather than a representation of fact; but a statement that corporate stock has been fully paid is a statement regarding an extrinsic fact made to induce the public to buy, and if false a purchaser in reliance thereon may sue the officers and directors of the corporation making it for a conspiracy to rob the public.<sup>7</sup> A representation made to induce purchase of stock in a corporation that certain property had been acquired by it unencumbered except for a small debt and that it was a perfectly safe investment which the speaker was himself interested in and that the speaker was conversant with the whole situation, though there be no evidence that the representor knew his representation to be false or made it with intent to deceive, is in substance a representation that he knew the property and of the incumbrances on it and is sufficient for rescission of the sale and recovery of the consideration.<sup>8</sup> The rule of *caveat emptor* applies to a purchaser of corporate stock who himself proposes the purchase, is a

<sup>4</sup> *Waters v. Waters & Co.*, 201 N. Y. 184, 94 N. E. 602 (1911).

<sup>5</sup> *Duryea v. Zimmerman*, 121 A. D. 560, 106 Supp. 237 (1907).

<sup>6</sup> *Schwenk v. Naylor*, 102 N. Y. 683, 7 N. E. 788 (1886).

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<sup>7</sup> *Van Slochem v. Villard*, No. 1, 154 A. D. 161, 138 Supp. 852 (1912); *aff'd* 207 N. Y. 587, 101 N. E. 467.

<sup>8</sup> *Lambert v. Elmendorf*, 124 A. D. 758, 109 Supp. 574 (1908).

stockholder in the corporation and presumably could have satisfied himself as to its financial condition.<sup>9</sup> Two stockholders, each owning a third of a corporation's stock and being its president and treasurer respectively, may be held by the committee of the third owning the remaining stock for damages resulting from their fraud and deceit in creating an impression that the corporate business was not as profitable as it had been and that unusual losses had been sustained, whereby the last mentioned third of stock was bought by them at less than its value, when in fact any unusual loss was a matter of bookkeeping and the company had never been more prosperous; and the committee's remedy is not confined to a representative action to redress the wrong to the corporation.<sup>10</sup> A stockholder induced by fraudulent representations by another to sell the latter his stock may, on the dissolution of the corporation and acquisition by the latter of its business, rescind the sale and hold the latter as trustee of an implied trust.<sup>11</sup> Persons claiming they had been induced by fraud to enter into a syndicate agreement to purchase stock in a corporation have three lines of relief open to them: "They might retain that which they received and bring an action at law against the guilty party to recover damages sustained by reason of his fraud; they might bring an action for rescission of the contract in which it would be sufficient to tender back anything which they might have received under the contract; they might bring an action based on a prior rescission wherein, having previously tendered back what they had received, they would recover that which had been taken from them."<sup>12</sup> A syndicate agreement to subscribe to stock of a corporation made by each subscriber by its express terms not only with the other subscribers but also with the chief promoter as syndicate manager and for his benefit not only in authorizing him to purchase a corporation's stock in which he is majority stockholder but also in conferring upon him general powers as a manager, is voidable for fraud of such chief promoter as well as of the other subscribers.<sup>13</sup>

<sup>9</sup> Rothmiller v. Stein, 143 N. Y. 581, 26 L.R.A. 148, 38 N. E. 718 (1894). The question was as to corporate solvency.

<sup>10</sup> Von Au v. Magenheimer, 126 A. D. 257, 110 Supp. 629 (1908); aff'd 196 N. Y. 510, 89 N. E. 1114. The complaint alleged a conspiracy by fraudulently (a) refraining from declaring a fair dividend, (b) in-

creasing salaries, (c) representing reverses as suffered by the company, so as to depress the value of the stock and cause its sale.

<sup>11</sup> Schafuss v. Betts, 94 Misc. 463, 157 Supp. 608 (Sup. Ct. 1916).

<sup>12</sup> Heckscher v. Edenborn, 203 N. Y. 210, 96 N. E. 441 (1911).

<sup>13</sup> Heckscher v. Edenborn, 203 N. Y. 210, 96 N. E. 441 (1911).

In an action to recover damages for loss sustained through subscription to a syndicate agreement on the ground of fraud by the chief promoter in suppression and misrepresentation of facts in that he did not disclose that the syndicate would purchase the stock of a corporation in which he was majority stockholder, a tender of stock in a new corporation which had acquired not only the chief promoter's stock in such other corporation but also various other property, and which new stock had been delivered to the plaintiff as his portion under the syndicate agreement, is sufficient as a prerequisite to an action based on rescission of the contract.<sup>14</sup> "If one by misrepresentation or suppression of facts when he ought to speak induces another ignorantly to make a contract appointing the first his agent to buy and conferring upon him discretionary power to purchase his own property, the contract is voidable and even if executed may be rescinded and the money recovered back on restoration of what has been received."<sup>14½</sup> If one agrees as agent to buy for another corporate stock and in pretended fulfillment of the agreement and with intent to defraud causes stock of the corporation to be transferred to such other which belongs to himself, retaining to his own use the money paid therefor, such other on discovery of the fraud may rescind the contract and recover back the purchase money paid.<sup>15</sup> The false representations of the holder of ninety-eight per centum and the controller of the remaining two per centum of the capital stock of a corporation in securing purchase of its stock are binding on the corporation and may be sued upon as its representations.<sup>16</sup>

**§ 142. Id.: Through Prospectus.**—The impression ordinarily created by a prospectus determines the liability of those

<sup>14</sup> *Heckscher v. Edenborn*, 203 N. Y. 210, 96 N. E. 441 (1911).

<sup>14½</sup> *Heckscher v. Edenborn*, 203 N. Y. 210, 96 N. E. 441 (1911). Defendant was chief promoter of an enterprise contemplating \$1,000,000 par value of stock of a corporation of which he was majority owner; the syndicate agreement made him and two associates agents of the subscribers with discretion to buy this stock; defendant, holding a rather intimate, influential relation with some of plaintiff's assignors, in effect solicited their subscription to the syndicate agreement; they did not know his interest in the property to be acquired, he did not inform them

of it, but his \$500,000 subscription in the agreement and statements by him that he was "putting in cash the same as" one of the subscribers and that "any man in joining puts in a dollar against the other man's dollar" and that there were no "inside profits" tended to exclude the idea he owned such stock.

<sup>15</sup> *Mayo v. Knowlton*, 134 N. Y. 250, 31 N. E. 985 (1892).

<sup>16</sup> *Cawthra v. Stewart*, 59 Misc. 38, 109 Supp. 770 (1908).

On liability of corporate officer for misrepresentation which induced the sale or purchase of stock, see note in 1 L.R.A.(N.S.) 258.

making the representations in it.<sup>17</sup> One purchasing stock relying upon the truth of a prospectus has a right of action for deceit against any persons "who, with knowledge of the fraud and with intent to deceive, put it in circulation. The representation was made to each person comprehended within the class of persons who were designed to be influenced by the prospectus; and when a prospectus of this character has been issued no other relation or priority between the parties need be shown, except that created by the wrongful and fraudulent acts of the defendants in issuing or circulating the prospectus, and the resulting injury to the plaintiff."<sup>18</sup> "So if any person makes or causes to be made to the public at large for the purpose of inducing purchases of the stock of a corporation, false statements as to the solvency and prosperity of the corporation, any person acting upon such representations and suffering loss thereby may prosecute his action for damages."<sup>19</sup> One investing in corporate stock by purchase in the open market relying on false and fraudulent representation in a prospectus delivered to him and the general public for the purpose of inducing investment by the public in general and all persons into whose hands the prospectus should come, may sue at law to recover damages for deceit from those preparing, publishing and delivering the prospectus.<sup>20</sup> "Where a prospectus is circulated as an inducement to take stock in a corporate enterprise the language of the prospectus is to be interpreted by the effect which it would produce upon an ordinary mind . . . [and] in estimating the probability of subscribers being misled by a prospectus the court may take into consideration not only the facts stated therein, but the facts suppressed."<sup>1</sup> " . . . a fraudulent intent on the part of the author and publisher of

<sup>17</sup> *Churchill v. St. George Development Co.*, 174 A. D. 1, 160 Supp. 357 (1916).

<sup>18</sup> *Morgan v. Skiddy*, 62 N. Y. 319 (1875).

<sup>19</sup> *Keeler v. Seaman*, 47 Misc. 292, 95 Supp. 920 (1905). Action against one who was corporate treasurer; not a director; based principally on false representation consisting of act of directors in declaring dividends payable out of earnings which did not exist and so of representing to public that company was making surplus earnings; allegation that treasurer was instru-

mental in having such declaration advertised. Complaint held good.

<sup>20</sup> *Reusens v. Gerard*, 160 A. D. 625, 146 Supp. 86 (1914).

<sup>1</sup> *Downey v. Finucane*, 205 N. Y. 257, 40 L.R.A.(N.S.) 307, 98 N. E. 391 (1912). Prospectus read: "This company . . . owns a franchise in the city of New York acquired under the advice of eminent counsel, under which it is its purpose to begin as soon as practicable and in the near future the construction of an independent telephone system in that city." No permit had been granted for extension of the com-

the prospectus [to promote subscriptions to corporate stock] may be inferred from the falsity of the statements therein contained and that alone."<sup>2</sup> It is not error to allow a jury to pass on the character of representations in a prospectus that certain dividends have been paid by the corporation if the testimony shows such dividends had not been earned as a declaration that dividends have been paid imports that they have been earned.<sup>3</sup> It is proper to submit to a jury the question of whether or not a statement in a prospectus is true that 413,030 shares of the corporation's capital stock have been issued or are contracted to be issued, as it conveys the idea that the stock had been issued or contracted to be issued for money or property its equivalent in value, if as a matter of fact 410,000 of such 413,030 shares of the corporation's stock had been issued on account of a franchise bought for \$250,000, as the disparity is so great as of itself to warrant an inference of fraud.<sup>4</sup> One relying in purchasing stock in a corporation upon written statements of its president, director and stockholder, positively misrepresenting material facts relating to its property and equipment, of the truth of which the representer had no personal knowledge and in making which he relied on information he believed received from engineers and others (but which he did not state to have been made on such information and belief), may hold such representer liable for the damages.<sup>5</sup>

**§ 143. Id.: Pleading and Practice.**—A sale of corporate stock by one to another with authorization "to take all such proceedings in my name for his benefit and at his expense as

pany's lines and they could not be extended without such permission. Legal advice had shown the validity and sufficiency of the alleged franchise to be doubtful.

<sup>2</sup> *Downey v. Finucane*, 205 N. Y. 251, 40 L.R.A.(N.S.) 307, 98 N. E. 391 (1912). The prospectus read: "Such \$7,000,000 of bonds are to be issued pursuant to contracts already made by the company and binding on it, and as a result of the performance of said contracts the company will have \$5,000,000 cash in its treasury in addition to the securities pledged under the mortgage." One side claimed this meant the contracts were unilateral and bound the company to sell, while the other said it meant they were

bilateral and enforceable by the company. The latter interpretation was held proper.

<sup>3</sup> *Downey v. Finucane*, 205 N. Y. 251, 40 L.R.A.(N.S.) 307, 98 N. E. 391 (1912).

<sup>4</sup> *Downey v. Finucane*, 205 N. Y. 251, 40 L.R.A.(N.S.) 307, 98 N. E. 391 (1912).

<sup>5</sup> *Bystrom v. Willard*, 175 A. D. 433, 162 Supp. 100 (1916); dismissed 220 N. Y. 765, 116 N. E. 1038.

On liability of officers of corporation to one who purchases stock from an individual in reliance on a prospectus issued to induce purchase of treasury stock, see note in 28 L.R.A.(N.S.) 359.

he may be advised are necessary or proper to enforce his rights as the holder of said stock," gives power to the immediate purchaser only to use the seller's name in such proceedings.<sup>6</sup> One may sue both individually and as personal representative of another to set aside a sale of corporate stock by him and the decedent induced by the same alleged fraudulent representations.<sup>7</sup> An action on an executory contract to recover the purchase price of corporate stock cannot be maintained unless the plaintiff has tendered a delivery and is able to perform.<sup>8</sup> A complaint for rescission of a contract for fraud and deceit in the sale of corporate stock must be based on something more than promises or fraud and deceit as to things undone and wholly to be done, there must be misrepresentation of something present or past.<sup>9</sup> Pleading due performance of all things to be performed on his part by one seeking to recover damages resulting from failure of another party to a contract to buy stock pursuant thereto is sufficient without alleging compliance with the terms of the contract.<sup>10</sup> An allegation in a complaint to recover damages for fraud and deceit in selling corporate stock of ratification of the purchase is insufficient to show a waiver of the cause of action for deceit, as the contract may be affirmed without ratifying the fraud.<sup>11</sup> A defendant sued for failure to live up to his agreement to take stock in a corporation at an agreed price, cannot be held to answer as for fraud in that he, as a director of the company, had been guilty of a fraudulent issue of stock, unless the complaint is based on fraud, instead of contract, liability.<sup>12</sup> One seeking to recover damages resulting from the purchase of stock in a corporation of which he was not yet a stockholder on the faith of a false report by its treasurer may join a cause of action under the statute and a cause of action upon substantially the same facts with an additional allegation of knowing misrepresentation by the treasurer.<sup>13</sup> A complaint is an action to rescind a contract for the sale by the defendant of corporate stock and the recovery of its purchase price is not demurrable because it

<sup>6</sup> *MacVeagh v. Continental Trust Co.*, 10 Misc. 600, 32 Supp. 198 (1894).

<sup>7</sup> *Groh v. Flammer*, 100 A. D. 305, 91 Supp. 423 (1905).

<sup>8</sup> *Security Title & Trust Co. v. Stewart*, 154 A. D. 434, 139 Supp. 74 (1913).

<sup>9</sup> *Wilson v. Meyer*, 154 A. D. 300, 138 Supp. 1048 (1912).

<sup>10</sup> *Moghabghab v. Sherman & Sons Co.*, 161 A. D. 135, 146 Supp. 392 (1914); C. C. P. § 533.

<sup>11</sup> *Potts v. Lambie*, 138 A. D. 144, 122 Supp. 935 (1910).

<sup>12</sup> *Lamphere v. Lang*, 213 N. Y. 585, 108 N. E. 82 (1915).

<sup>13</sup> *Hutchinson v. Young*, 93 A. D. 407, 87 Supp. 678 (1904); C. C. P. § 484, subd. 6.

states two definite grounds of relief, one in fraud and the other in mutual mistake.<sup>14</sup> A cause of action to set aside a sale by the plaintiff of corporate securities as induced by fraud cannot be joined with a cause of action to compel the buyer to account for the property of the corporation he has received by virtue of his control of it acquired by the sale of stock in question in violation of an alleged agreement with the plaintiff.<sup>15</sup> A complaint for return of corporate stock exchanged because of false and fraudulent representations for stock of another corporation is not bad because no damage is alleged on the theory that the stock received in exchange may be as valuable as that given in exchange if the complaint allege that by the exchange plaintiff and those in harmony with him lost control of the corporation, the stock of which was exchanged, while one of the representations leading to the exchange was that by it the other corporation would control—which was not so.<sup>16</sup> If one selling stock sues the purchaser claiming, first, to recover the difference between the price paid him and a greater amount paid other stockholders, under an agreement whereby he should be paid such difference and, second, to have the stock he sold returned to him under an option given him by such agreement, he seeks to recover on two inconsistent theories, one under the contract and the other on disaffirmance of the contract, and must make his election: he cannot claim breach of the contract and demand damages conditioned on the existence of the contract as he does when he demands the largest price paid by the purchaser for any stock as the basis of the purchase of his own stock.<sup>17</sup> In an action based on failure to complete a contract for the purchase of corporate stock, the failure to pay the tax charged by statute on sales and transfers of stock is a matter to be plead in defense, and if this is not done it cannot be availed of.<sup>18</sup> To a complaint seeking to recover the agreed price of sale of corporate stock the defendant may counterclaim inducement by the plaintiff by fraud to make him enter into the agreement sued on.<sup>19</sup> An action to recover the value of shares of corporate stock pursuant to an agreement to pay therefor is to recover a sum of money, though to

<sup>14</sup> *Garrett Co. v. Astor*, 67 A. D. 595, 73 Supp. 966 (1902).

<sup>15</sup> *Groh v. Flammer*, 100 A. D. 305, 91 Supp. 423 (1905).

<sup>16</sup> *Jahn v. Reynolds*, 115 A. D. 647, 101 Supp. 293 (1906).

<sup>17</sup> *Stewart v. Huntington*, 124 N. Y. 127, 26 N. E. 289 (1891).

<sup>18</sup> *Bean v. Flint*, 204 N. Y. 153, 97 N. E. 490 (1912); *Tax L.* §§ 270-278.

<sup>19</sup> *Delano v. Rice*, 23 A. D. 327, 48 Supp. 295 (1897).

be gauged by the figures disclosed on an account of the assets and property of the corporation; and the Supreme Court cannot compel a reference to hear and determine, though it could, if it thought the case a suit in equity, refer the case so far as to have the testimony as to the value of such assets taken by a referee and reported to it with his opinion thereon.<sup>20</sup>

" . . . the doctrine of *lis pendens*, so far as it maintains that the mere pending of an action concerning the title to stocks, is constructive notice to all mankind, and that a purchaser acting in good faith is bound by the results of the action, is no part of the law of this State."<sup>21</sup> A cause of action at law to recover damages for deceit in having been induced by false and fraudulent representations to make a contract for the purchase of corporate stock begins to run from the consummation of the fraud and not from the discovery thereof, even though but part payment on the contract was made, and suit cannot be brought after six years from the date of the contract.<sup>22</sup> A broker seeking to recover commissions for securing a purchaser of stock of a corporation to be formed who never bought the stock because of false statements made by the principal to the broker must also allege in his complaint that such statements were communicated to the purchaser who relied upon them when he accepted the proposition to buy the stock.<sup>23</sup>

**§ 144. Id.: Evidence and Proof.**—One complaining that another induced him to buy certain stock by false and fraudulent representations has the burden "to show (1) that defendant made material representations to induce the purchase of the stock; (2) that the defendant knew that they were untrue; (3) that plaintiff relied thereon in making the purchase; and (4) that (s)he was damaged thereby."<sup>24</sup> The evidence sufficient to warrant the recovery of damages for fraud by one in inducing another to buy his holdings of stock in a corporation must tend to establish the falsity of the seller's statements and his knowledge of their falsity; and to this end facts and circumstances showing the seller's means of knowledge bearing upon the candor and integrity of his acts in his connection with the corporation and the management of its business are more freely admissible.<sup>25</sup> A memorandum

<sup>20</sup> *Camp v. Ingersoll*, 86 N. Y. 433 (1881); C. C. P. § 1015.

<sup>21</sup> *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616 (1874).

<sup>22</sup> *Ball v. Gerard*, 160 A. D. 619, 146 Supp. 81 (1914).

<sup>23</sup> *Lewin v. Hecht*, 179 A. D. 106, 166 Supp. 116 (1917).

<sup>24</sup> *Bevan v. Roach*, 142 A. D. 541, 127 Supp. 68 (1911).

<sup>25</sup> *Townsend v. Felthousen*, 156 N. Y. 618, 51 N. E. 279 (1898).

concerning sale of corporate stock which omits the amount of the stock and the time of performance does not satisfy the Statute of Frauds.<sup>6</sup> Writings endorsed by one involved in a dispute as to ownership of corporate stock on returned certificates of stock are made for his own benefit and not in performance of his duties as officer of the company and are inadmissible in evidence.<sup>7</sup>

**§ 145. Id.: Measure of Damages.**— In an action to recover damages for breach of a contract of sale of corporate stock the measure is the difference between the price the plaintiff agreed to pay and the value on the day set for delivery; but an unaccepted offer for such stock in an isolated transaction, not shown to have been made in a market attended by sellers and buyers, or in the open market on the floor of the stock exchange, under circumstances warranting the conclusion that the person bidding was in a situation to buy, is no evidence as to the stock's value.<sup>8</sup> One buying stock which should have been delivered under contract is entitled to recover from him who failed to fulfill the contract the difference between the purchase price and the price at the time when the stock should have been delivered.<sup>9</sup> The measure of damages for deceit in selling corporate stock is the difference between the actual value of the stock sold and what its value would have been if the stock had been as represented.<sup>10</sup> In recovering damages for deceit in securing the sale of corporate stock the plaintiff can have only the difference between the value of the stock and what he paid for it.<sup>11</sup>

**§ 146. Id.: Equitable Remedies.**— One seeking equitable relief that he be given certain corporate stock pursuant to a certain transaction will be refused if he does not come into court with clean hands.<sup>12</sup> Specific performance by certain persons of their agreement to convey stock of a certain corporation to another individual will not be decreed if damages to the latter are an adequate remedy.<sup>13</sup> Equity will not exercise its discretion to award specific performance of an agreement to secure corporate stock to a plaintiff when there is nothing to show that its value cannot be determined so that

<sup>6</sup> Leach v. Weil, 129 A. D. 688, 114 Supp. 234 (1908).

<sup>7</sup> Geneva Mineral Springs Co., Ltd. v. Steele, 111 A. D. 706, 97 Supp. 996 (1906).

<sup>8</sup> Wildes v. Robinson, 50 A. D. 192, 63 Supp. 811 (1900).

<sup>9</sup> Sloan v. McKane, 131 A. D. 244, 115 Supp. 648 (1909).

<sup>10</sup> Spotten v. De Freest, 140 A. D. 792, 125 Supp. 497 (1910).

<sup>11</sup> Tripler v. Fairchild, 167 A. D. 195, 152 Supp. 624 (1915).

<sup>12</sup> York v. Searles, 97 A. D. 331, 90 Supp. 37 (1904); aff'd 189 N. Y. 573, 82 N. E. 1134.

<sup>13</sup> Kennedy v. Thompson, 97 A. D. 296, 89 Supp. 963 (1904). There

a money-damage judgment will compensate plaintiff.<sup>14</sup> “ . . . an action to compel specific performance of a contract whereby the defendant agreed to deliver to the plaintiff a number of shares of the stock in a specified corporation which the plaintiff ha(s) no special interest in acquiring except for the pecuniary advantage which would accrue to him from its ownership, cannot be maintained simply because it appears that there have been no sales of the stock in question ”—certainly not if there have been sales.<sup>15</sup> Pending an action to compel a retransfer of stock alleged to have been acquired by an individual pursuant to a fraudulent contract, in which fraud is denied, it is proper to enjoin the defendant from disposing of his stock *pendente lite* but not to abstain from voting on it or exercising any rights incident to its ownership.<sup>16</sup> One seeking to rescind an executed contract for the purchase of corporate stock on the ground of fraud and to require the taking back of other shares acquired by subscription to increases of stock must offer to return the stock at once on discovering the fraud or otherwise disaffirm the purchase.<sup>17</sup> A denial in an answer to a complaint for specific performance of an agreement to sell certain corporate stock which alleges that plaintiff has no adequate remedy at law is sufficient to enable the defendant to urge that the case is not of equitable cognizance without need for the defendant setting up that matter in his answer.<sup>18</sup> Defendants are entitled to an order compelling a reply to allegations in their answer to a complaint seeking specific performance of a contract of sale of stock if such allegations are that no stock transfer tax was paid or canceled in connection with the agreement of sale.<sup>19</sup> A written agreement by two persons to buy from a third person a certain number of dollars' worth of stock in a corporation within a stated time of its incorporation, and the agreement of such third person to deliver such amount of stock to such two persons, cannot be enforced by such third person, for one-half the amount agreed to be taken, against one of the two purchasers after delivery to the other of one-half on receipt from him of one-half of the price agreed upon

were no allegations in the complaint that the stock had any peculiar value or that plaintiff could not fully recover at law by way of damages.

<sup>14</sup> Bateman v. Straus, 86 A. D. 540, 83 Supp. 785 (1903).

<sup>15</sup> Clements v. Sherwood-Dunn, 108 A. D. 327, 95 Supp. 766 (1905).

<sup>16</sup> Maine Products Co. v. Alex-

ander, No. 2, 115 A. D. 112, 100 Supp. 711 (1906).

<sup>17</sup> Davis v. Levering, 168 A. D. 78, 153 Supp. 772 (1915).

<sup>18</sup> Clements v. Sherwood-Dunn, 108 A. D. 327, 95 Supp. 766 (1905).

<sup>19</sup> Dittenfass v. Horsley, 171 A. D. 507, 157 Supp. 632 (1916); C. C. P. § 516.

and release of such other from the agreement.<sup>20</sup> A court of equity invoked to cancel a subscription for stock on the ground of fraud by individual promoters (who later became officers and directors) in securing it, and to enjoin further calls for payments, and the prosecution of actions thereon, is justified in bringing in the officers and agents of the corporation who were personally guilty of making the misrepresentations constituting the fraud, so that the plaintiff may have complete relief in one action against both the corporation and the persons guilty of the fraud.<sup>1</sup> One induced by fraudulent representations to subscribe to corporate bonds cannot have the remedy of rescission unless resort to equity is necessary to do full justice, but must sue at law for their purchase after returning the bonds; so that the statute of limitations governing legal actions and not equitable suits bars him.<sup>2</sup> A complaint by one who had advanced to a corporation at the request of subscribers to its stock the amount of the subscriptions to the capital stock, upon the written agreement of the subscribers that in case of the failure of any subscriber to pay, the remaining subscribers would be liable jointly and severally to pay such unpaid subscription, against a subscriber to recover for such a failure by another subscriber, is good, although if the corporation itself had sued for the unpaid subscriptions it could not have succeeded because ten per cent of the subscriptions had not been paid in when made, as the complaint in question is not for an unpaid subscription but upon an individual promise.<sup>3</sup>

§ 147. *Id.*: **Pledge and Conversion of, What Constitutes Conversion.**—Conversion lies against a holder of shares of stock in a corporation, evidenced by one certificate for the whole thereof, who sells and assigns the whole thereof with such certificate endorsed for transfer after he has by a separate instrument under seal sold part of such shares to another.<sup>4</sup> A refusal on demand of payment by one tenant in common of corporate stock of proceeds of the sale thereof by him to the other tenant of his share of the proceeds is a

<sup>20</sup> *Van Dam v. Tapscott*, 40 A. D. 36, 57 Supp. 534 (1899). It is not the law "that a joint contract of two or more parties to purchase property, where the property is divisible into portions absolutely alike in quality and value, can be treated as the individual promise of each party to purchase and take his aliquot share."

<sup>1</sup> *Mack v. Latta*, 178 N. Y. 525, 67 L.R.A. 126, 71 N. E. 97 (1904).

<sup>2</sup> *Dennin v. Powers*, 96 Misc. 252, 160 Supp. 636 (1916); C. C. P. § 382.

<sup>3</sup> *Knickerbocker Trust Co. v. Hard*, 67 A. D. 463, 73 Supp. 979 (1902).

<sup>4</sup> *Mahaney v. Walsh*, 16 A. D. 601, 44 Supp. 969 (1897).

conversion.<sup>5</sup> Sale made by a lender of corporate stock deposited with him by the borrower as collateral for the loan without first demanding payment of the advance and giving notice of the time and place of sale of the stock constitutes conversion.<sup>6</sup>

**§ 148. Id.: Who May Be Pledgor or Pledgee.**—While a blank transfer of a certificate of stock, with irrevocable power of attorney to transfer, signed by the person who appears by the certificate to be the owner, confers upon the holder of the certificate and power of attorney the apparent legal and equitable title to the stock so that a *bona fide* purchaser can hold the stock against the real owner, yet it does not *per se* and with the holder's verbal statement of authority confer upon the holder the power to pledge the stock for a loan to the owner.<sup>7</sup> A pledge of treasury stock by a corporation as collateral to a loan which would be valid if made to an outsider is none the less valid because a director of the corporation induced his firm to make the loan which no one else would make and as security for which the pledge was given.<sup>8</sup>

**§ 149. Id.: Liability of Corporation for.**—A corporation is not chargeable with negligence so as to render it liable for damages suffered by a pledgee of certificates of its stock pledged to secure a loan to one of its employees through the unauthorized use of the certificates by the pledgor made possible because the corporation in violation of its by-laws permitted the certificates to remain uncanceled and in its safe to which the employee had access or because it neglected to exercise a proper supervision over its business and its employees and committed to this particular employee the management of its affairs without special inquiry into the manner in which he discharged his duties, unless it be shown that it knew he was dishonest or had reason to suspect his dishonesty.<sup>9</sup> A corporation cannot be held for conversion of stock alleged to have been loaned to it by one of its directors because a receipt for its proceeds was signed by the corporation or because it was given its president who by its by-laws had the duty of special supervision over its property, when the president was handed

<sup>5</sup> Warner v. Cecil, 84 Misc. 21, 145 Supp. 902 (1914).

<sup>6</sup> Wallace v. Berdell, 24 Hun, 379 (1881).

As to what sales of corporate stock by pledgee amounts to conversion, see note in 43 L.R.A. 739.

<sup>7</sup> Merchants' Bank v. Livingston, 74 N. Y. 223 (1878).

<sup>8</sup> Kinsman v. Fisk, 83 Hun, 494, 31 Supp. 1045 (1895).

<sup>9</sup> Knox v. Eden Musee American Co., 17 A. D. 365, 45 Supp. 255 (1897).

the stock and there is no evidence of his implied authority to borrow for the corporation.<sup>10</sup>

**§ 150. Id.: Actions and Practice.**—In an action against an individual pledgee of corporate stock and a corporation as joint wrongdoers in converting the stock, recovery may be had against one though not sustained against the other, and if the corporation took the stock from the pledgee knowing he converted it no tender of the stock to the company is needed to permit recovery of its value.<sup>11</sup> In an action to recover from certain persons who have converted the stock of a corporation, one who is a director but who had no connection as such or in any other way with the corporation until after the consummation of the alleged illegal scheme, is not a proper party.<sup>12</sup> An action by a pledgee of stock to recover damages from a third person who agreed to buy it from the pledgee at a stated price if the pledgor did not redeem it before a certain date is not to recover the purchase price but for breach of contract, and the fact that no tax was paid or stamps affixed at the time of the pledge is therefore no defence to the action.<sup>13</sup> A conversion of corporate stock by the pledgee does not entitle the pledgor to demand its return without tender of payment of his debt.<sup>14</sup>

**§ 151. Id.: Measure of Damages.**—When “ a pledgee of corporate stock, acting in good faith and under an honest mistake, converts it, it is the duty of the owner to replace it himself within a reasonable time after notice, and the proper measure of damages for the conversion is the highest market price during such reasonable time, and . . . where the facts are undisputed, what is a reasonable time is a question of law for the court ”; but if there be no evidence upon which the value of the stock can properly be determined within a

<sup>10</sup> *Logan v. Fidelity-Phenix Fire Ins. Co.*, 161 A. D. 404, 146 Supp. 678 (1914). The lender was also one of a committee of accounts of the corporation directed by its by-laws to audit the books and accounts of its secretary and examine its assets every six months and report to the board, which was not done.

On validity of pledge of stock of corporation when not made in the books of the company as against attachments, executions, or subsequent transfers, see notes in 67 L.R.A. 656; 20 L.R.A.(N.S.) 996; 49 L.R.A.(N.S.) 1159.

On liability of pledgee of stock as a shareholder, generally, see notes in 36 L.R.A. 139; 19 L.R.A.(N.S.) 249.

<sup>11</sup> *Usher v. Van Vranken*, 48 A. D. 413, 63 Supp. 104 (1900).

<sup>12</sup> *Mulheran v. Gebhardt*, 93 A. D. 98, 86 N. Y. Supp. 941 (1904).

<sup>13</sup> *Wyllis Co. v. Nixon*, 165 A. D. 373, 150 Supp. 944 (1915); *Tax L.* § 278.

<sup>14</sup> *New York, Lake Erie & Western R. R. Co. v. Davies*, 38 Hun, 477 (1886).

reasonable time after its conversion, nominal damages only can be awarded.<sup>15</sup> The measure of damages accorded an owner of pledged stock sold wrongfully but in good faith and by mistake by the pledgee is the highest price it reaches within a reasonable time after the owner learns of the conversion of his stock within which he could go in the market and repurchase it.<sup>16</sup> One suing a pledgee of his corporate stock who has converted it "is entitled to recover the highest market value of the stock at any time intermediate the conversion and the close of the trial."<sup>17</sup> Evidence of the par value of stock and none other does not support a judgment for damages for its conversion.<sup>18</sup>

**§ 152. Id.: Dividends, Definitions, and Legality, Nature, In General.**—"A dividend is a corporate profit set aside, declared and ordered by the directors to be paid to the stockholders upon demand or at a fixed time."<sup>19</sup> "This word ["dividends"] when used in reference to corporate stocks has a technical but well understood meaning, and indicates corporate funds derived from the business and earnings of the corporation, appropriated by a corporate act to the use of and to be divided among the stockholders."<sup>20</sup> "A division of profits without the formality of declaring a dividend is the equivalent of declaring a dividend."<sup>1</sup> A payment of all the net amount realized from sale of realty put in a corporation to the stockholders who were owners of undivided interests in the realty after the termination of a litigation because of which such interests were pooled in the corporation is a distribution of capital and not the payment of a dividend.<sup>2</sup> "A corporation which has earned profits is not precluded from distributing them as dividends because some of its assets are in such a form that it must borrow money for its business."<sup>3</sup> A distribution by directors of surplus corporate earnings among themselves and certain employee stockholders under

<sup>15</sup> *Griggs v. Day*, 158 N. Y. 1, 52 N. E. 692 (1899).

<sup>16</sup> *Wright v. Bank of the Metropolis*, 110 N. Y. 237, 1 L.R.A. 289, 18 N. E. 79 (1888).

<sup>17</sup> *Romaine v. Van Allen*, 26 N. Y. 309 (1863).

<sup>18</sup> *Warren v. Stikeman*, 84 A. D. 610, 82 Supp. 1003 (1903).

On measure of damages for conversion of pledged stocks by invalid sale, see note in 43 L.R.A. 768.

<sup>19</sup> *People ex rel. Pullman Co. v. Glynn*, 130 A. D. 332, 114 Supp. 460

(1909); *aff'd* 198 N. Y. 605, 92 N. E. 1097, citing *Cook Corp.* 6th ed. § 534.

<sup>20</sup> *Hyatt v. Allen*, 56 N. Y. 553 (1874).

<sup>1</sup> *Hartley v. Pioneer Iron Works*, 181 N. Y. 73, 73 N. E. 576 (1905).

<sup>2</sup> *People ex rel. Tetragon Co. v. Sohmer*, 162 A. D. 433, 147 Supp. 611 (1914); *aff'd* 213 N. Y. 702, 108 N. E. 1105; *Tax L.* § 182.

<sup>3</sup> *Holmes v. St. Joseph Lead Co.*, 84 Misc. 278, 147 Supp. 104 (1914); *aff'd* 163 A. D. 885, 147 Supp. 1117.

the guise of additional salary but upon a uniform basis of a percentage of the stock held by each and not according to the services rendered the corporation by the distributees is without consideration and a wrong to the corporation itself, which a stockholder, in a representative action, may compel the officers to account for as a diversion of the corporation's money and property.<sup>4</sup>

**§ 153. Id.: Property Dividend.**—A dividend in property, as well as in money, is lawful.<sup>5</sup> “The surplus may be in cash, and then it may be divided in cash; it may be in property, and if the property is so situated that a division thereof among the stockholders is practicable, a dividend in property may be declared, and that may be distributed among stockholders.”<sup>6</sup> “There is no statute which requires dividends in telegraph companies or in companies generally to be made in cash. Whether they shall be made in cash or property must also rest in the discretion of the directors.”<sup>7</sup> “. . . a railroad corporation may issue to its stockholders bonds in lieu of cash dividends, to represent the earnings of the company which have been used by the company for construction and the betterment of its railroad and property.”<sup>8</sup>

**§ 154. Id.: Stock Dividend.**—Stock dividends are not within the purview of the statute prohibiting declaration of dividends except from surplus, etc., as “after a stock dividend a corporation has just as much property as it had before.”<sup>9</sup> “So long as every dollar of stock issued by a corporation is represented by a dollar of property, no harm can result to individuals or the public from distributing the stock to the stockholders.”<sup>10</sup> “A stock dividend does not distribute property, but simply dilates the shares as they existed before . . .”<sup>11</sup> “There is no limit to the capital which business corporations in this state may have, and there is no limit in the law beyond which they may not increase their capital. All that can be required in any case is that there shall be an actual capital in property representing the amount of share capital issued,” so that if this requirement be observed, there is no

<sup>4</sup> *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L.R.A.1915D, 632, 105 N. E. 818 (1914).

<sup>5</sup> *Scott v. Central R. R. & Banking Co. of Ga.*, 52 Barb. 45 (1868).

<sup>6</sup> *Williams v. Western Union Telegraph Co.*, 93 N. Y. 162 (1883).

<sup>7</sup> *Williams v. Western Union Telegraph Co.*, 93 N. Y. 162 (1883).

<sup>8</sup> *Wood v. Lary*, 47 Hun, 550;

dismissed 124 N. Y. 83, 26 N. E. 338.

<sup>9</sup> *Williams v. Western Union Telegraph Co.*, 93 N. Y. 162 (1883); R. S. c. 18, part 1, title 4, § 2.

<sup>10</sup> *Williams v. Western Union Telegraph Co.*, 93 N. Y. 162 (1883).

<sup>11</sup> *Williams v. Western Union Telegraph Co.*, 93 N. Y. 162 (1883).

limit upon the declaration of stock dividends, which operate to increase the capital stock.<sup>12</sup> “ . . . when stock has been lawfully created and is held by a corporation, which it has a right to issue for value, then a stock dividend may be made, provided that the stock always represents property.”<sup>13</sup> A bonus of \$30,000 cash and \$70,000 in stock of a corporation to be paid to one of its directors or a company controlled by him under a resolution of the board for negotiating a \$200,000 loan to the corporation on the security of its second mortgages will be enjoined when the stockholders authorizing the loan knew nothing of the bonus.<sup>14</sup>

**§ 155. Id.: Scrip Dividend.**—“ ‘A scrip dividend is a dividend of certificates giving the holder certain rights which are specified in the certificate itself ’ ’; and it is a legal kind of dividend.<sup>15</sup> A corporation cannot make a scrip dividend one year and issue bonds the next to pay it; nor can it reduce its capital stock by substituting therefor bonds.<sup>16</sup> A trustee appointed to hold corporate stock and pay the dividends for another’s life to such other and on such other’s death to distribute should pay dividends not only on the stock originally coming to his hands but also on stock coming to him by declaration of a scrip dividend.<sup>17</sup>

**§ 156. Id.: Governing Statutes.**—The directors of a stock corporation must not make dividends except from the surplus profits arising from the business of the corporation, nor divide, withdraw or in any way pay to the stockholders or any of them any part of the capital of the corporation, or reduce its capital stock, except as authorized by law; but it is legal for the corporation to divide and distribute the assets of the corporation remaining after payment of all its debts and liabilities upon its dissolution or the expiration of its charter, and to accept shares of its capital stock in complete or partial settlement of a debt owing to it which is deemed bad or doubtful by its board of directors.<sup>18</sup>

<sup>12</sup> *Williams v. Western Union Telegraph Co.*, 93 N. Y. 162 (1883).

<sup>13</sup> *Williams v. Western Union Telegraph Co.*, 93 N. Y. 162 (1883).

<sup>14</sup> *Commercial National Bank of Cleveland v. Syracuse Rapid Transit Ry. Co.*, 25 Misc. 36, 54 Supp. 429 (1898).

<sup>15</sup> *Bankers Trust Co. v. Dietz Co.*, 157 A. D. 594, 142 Supp. 847 (1913).

<sup>16</sup> *Merz v. Interior Conduit & Insulation Co.*, 87 Hun, 430, 34 Supp. 215 (1895); app. dismissed 151 N. Y. 638, 45 N. E. 1133.

<sup>17</sup> *Goldsmith v. Swift*, 25 Hun, 201 (1881).

<sup>18</sup> *St. Corp. L. § 28* (L. 1909, c. 61).

**§ 157. Id.: Declaration of, By Directors Only.**—"It is well settled that in the absence of statutory provisions, the granting of dividends from the profits of a trading corporation is in the discretion of the directors subject to the intervention of a court of equity for improper refusal."<sup>19</sup> "When a corporation has a surplus, whether a dividend shall be made, and if made, how much it shall be, and when and where it shall be payable, rest in the fair and honest discretion of the directors uncontrollable by the courts."<sup>20</sup> A stockholder cannot compel declaration of dividends from surplus determined by directors in good faith to be advantageously retained in the corporate business.<sup>1</sup> There is no reason why the exercise of the power and discretion of the directors of a corporation to declare dividends may not be controlled by agreement between the persons owning all its stock, so long as the interests of corporate creditors are not affected.<sup>2</sup>

**§ 158. Id.: By Court Compulsion.**—"While, as a general rule, courts of equity will not exercise visitatorial powers over corporations, and its officers are the sole judges as to the propriety of declaring dividends, and in this respect the court will not interfere with a proper exercise of their discretion, yet where the right to the dividend is clear and fixed by the contract, and requires the directors to take action before it can be asserted by a suit at law, and a restraint by injunction is essential to maintain the right of the stockholder, the interposition of a court of equity is a proper exercise of its power and should be upheld."<sup>3</sup> ". . . where, without doubt, the surplus of a corporation properly applicable to a dividend is ample for the purpose, and the directors, or a majority of them, acting in bad faith, and without reasonable cause, refuse to declare a dividend, the courts will interpose in favor of those stockholders who otherwise would be without remedy."<sup>4</sup> A stockholder must prove a dividend and a demand for it before he can maintain an action for it.<sup>5</sup> A complaint to recover unpaid dividends is demurrable if it do not aver that

<sup>19</sup> *Turnbloom v. International Paper Co.*, — Misc. — (1918); *N. Y. L. J.* Feb. 7, Sp. T. N. Y. Co.; quoting from *Wilson v. American Ice Co.*, 206 Fed. 736.

<sup>20</sup> *Williams v. Western Union Telegraph Co.*, 93 N. Y. 162 (1883).

<sup>1</sup> *McNab v. McNab & Harlin Mfg. Co.*, 62 Hun, 18, 16 Supp. 448 (1891); *aff'd* 133 N. Y. 687, 31 N. E. 627.

<sup>2</sup> *Kassel v. Empire Tinware Co.*, 178 A. D. 176, 164 Supp. 1033 (1917).

<sup>3</sup> *Boardman v. Lake Shore & Michigan Southern Ry. Co.*, 84 N. Y. 157 (1881).

<sup>4</sup> *Hiscock v. Lacy*, 9 Misc. 578, 30 Supp. 860 (1894).

<sup>5</sup> *Scott v. Central R. R. & Banking Co. of Ga.*, 52 Barb. 45 (1868).

the plaintiff was the owner of the stock at the time the dividends were declared, or became entitled to them by reason of a subsequent assignment.<sup>6</sup> An assignee of a transferee of stock, which, upon demand of the latter and presentation of all indicia of ownership, the corporation has refused to transfer on its books, need not, as a condition precedent to suit to recover dividends, make further demand of the corporation that the stock be transferred on its books to *his* name.<sup>7</sup>

§ 159. *Id.*: **From What.**—Dividends may only be declared from the surplus profits arising from the business of the corporation; and division, withdrawal or payment of any part of the capital or reduction of the capital stock is forbidden, except as authorized by law.<sup>8</sup> “The ‘capital stock’ . . . [in the statute prohibiting declaration of dividends except from surplus profits, etc.] does not mean share stock, but it means the property of the corporation contributed by its stockholders or otherwise obtained by it, to the extent required by its charter.”<sup>9</sup> By making illegal any dividend made by a corporation when its capital stock is impaired the legislature uses the word “dividend” in its “popular sense, that is, a sum of money distributed *pro rata* among the stockholders, without reference to the source from which it was taken or paid.”<sup>10</sup> Dividends cannot lawfully be made “of a hope based on an expectation of a future delivery at a favorable price of what is not yet in existence.”<sup>11</sup> If an amount greater than the par value of stock be paid therefor, the entire sum need not be held and distributed as capital, but only the amount at par value paid for each share, while the amount above par represents accumulated profits or surplus, distributable as such in dividends.<sup>12</sup> The gains or profits realized by a corporation from its active transactions, such as sale of its stock above its par value and the purchase and sale at an advance of various stocks, constitute profits and surplus which

<sup>6</sup> *Tepfer v. Ideal Gas & Electric Fixtures Co.*, 58 Misc. 396, 109 Supp. 664 (1908).

<sup>7</sup> *Robinson v. National Bank of Berne*, 95 N. Y. 637 (1884).

<sup>8</sup> *St. Corp. L.* § 28 (L. 1909, c. 61).

<sup>9</sup> *Williams v. Western Union Telegraph Co.*, 93 N. Y. 162 (1883); *R. S. c. 18*, part 1, tit. 4, § 2. See now *St. Corp. L.* § 28.

<sup>10</sup> *Osgood v. Layten*, 42 N. Y. (3 Keyes) 521 (1867); 4 *Edm. R. S.* p. 210. See now *St. Corp. L.* § 28.

<sup>11</sup> *Hutchinson v. Curtiss*, 45 Misc. 484, 92 Supp. 70 (1904). The dividend was based on calculations made months in advance of profits to be made on contracts to deliver at a future time a product not yet made from raw material, not yet purchased, with the aid of labor not yet expended.

<sup>12</sup> *Equitable Life Assurance Soc. v. Union Pacific R. R. Co.*, 212 N. Y. 360, L.R.A.1915D, 1052, 106 N. E. 92 (1914).

are available for dividends.<sup>13</sup> "Dividends, as the rule, are not payable out of the capital of a corporation; but only from the surplus profits arising from the business carried on . . . . When the property of a corporation has *accumulated* in excess of its chartered capital, the excess may be regarded and dealt with as constituting a surplus of profits; but not when the surplus capital arises simply from a reduction of capital."<sup>14</sup> The definition in the Century dictionary of "net profits" has been judicially adopted as a basis for determining if the statute prohibiting the making of dividends except from surplus or net profits has been violated, viz.: "What remains as the clear gain of any business after deducting the capital invested in the business, the expenses incurred in its management and the losses sustained by its operation."<sup>15</sup> A shareholder in a family, close corporation, given a salary as a substitute for dividends though doing no work will be compelled to account therefor if the company runs at a loss, as this then constitutes a division of non-existing profits.<sup>16</sup> The statutory provisions against directors paying to stockholders or reducing capital stock without legislative consent "were intended to prevent the division, distribution, withdrawal and reduction of the property of a corporation below the sum limited in its charter or articles of association for its capital, but not to prevent its increase above that sum. The purpose was to prevent the depletion of the property of the corporation, thereby endangering its solvency."<sup>17</sup> When all of the stock of a corporation is issued for patent rights, an agreement to transfer territorial rights therein is a reduction of capital forbidden by law and void.<sup>18</sup>

<sup>13</sup> Equitable Life Assurance Soc. v. Union Pacific R. R. Co., 212 N. Y. 360, L.R.A.1915D, 1052, 106 N. E. 92 (1914).

<sup>14</sup> Roberts v. Roberts-Wicks Co., 184 N. Y. 257, 3 L.R.A.(N.S.) 1034, 77 N. E. 13. (1906).

<sup>15</sup> Hutchinson v. Curtiss, 45 Misc. 484, 92 Supp. 70 (1904); People *ex rel.* Edison General Electric Co. v. Barker, 141 N. Y. 251, 36 N. E. 196 (1894); 1 R. S. 589, § 1; Gen. Mfg. Act, § 13 (L. 1848, c. 40). A corporation incorporated under the General Manufacturing Act (L. 1848, c. 40) is not subject to the inhibition against a corporation declaring dividends other than from

surplus profits (1 R. S., 589, § 1), as the only penalty imposed on a corporation so formed is that the trustees shall become liable for all debts contracted during their terms of office, thereby substituting for creditors the liability of the trustees for the impairment of capital.

<sup>16</sup> Williams v. McCleve, 168 A. D. 192, 154 Supp. 38 (1915).

<sup>17</sup> Williams v. Western Union Telegraph Co., 93 N. Y. 162 (1883); R. S. c. 18, part 1, tit. 4, § 2. See now St. Corp. L. § 28.

<sup>18</sup> Stevens v. Olus Manufacturing Co., 72 Misc. 508, 130 Supp. 22 (1911); *aff'd* 146 A. D. 951, 131 Supp. 1145; St. Corp. L. § 28.

**§ 160. Id.: Who Entitled To, In General.**—"Prima facie all stockholders, at any particular period, are equally interested in the property and business of a corporation. . . . When, therefore, the directors undertake to distribute among the stockholders any portion of the funds or property of a corporation—whether it be called profits or not—all the stockholders are entitled to an equal share in the fund, proportionate to their stock; whether they have been stockholders for a longer or a shorter period."<sup>20</sup> ". . . a stockholder in a corporation has an interest, in proportion to his stock, in all the corporate property, and has a right to share in any surplus of profits arising from its use and employment in the business of the company; and this legal right does not depend upon the question whether he is a stockholder of long standing or of recent date."<sup>1</sup> Directors cannot, in declaring dividends, discriminate between the stockholders for any reason whatever, but must treat all who are holders of stock before the dividends are declared alike.<sup>2</sup> It is sufficient, if uncontradicted, to entitle the holder of stock to dividends coming to a certain class of stock, to show that he held a certificate of the stock; that dividends were not paid; that the stock was to pay a dividend; and that there is no proof of any other stock of this description.<sup>3</sup> If directors do not limit the period for which a dividend is declared the officers can only pay to those who are stockholders on the corporate books at the time of its declaration.<sup>4</sup>

**§ 161. Id.: On Sale, Transfer or Assignment.**—"A share of stock represents the interest which the shareholder has in the capital and net earnings of the corporation. The interest is of an abstract nature, that is the shareholder cannot by any act of his, nor ordinarily by any act of the law, reduce it to possession. He can take, and is entitled to take, the surplus profits when a dividend has been declared by the proper officers of the corporation, and upon dissolution of the corpo-

<sup>20</sup> Jones v. Terre Haute & Richmond R. R. Co., 29 Barb. 353 (1859).

<sup>1</sup> Jones v. Terre Haute & Richmond R. R. Co., 57 N. Y. 196 (1874).

<sup>2</sup> Jones v. Terre Haute & Richmond R. R. Co., 57 N. Y. 196 (1874).

<sup>3</sup> Boardman v. Lake Shore & Michigan Southern Ry. Co., 84 N. Y. 157 (1881).

<sup>4</sup> Jones v. Terre Haute & Richmond R. R. Co., 29 Barb. 353 (1859).

The right as between life tenant and remainderman in dividends on distribution by corporations is discussed in notes in 12 L.R.A.(N.S.) 768; 35 L.R.A.(N.S.) 563; 50 L.R.A.(N.S.) 510; L.R.A.1916D, 211.

ration he can take his share of the assets thereof left for distribution, *pro rata*, among the shareholders. The corporation represents the whole body of the shareholders and to it, before a dividend has been declared, belong, *in solido*, all the assets in which the shareholders, as such, are interested. When a dividend has once been declared out of net earnings, the amount of such dividend is no longer a part of the assets of the company, but is appropriated or set apart for the shareholders. They receive credit for the dividends and the corporation simply holds them as their trustee. Therefore, before a dividend has been declared, a share of stock represents the whole interest which the shareholder has in the corporation, and when he transfers his stock he transfers his entire interest, and dividends subsequently declared, without reference to the source from which or the time during which the funds divided were acquired by the corporation, necessarily belong to the holder of the stock at the time of the declaration. But when the dividend has once been declared and credited to the shareholder, the amount thereof has been separated from the assets of the corporation and been appropriated to his use. It is then no longer represented by his stock, and is no longer an incident thereof; and hence when he transfers his stock he does not transfer his dividend, which remains subject to his control.”<sup>5</sup> “ . . . when a dividend is declared it belongs to the owner of the stock at that time, but . . . until such declaration the profits form part of the assets, and an assignment by a stockholder before such declaration carries with it his proportional share of the assets, including all undeclared dividends. This is so in regard to dividends declared, but which are payable at a future time, and such dividends belong to the owner of the stock when declared. . . . In the absence, therefore, of any provision in a contract of sale and purchase of stock, outside of and not subject to the rules of the Stock Exchange, the law declares that such a contract gives the dividends to the owner of the shares when the dividends were declared.”<sup>6</sup> A vendee of stock is entitled to all dividends thereon declared after the sale even though the transfer has not been recorded.<sup>7</sup> The purchaser under a contract for sale of corporate stocks by which the seller assumes to have them and agrees to deliver them on a certain date is entitled to dividends accruing between the sale and

<sup>5</sup> *Jermain v. Lake Shore and Michigan Southern Ry. Co.*, 91 N. Y. 483 (1883).

<sup>6</sup> *Hopper v. Sage*, 112 N. Y. 530, 20 N. E. 350 (1889).

<sup>7</sup> *Tepfer v. Ideal Gas & Electric Fixtures Co.*, 58 Misc. 396, 109 Supp. 664 (1908).

delivery.<sup>8</sup> A *bona fide* purchaser of stock, "dividend on," upon the New York Stock Exchange, is not entitled to dividends declared, but not payable at the time of such purchase, as against the owner at the time the dividend was declared who had endorsed an irrevocable power of attorney upon the stock certificate and pledged the stock for a time loan with parties who fraudulently and without notice to him had, before the loan was due, sold the stock upon the street.<sup>9</sup> A transfer of the stock of a corporation carries with it to the transferee its proportionate share of the assets of the company including dividends which have not been declared and all the incidents and advantages which appertain to the rights of a shareholder; and no separate and distinct assignment of the dividends is essential.<sup>10</sup> One coming to hold stock entitled to dividends, is entitled to those then unpaid for any period of time prior to his becoming holder of the stock, as well as to those for any period thereafter until he ceases to hold the stock, provided such dividends are none of them declared save while he is holder of the stock.<sup>11</sup> One holding stock at the time a dividend thereon is declared though to be paid from past earnings sometime in the future at the discretion of an agent of the corporation to whom the stock is later transferred but before fixing by him of the date of payment is entitled to the dividend rather than such agent.<sup>12</sup> Even though there be a special contract by a company with the holders of its stock to declare dividends, that does not alter or change the effect of the contract by which a transferee of the stock holds it and becomes entitled to dividends thereon; for in all cases the dividends follow the stock and belong to the owner of the stock at the time the dividends are declared.<sup>13</sup> The facts that divi-

<sup>8</sup> Currie v. White, 45 N. Y. 822 (1871).

<sup>9</sup> Warner v. Watson & Gibson, 4 Misc. 12, 23 Supp. 922 (1893).

<sup>10</sup> Boardman v. Lake Shore & Michigan Southern Ry. Co., 84 N. Y. 157 (1881).

<sup>11</sup> Boardman v. Lake Shore & Michigan Southern Ry. Co., 84 N. Y. 157 (1881).

<sup>12</sup> Hill v. Lewichawanick Co., 8 Hun, 459 (1876); aff'd 71 N. Y. 593. "The transaction of sale . . . was a private one . . . sales of stock made at the board of brokers in this city at any time before the day fixed for the closing of the

books of transfer of the corporation or company declaring a dividend payable at a future day, carry with them the dividend so declared, and the price is regulated accordingly. After the books are closed, the sales are understood to be ex-dividend, and the price is correspondingly affected, by the fact that the seller retains and is to collect the dividend. Those usages and rules have nothing to do with the case . . ."

<sup>13</sup> Boardman v. Lake Shore & Michigan Southern Ry. Co., 84 N. Y. 157 (1881).

dends, the subject of a corporate guaranty of payment, are payable before a transfer of stock, and that sufficient corporate net earnings exist before such transfer to make the guaranteed dividends, do not entitle the transferee (but the transferee) to the dividends if they are not declared before the transfer and the guaranty of their payment is repudiated by the corporation until after such transfer.<sup>14</sup> "The circumstance that the directors have adopted some particular day as the close of the corporate fiscal year, or that special days are adopted for declaring dividends, or that it is found convenient to close the transfer books for any purpose does not, in any way, impair the legal rights of a stockholder to share in dividends subsequently declared, although the closing of the books would, to some extent, embarrass the transfer of stock."<sup>15</sup> " . . . when a dividend is made payable on a day subsequent to the day on which it is formally declared it belongs to the stockholder who owns the share on the day the dividend is declared and not to the owner at the time it is payable."<sup>16</sup> One entitled to convert his bonds into stock, who mails them for that purpose so that they do not reach the corporation's office till after its transfer books have been closed preparatory to making usual semi-annual dividends, but who has mailed his certificate for stock before the declaration by the directors of such dividends, is entitled to his *pro rata* share thereof though the resolution declaring them do so on the company's business and stock as they stood on the date of the closing of the books.<sup>17</sup>

§ 162. **Id.: On Pledge, Death or Marriage.**—Dividends declared on pledged stock after the pledge belong to the pledgee as an increment of the thing pledged, to be accounted for later.<sup>18</sup> A corporation is justified in paying to the duly appointed personal representative of a deceased stockholder of record on its books dividends due on such stock, even without production of a certificate of shares of such stock in the name of the decedent.<sup>19</sup> The question of the efficacy of

<sup>14</sup> *Jermain v. Lake Shore & Michigan Southern Ry. Co.*, 91 N. Y. 483 (1883).

<sup>15</sup> *Jones v. Terre Haute & Richmond R. R. Co.*, 57 N. Y. 196 (1874).

<sup>16</sup> *Tepfer v. Ideal Gas & Electric Fixtures Co.*, 58 Misc. 396, 109 Supp. 664 (1908).

<sup>17</sup> *Jones v. Terre Haute & Richmond R. R. Co.*, 57 N. Y. 196 (1874).

On right to dividends on transfer of stock see notes in 45 L.R.A. 392; L.R.A.1917B, 326.

<sup>18</sup> *Booth v. Consolidated Fruit Jar Co.*, 62 Misc. 252, 114 Supp. 1000 (1909).

<sup>19</sup> *Brisbane v. Delaware, Lackawanna & Western R. R. Co.*, 94 N. Y. 204 (1883).

payment to a husband of dividends on stock held by his wife in order to discharge the corporation from liability therefor is to be determined by the law of the State in which the contract to pay them was made, and they were declared and payable, as distinguished from the law of the State of their domicile.<sup>20</sup>

§ 163. **Id.: Preferred or Guaranteed Stockholders.**—Preferred stockholders entitled to preferred dividends annually of a certain per cent. and “to no other or further share of the profits” cannot claim more than their per cent. of dividends, even though resulting from profitable dealing by the corporation in stocks which it was not organized to deal in.<sup>1</sup> A charter provision for cumulative dividends to preferred stockholders out of surplus profits before payment of any dividends to common stockholders is a contract binding on all stockholders, and such dividends are a charge upon the profits for all time, with accrued interest; so that on reduction of the company’s capital stock the preferred stockholders, though holding a less number of shares, are still entitled to be paid arrears of dividends on shares they had previously held from any dividends declared after the reduction before the common stockholders could receive any dividends, if such dividends were declared from surplus profits, but not if declared from a surplus of capital brought about by the reduction, as to which all stockholders share alike.<sup>2</sup> If a stock certificate alone entitle the holder to dividends at a stated rate payable at stipulated periods from net earnings and a guaranty thereon assure payment of the dividends as provided, it necessarily follows that, in the event that such earnings should not reach that amount or at any time failed, the dividends must afterward be paid from the net earnings when earned and received by the company; and “the reasonable and fair interpretation of the contract is, that the dividends were not only to be preferred but, being guaranteed, were cumulative and a specific charge upon the accruing profits, to be paid as arrears, before any other dividends were divided upon the common stock.”<sup>3</sup> Interest should be allowed a holder of preferred stock on dividends passed by the corporation to which he is entitled if

<sup>20</sup> *Graham v. First Nat. B'k*, 84 N. Y. 393 (1881).

<sup>1</sup> *Equitable Life Assurance Soc. v. Union Pacific R. R. Co.*, 212 N. Y. 360, L.R.A.1915D, 1052, 106 N. E. 92 (1914).

<sup>2</sup> *Roberts v. Roberts-Wicks Co.*, 184 N. Y. 257, 3 L.R.A.(N.S.) 1034, 77 N. E. 13 (1906).

<sup>3</sup> *Boardman v. Lake Shore & Michigan Southern Ry. Co.*, 84 N. Y. 157 (1881).

the directors in violation of the contract with him pay out dividends on common stock before paying him his dividends.<sup>4</sup>

**§ 164. Id.: Under Specific Contracts.**—A clause in a stock certificate that dividends shall be paid from net earnings at a certain time or at certain regulated periods does not mean that the holder is entitled to the dividends only if there be net earnings available therefor when such time and periods roll around.<sup>5</sup> An agreement by individuals that, in the event a corporation in which another holds stock fails to declare dividends at a certain rate yearly, they will pay the money necessary to make up such dividends, is not within the statute of frauds.<sup>6</sup> Payment by one of the purchase price of corporate stock is sufficient consideration for an agreement by persons interested in the corporation to make up to him dividends at a certain rate if not paid by the company.<sup>7</sup> A certificate by a corporation that one is entitled to a stated sum representing undivided earnings on a certain certificate of its stock, "this dividend . . . payable at the pleasure of the company" on surrender thereof and of such certificate of stock, represents an obligation of the company to pay the stated sum of money, the time at which payment was to be made being left to its determination; and the obligation being absolute, payment must be made within a reasonable time, at the expiration of which the holder may sue to recover payment, after due demand and tender of the certificate and the stock certificate—particularly if the corporation has paid similar certificates to their holders.<sup>8</sup> Under a stock certificate providing that the holder is entitled to dividends whenever in any year the net earnings, after payment of all interest charges, are sufficient for the payment thereof, the directors may legally declare a lump dividend for four years past, although the certificate stipulate that the dividends shall not be cumulative.<sup>9</sup> In an action for the recovery of an undeclared dividend

<sup>4</sup> Boardman v. Lake Shore & Michigan Southern Ry. Co., 84 N. Y. 157 (1881).

The question of rights and preferences of preferred shareholders to dividends, is discussed in a note in 27 L.R.A. 143.

On right to have earnings applied to payment of dividends on preferred stock of previous years, see note 3 L.R.A.(N.S.) 1034.

<sup>5</sup> Boardman v. Lake Shore & Michigan Southern Ry. Co., 84 N. Y. 157 (1881).

<sup>6</sup> Crook v. Scott, 65 A. D. 139, 72 Supp. 516 (1901); aff'd 174 N. Y. 520, 66 N. E. 1106.

<sup>7</sup> Crook v. Scott, 65 A. D. 139, 72 Supp. 516 (1901); aff'd 174 N. Y. 520, 66 N. E. 1106.

<sup>8</sup> Billingham v. Gleeson Mfg. Co., 101 A. D. 476, 91 Supp. 1046 (1905); aff'd 185 N. Y. 571, 78 N. E. 1099.

<sup>9</sup> Wood v. Lary, 47 Hun, 550; dism'd 124 N. Y. 83, 26 N. E. 338.

upon a corporation's preferred stock, "the plaintiffs cannot recover unless they prove that the net earnings of the company have been large enough to pay them a dividend, according to the agreement by which they became preferred stockholders"; and it is not necessary that the common stockholders be parties to the action, though the court has discretion to have them in.<sup>10</sup>

**§ 165. Id.: When Entitled To.**—"A shareholder in a corporation has no legal title to the property or profits of the corporation until a division is made or a dividend declared (*citations*). He acquires no right or title to the accumulated gains from the revenues of the corporation, which entitles him to sue for his aliquot share of dividends. Until divided by the directors or trustees of the corporation, all of its property is held in joint ownership by the incorporators, and no several right is possessed by the individual stockholder, until after a dividend is declared. The declaration of a dividend from a surplus, or the division of profits is within those discretionary powers of the directors or trustees, which will not be controlled by the courts."<sup>11</sup> "A shareholder in a corporation has no legal title to the property or profits of the corporation until a division is made."<sup>12</sup> ". . . before a dividend is declared all the property of the corporation belongs, in fact, jointly to all the stockholders, the legal title being in the corporate body and its affairs managed by the directors as trustees for the stockholders. After a dividend is declared, each stockholder has a right in severalty to his particular proportion; and this right cannot . . . be abridged by any discrimination of the directors in any form whatever."<sup>13</sup>

<sup>10</sup> *Thompson v. Erie R. R. Co.*, 45 N. Y. 468 (1871).

On right of holder of preferred stock, in absence of express statutory provision or agreement on the point, to share in earnings, in addition to the stipulated dividends, see note in 24 L.R.A.(N.S.) 1079.

<sup>11</sup> *Beveridge v. New York Elevated R. R. Co.*, 112 N. Y. 1, 2 L.R.A. 648, 19 N. E. 489 (1889).

<sup>12</sup> *Hyatt v. Allen*, 56 N. Y. 553 (1874). Defendant agreed that

dividends and profits on certain stock to a certain date should be paid plaintiffs. Though an increase in the company's assets came about before that date, yet as no dividend was declared, plaintiffs could not share therein as the profits resulting from such increase were the company's and not the stockholder's.

<sup>13</sup> *Jones v. Terre Haute & Richmond R. R. Co.*, 57 N. Y. 196 (1874).

## CHAPTER V.

### STOCKHOLDERS.

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§ 166. **Stockholders: Definitions, Distinctions and Nature.**—

One is constituted a stockholder in a corporation by subscription to its stock; it is not necessary that a certificate for stock

be issued to him.<sup>1</sup> "It is often said that the great distinction between stockholders and bondholders is that stockholders are partners in the enterprise, while bondholders are creditors."<sup>2</sup> At the time of apportionment by corporate trustees of shares according to a certificate of incorporation, if the corporation then had property or valuable rights, or as soon as obtained, every person to whom shares are assigned acquires a proprietary interest in the company and becomes a stockholder.<sup>3</sup>

**§ 167. Id.: Powers, Privileges and Duties, in General; Miscellaneous.**—The certificate of incorporation of any corporation may contain any limitation upon the powers of its stockholders which does not exempt them from the performance of any obligation or the performance of any duty imposed by law.<sup>4</sup> "As a general rule stockholders cannot act in relation to the ordinary business of a corporation. The body of stockholders have certain authority conferred by statute which must be exercised to enable the corporation to act in specific cases, but except for certain authority conferred by statute, which is mainly permissive or confirmatory, such as consenting to the mortgage, lease or sale of real property of the corporation, they have no express power given by statute. They are not by any statute in this State given general power of initiative in corporate affairs. Any action by them relating to the details of the corporate business is necessarily in the form of an assent, request or recommendation. Recommendations by a body of stockholders can only be enforced through the board of directors, and indirectly by the authority of the stockholders to change the personnel of the directors at a meeting for the election of directors. Such action may or may not result in securing adequate, corporate action with reference to illegal or fraudulent acts . . . . Although it is said that the authority of stockholders in the management of business corporations is exhausted when they elect the directors (*citation*) nevertheless it is generally recognized that certain acts of boards of directors that are legal, but voidable, can be ratified and confirmed by a majority of the body of stockholders as the ultimate parties in interest and

<sup>1</sup> *Beals v. Buffalo Construction Co.*, 49 A. D. 589, 63 Supp. 635 (1900).

<sup>2</sup> *Smith v. Westchester Bronxville Realty Co.*, 78 Misc. 75, 137 Supp. 690 (1912); *aff'd* 156 A. D. 920, 141 Supp. 1147.

<sup>3</sup> *Burr v. Wilcox*, 22 N. Y. 551

(1860). Determining the liability of one as a stockholder for debts of a corporation to an amount equal to his holdings under Gen. Mfg. Act, L. 1848, c. 40, § 10.

<sup>4</sup> Gen. Corp. L. § 10 (L. 1909, c. 28).

thus make them binding upon the corporation (*citation*). Such recognized authority in stockholders to ratify and confirm the acts of boards of directors is confined to acts voidable by reason of irregularities in the make up of the board or otherwise or by reason of the directors or some of them being personally interested in the subject-matter of the contract or act, or for some other similar reason which makes the action of the directors voidable. No such authority exists in case of an act of the board of directors which is prohibited by law or which is against public policy (*citation*). In any case where action is taken by stockholders confirming and ratifying a fraud and misapplication of the funds of the corporation by the directors or others the action is binding only by way of estoppel upon such stockholders as vote in favor of such approval.”<sup>5</sup> “While he [a stockholder] does not own and cannot dispose of any specific property of the corporation, yet he and his associates own the corporation itself, its charter, franchises and all rights conferred thereby, including the right to increase the stock. He has an inherent right to his proportionate share of any dividend declared, or of any surplus arising upon dissolution, and he can prevent waste or misappropriation of the property of the corporation by those in control. Finally, he has the right to vote for directors and upon all propositions subject by law to the control of the stockholders and this is his supreme right and main protection.”<sup>6</sup> “The equal and ratable distribution of the assets and the equal and ratable enforcement of the liabilities of a company, according to the interest of shareholders therein, is equitable and should be enforced, so that each shareholder may receive an equal proportion of the assets and contribute only an equal proportion to discharge its liabilities. This principle . . . applies as well to the proceeds of calls as to property already in hand. In other words, shareholders have equal rights and must bear equal burdens.”<sup>7</sup> Any stockholder not party to arrangements by directors of a corporation for virtually suspending the functions for which it is incorporated may complain and demand restoration.<sup>8</sup> When the charter appoints the corporation’s directors to manage its affairs, its stockholders as such cannot make a lease of its property, even though they be also

<sup>5</sup> *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 51 L.R.A. (N.S.) 112, 99 N. E. 138 (1912).

<sup>6</sup> *Stokes v. Continental Trust Co.*, 186 N. Y. 285, 12 L.R.A. (N.S.) 969, 78 N. E. 1090 (1906).

<sup>7</sup> *Bank of China, etc., v. Morse*, 168 N. Y. 458, 56 L.R.A. 139, 61 N. E. 774 (1901).

<sup>8</sup> *Jacobus v. Diamond Soda Water Mfg. Co.*, 94 A. D. 366, 88 Supp. 302 (1904).

directors.<sup>9</sup> While directors may not properly vote to discontinue an action by their corporation in which they are personally interested, a majority of the stockholders may.<sup>10</sup> "The admissions of a member of a corporation aggregate are not competent to charge the corporation unless they are made in relation to a transaction in which such member is the authorized agent of the corporation."<sup>11</sup> One not a stockholder who holds a proxy and is requested by the president (under arrest) to call a stockholders' meeting to order may do so.<sup>12</sup> One making a loan of shares of stock in a corporation to be returned or paid for at the borrower's option and delivering a certificate for the shares endorsed in blank is not entitled to the same certificate back but must be satisfied with any certificate for the same number of shares.<sup>13</sup> A transfer of corporate property which does not purport to be a corporate act is insufficient to effect a transfer even though made by one who owns substantially all of the corporation's stock.<sup>14</sup> On application by a stockholder he will be permitted to come in and defend in behalf of his company by an attorney of his own selection an action in which judgment has been had against it (and which is opened so he can defend), when collusion in obtaining the judgment is shown in directors to the special injury of such stockholder.<sup>15</sup> The power of stockholders to control the expenditure by directors of their corporation of its funds in co-operation with other corporations or persons to help win the World War is hereinafter stated.<sup>15a</sup>

**§ 168. Id.: By Unanimous Consent Without Meeting.—**

"Certainly, what the stockholders might have done by the

<sup>9</sup> *Couro v. Port Henry Iron Co.*, 12 Barb. 27 (1851).

<sup>10</sup> *Socorro Mountain Mining Co. v. Preston*, 17 Misc. 220, 40 Supp. 1040 (1896).

<sup>11</sup> *Simmons v. Sisson*, 26 N. Y. 264 (1863).

<sup>12</sup> *People v. Albany & Susquehanna R. R. Co.*, 55 Barb. 344 (1869).

<sup>13</sup> *Barclay v. Culver*, 30 Hun, 1 (1883); *Kelly v. Mariposa Land & Mining Co.*, 4 Hun, 632 (1875). There is no opinion, but only this headnote: "The plaintiff owned, and held as security, a large quantity of the stock of the M. L. & M. Co., a corporation . . . of this State, to which a large tract of land had been conveyed, constituting the bulk of its property. A new com-

pany was afterward organized in California, to which it was proposed to convey all the property of the former corporation. The plaintiff, claiming that such transfer was made with the intent to render his stock worthless, brought this action to restrain the defendant from carrying such transfer into effect, and to secure the appointment of a receiver. *Held*, that a temporary injunction was properly granted and a receiver appointed."

<sup>14</sup> *Palmer v. Ring*, 113 A. D. 643, 99 Supp. 290 (1906).

<sup>15</sup> *Matter of Virgil*, 26 Misc. 320, 57 Supp. 58 (1899); *Gen. Corp. L.* § 28 (L. 1892, c. 687).

<sup>15a</sup> See § 284, *infra*.

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requisite vote, at a formal meeting, they might do by agreement between themselves, to which the assent of every one was obtained.”<sup>16</sup> Stockholders of a corporation formed, in which none but themselves ever were interested, which never did any business, and which never had any creditors may *inter sese* agree to release each from their subscriptions to stock.<sup>17</sup> Whenever under the provisions of any of the corporate laws a corporation is authorized to take any action after notice to its members or after the lapse of a prescribed period of time, such action may be taken without notice and without the lapse of any period of time, if such action be authorized or approved, and such requirements be waived in writing by every member of such corporation, or by attorney thereunto authorized.<sup>18</sup>

**§ 169. Id.: To Vote at Meetings.**—Every corporation has power to make by-laws not inconsistent with any existing law for the calling of meetings of its members.<sup>19</sup> Every corporation has power to make by-laws not inconsistent with any existing law fixing the amount of stock which must be represented at meetings of the stockholders in order to constitute a quorum.<sup>20</sup> Unless otherwise provided in the certificate of incorporation, every stockholder of record of a stock corporation is entitled at every meeting of the corporation to one vote for every share of stock standing in his name on the books of the corporation.<sup>1</sup> The certificate of incorporation of any stock corporation may provide that at all elections of directors of such corporation each stockholder shall be entitled to as many votes as shall equal the number of his shares of stock multiplied by the number of directors to be elected and that he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them, as he may see fit.<sup>2</sup> The stockholders of a stock corporation, by a by-law adopted by a vote (a) at any annual meeting, or (b) at any special meeting duly called for such purpose, may prescribe a period,

to become a shareholder in a corporation, see note in 46 L.R.A. 618.

<sup>16</sup> *Elyea v. Lehigh Salt Mining Co.*, 169 N. Y. 29, 61 N. E. 992 (1901). Selling out of corporation, all creditors being taken care of.

<sup>17</sup> *Non-Electric Fibre Mfg. Co. v. Peabody*, 21 A. D. 247, 47 Supp. 677 (1897).

<sup>18</sup> Gen. Corp. L. § 42 (L. 1909, c. 28).

<sup>19</sup> Gen. Corp. L. § 11 (L. 1909, c. 28).

<sup>20</sup> Gen. Corp. L. § 11 (L. 1909, c. 28).

<sup>1</sup> Gen. Corp. L. § 23 (L. 1909, c. 28).

<sup>2</sup> Gen. Corp. L. § 24 (L. 1909, c. 28). “The stockholders of a corporation heretofore formed, who, by the provisions of laws existing on April thirtieth, eighteen hundred and ninety-one, were entitled to the exercise of such right, may hereafter exercise such right according to the provisions of this section.”

not exceeding forty days prior to meetings of the stockholders, during which no transfers of stock on the books of the corporation may be made.<sup>3</sup> Unless a certificate of incorporation or by-laws make provision for the manner of voting at a stockholders' meeting, each share of stock, as distinguished from each person holding one or more shares, is entitled to a vote, under a statute providing that all shares standing on the corporation's books shall be voted on by him in whose name they stand.<sup>4</sup> A statute giving every stockholder the right to one vote for every share of stock held by him for ten days preceding an election gives such vote only to such stockholder as is shown on the corporate books by transfer made on such books ten days before the election.<sup>5</sup> The books and papers containing the record of membership of the corporation must be produced at any meeting of its members upon the request of any member; and if the right to vote at any such meeting is challenged, the inspectors of election or other persons presiding thereat, must require such books, if they can be had, to be produced as evidence of the right of the person challenged to vote at such meeting, and all persons who may appear from such books to be members of the corporation may vote at such meeting in person, subject to the provisions of the General Corporation Law.<sup>6</sup> Every member of a corporation offering to vote at any election or meeting of the corporation must, if required by an inspector of election or other officer presiding at such election or meeting, or by any other member present, take and subscribe the following oath: "I do solemnly swear that in voting at this election I have not, either directly, indirectly or impliedly received any promise or any sum of money or any thing of value to influence the giving of my vote or votes at this meeting or as a consideration therefor"; and the inspectors or persons presiding at the election may administer such oath and all such oaths must be filed in the office of the corporation.<sup>7</sup> In the absence at a special meeting of the members of a corporation, called by the directors

<sup>3</sup> Gen. Corp. L. § 23 (L. 1909, c. 28).

<sup>4</sup> *Matter of Rochester District Telegraph Co.*, 40 Hun, 172 (1886); 2 R. S. (7th ed.) 1535.

<sup>5</sup> *Matter of Glen Salt Co.*, 17 A. D. 234, 45 Supp. 568 (1897); *aff'd* 153 N. Y. 688, 48 N. E. 1104; Gen. Corp. L. § 20 (L. 1892, c. 687), see now § 23; St. Corp. L. B. C. N. Y.—12

§ 29 (L. 1892, c. 688), see now § 32: "As between the holder of the certificate and his assignee the transfer may operate to pass the title, but it does not determine the right of voting at elections."

<sup>6</sup> Gen. Corp. L. § 23 (L. 1909, c. 28).

<sup>7</sup> Gen. Corp. L. § 27 (L. 1909, c. 28).

for the purpose of electing directors because directors were not elected on the day designated in the by-laws or by law, of the books of the corporation showing who are members thereof, each person, before voting, must present his sworn statement setting forth (1) that he is a member of the corporation; (2) the number of shares of stock owned by him and standing in his name on the books of the corporation; and (3), if known to him, the whole number of shares of stock of the corporation outstanding, and on filing such statement he may vote as a member of the corporation on the shares appearing in such statement to be owned by him and standing in his name on the books of the corporation.<sup>8</sup> Any person is guilty of a misdemeanor who acts as an inspector of election of any meeting of stockholders or bondholders of a stock corporation and violates an oath taken by him in pursuance of law as such inspector, or violates the provisions of an oath required by law to be taken by him as such inspector, or is guilty of any dishonest or corrupt conduct as such inspector.<sup>9</sup> No member of a corporation must sell his vote to any person for any sum of money or anything of value.<sup>10</sup> Any person is guilty of a misdemeanor who, being entitled to vote at any meeting of the stockholders of a stock corporation, sells his vote or issues a proxy to vote to any person for any sum of money or thing of value, except as expressly authorized by law.<sup>11</sup> "A shareholder has a legal right at a meeting of the shareholders to vote upon a measure, even though he has a personal interest therein separate from other shareholders. In such a meeting each shareholder represents himself and his own interests solely and he in no sense acts as a trustee or representative of others. The law of self interest has at such time very great and proper sway."<sup>12</sup> One corporation becoming a stockholder in another through acquisition pursuant to statute of stock of the latter possesses and may exercise in respect of such stock all the rights, powers and privileges of individual owners or holders of such stock.<sup>13</sup> That part of corporate stock paid for by a subscriber in full, constituting a portion

<sup>8</sup> Gen. Corp. L. § 31 (L. 1909, c. 28): "The inspectors shall return and file such statements, with a certificate of the result of the election, verified by them, in the office of the clerk of the county in which such election is held, and the persons so elected shall be the directors of the corporation."

<sup>9</sup> Penal L. § 668 (L. 1909, c. 88).

<sup>10</sup> Gen. Corp. L. § 23 L. 1909, c. 28).

<sup>11</sup> Penal L. § 668 (L. 1909, c. 88).

<sup>12</sup> *Gamble v. Queens Co. Water Co.*, 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201 (1890).

<sup>13</sup> St. Corp. L. § 53 (L. 1909, c. 61). See §§ 415 and 416 of this book for further discussion.

of the whole amount subscribed for by him, the whole amount of which was issued to a third person in trust for him till he paid the amount of his subscription unpaid upon the residue, may properly be voted by the trustee in an election of directors.<sup>14</sup> Pending the determination by trial of the ownership of corporate stock held by one as trustee for another the latter may in this State enjoin the former from voting or otherwise dealing with it to his prejudice, even though both be non-residents and the corporation be a foreign one.<sup>15</sup> No rule of law is offended by a testamentary restriction on trustees to vote stock in a corporation mapped out by will.<sup>16</sup> In the note is a recent statute regulating the voting of stock by fiduciaries.<sup>16a</sup> Persons holding stock as members of a reorganization committee which stands on the corporate books, in their names as such committee, may vote upon it, especially if the agreement under which they act gives them such voting power.<sup>17</sup>

**§ 170. Id.: To Vote by Proxy or Voting Trust.**—Every stockholder in a corporation entitled to vote at any meeting

<sup>14</sup> Matter of Conlon Electric Washer Co., Inc., 169 A. D. 192, 154 Supp. 366 (1915).

<sup>15</sup> Harper v. Smith, 93 A. D. 608, 87 Supp. 516 (1904).

<sup>16</sup> Elger v. Boyle, 69 Misc. 273, 126 Supp. 946 (1910).

<sup>16a</sup> "Fiduciaries, whether appointed by last will and testament or by the court, shall have the same right and power, either in person or by proxy, at all corporate meetings to vote any and all shares of stock held by them in a fiduciary capacity in any corporation organized under the laws of this state, as the deceased or legal owner thereof had in his lifetime. And where such stock is registered on the books of such corporation in the name of, or has passed by operation of law or by virtue of any last will and testament, to more than two fiduciaries, and dispute shall arise among them, the said shares of stock shall be voted by a majority of such fiduciaries, and in such manner and for such purposes as such majority shall authorize, direct or desire the same to be voted. If the number of fiduciaries shall be even and they shall be equally di-

vided upon the question of voting such stock, it shall be lawful for the court having jurisdiction of their accounts, upon petition filed by any of such fiduciaries or by any party in interest, to direct the voting of such stock in the manner which, in the opinion of such court, will be for the best interests of the parties beneficially interested in the stock. Fiduciaries, whether appointed by last will and testament, filed in any court of this state, or by any court of this state, shall have all the foregoing rights and powers, subject to the foregoing limitations, to vote any and all shares of stock, held by them in a fiduciary capacity, in any corporation, organized under the laws of any other state, provided nothing in the laws of the state, under which the corporation was organized, prohibits the exercise of such rights and powers."

<sup>17</sup> Haines v. Kinderhook & Hudson Ry., 33 A. D. 154, 53 Supp. 368 (1898).

On right of holders of preferred stock to vote at corporate meetings. see note in 2 L.R.A.(N.S.) 121.

thereof may so vote by proxy, which must be executed in writing by either the member himself or his duly authorized attorney and is not valid after the expiration of eleven months from the date of its execution unless the member executing it has specified therein the length of time it is to continue in force (which must be for some limited period); and every such proxy is revocable at the pleasure of the person executing it.<sup>18</sup> A stockholder may by agreement in writing transfer his stock to any person or persons for the purpose of vesting in him or them the right to vote thereon for a time not exceeding five years upon terms and conditions stated, pursuant to which such person or persons shall act; and every other stockholder, upon his request therefor, may by a like agreement in writing also transfer his stock to the same person or persons and thereupon may participate in the terms, conditions and privileges of such agreement; and the certificates of stock so transferred must be surrendered and cancelled and certificates therefor issued to such transferee or transferees in which it shall appear that they are issued pursuant to such agreement; and in the entry of such transferee or transferees as owners of such stock in the proper books of the corporation that fact must also be noted, and thereupon he or they may vote upon the stock so transferred during the time in such agreement specified; and a duplicate of every such agreement must be filed in the office of the corporation where the principal business is transacted and be open daily during business hours to the inspection of any stockholder.<sup>19</sup> Any person offering to vote as proxy for any other person must present his proxy and, if so required, take and subscribe the following oath: "I do solemnly swear that I have not, either directly, indirectly or impliedly, given any promise or any sum of money or any thing of value to induce the giving of a proxy to me to vote at this election, or received any promise or any sum of money or any thing of value to influence the giving of my vote at this meeting, or as a consideration therefor;" and the

<sup>18</sup> Gen. Corp. L. § 26 (L. 1909, c. 28): "but a corporation having no capital stock may prescribe in its by-laws the persons who may act as proxies for members, and the length of time for which proxies may be executed." *Manson v. Curtis*, — N. Y. — (1918); N. Y. L. J., May 14, p. 533. A test to determine if an agreement is a voting trust is to ask whether under it each party retains the voting power of

the shares owned or to be owned by him; if he does, no voting trust is created. "A voting trust agreement accumulates in the hands of a person or persons shares of several owners, in trust for the purpose of voting them, in order, through the selection and election of directors, to control the corporate business and affairs."

<sup>19</sup> Gen. Corp. L. § 25 (L. 1909, c. 28).

inspectors or persons presiding at the election may administer such oath, and all such oaths and proxies must be filed in the office of the corporation.<sup>20</sup> The books and papers containing the record of membership of the corporation must be produced at any meeting of its members upon the request of any member; and if the right to vote at any such meeting is challenged, the inspectors of election, or other persons presiding thereat, must require such books, if they can be had, to be produced as evidence of the right of the person challenged to vote at such meeting, and all persons who may appear from such books to be members of the corporation may vote at such meeting by proxy subject to the provisions of the General Corporation Law.<sup>1</sup> No member of a corporation must issue a proxy to vote to any person for any sum of money or any thing of value.<sup>2</sup> Any person is guilty of a misdemeanor who, being entitled to vote at any meeting of the stockholders of a stock corporation, sells his vote, or issues a proxy to vote to any person for any sum of money or thing of value, except as expressly authorized by law.<sup>3</sup> The record holder of stock (1) held by him as security or (2) which actually belongs to another, upon demand therefor and payment of necessary expenses thereof, must issue to such pledger or actual owner of such stock a proxy to vote thereon, except in cases (a) of express trust, or (b) in which other provision has been made by written agreement between the parties.<sup>4</sup> A transfer, absolute on its face, by the owner of corporate stock to another, designed only to confer upon the latter the power to vote thereon for a period of years is, in substance, a proxy given for a consideration, and is void.<sup>5</sup> It seems that an agreement between stockholders perpetually to give certain of themselves by proxy from others the control of the corporation might be void.<sup>6</sup> A by-law declaring that a stockholder's proxy must himself be a stockholder to be entitled to vote as such for the former is void if the corporation is created under a law which simply enacts "that the

<sup>20</sup> Gen. Corp. L. § 27 (L. 1909, c. 28).

<sup>1</sup> Gen. Corp. L. § 23 (L. 1909, c. 28).

<sup>2</sup> Gen. Corp. L. § 23 (L. 1909, c. 28).

<sup>3</sup> Penal L. § 668 (L. 1909, c. 88).

<sup>4</sup> Gen. Corp. L. § 23 (L. 1909, c. 28).

<sup>5</sup> Matter of Glen Salt Co., 17 A. D. 234, 45 Supp. 568 (1897); *aff'd* 153 N. Y. 688, 48 N. E. 1104; Gen.

Corp. L. § 20 (L. 1892, c. 687); see now § 23.

<sup>6</sup> Brown v. Britton, 41 A. D. 57, 58 Supp. 353 (1899). The owners of the majority stock agreed to appoint one of themselves proxy for any meeting some of them could not attend, the proxy to be irrevocable for three years; and not to sell his holdings for three years except on approval of all such majority stockholders; and to give preference *inter sese* on sale by any of his stock.

election shall be made by such of the stockholders as shall attend for that purpose, either in person or by proxy.”<sup>7</sup> A stockholder cannot issue a proxy coupled with an interest; and every proxy issued by a stockholder is revocable.<sup>8</sup>

**§ 171. Id.: To Ratify Unauthorized Acts of Officers and Directors.**—“The stockholders are the equitable owners of the corporate property, and if the officers or trustees do an unauthorized act or incur indebtedness which would not create a corporate liability, the stockholders may subsequently ratify the acts and validate the originally unauthorized transaction. What they might originally have done, they may do afterwards, and their subsequent assent is equivalent to original authority.”<sup>9</sup> The validity of a blanket ratification by stockholders at an annual meeting of the acts of their officers for a long period of time depends upon the knowledge of the facts by them when they passed the resolution of approval.<sup>10</sup> “The direct or indirect misappropriation of assets of the corporation to his own use or benefit by an officer is incapable of being authorized or ratified by a vote or any act or omission of the majority of the stockholders;” but a proceeding by such officers, such as the sale of its property to a syndicate having members in common with its directors, conducted in good faith and in furtherance of the corporation’s purposes, though voidable, may be ratified by the stockholders through a duly had majority vote.<sup>11</sup> “It is well settled that a misappropriation of the funds of a corporation cannot be ratified as against the rights of creditors by all the stockholders of a corporation, and that no such ratification, even by all but one of the stockholders, would be binding upon the corporation itself.”<sup>12</sup>

**§ 172. Id.: To Bind Successors.**—While it may be competent in some cases for stockholders to bind themselves by an

<sup>7</sup> *Matter of Lighthall Mfg. Co.*, 47 Hun, 258 (1838); L. 1848, c. 40, § 3.

<sup>8</sup> *Matter of Germicide Co.*, 65 Hun, 606, 20 Supp. 495 (1892); L. 1890, c. 564, § 54.

On right of stockholder to vote by proxy, see note in 29 L.R.A. 844.

<sup>9</sup> *Martin v. Niagara Falls Paper Mfg. Co.*, 122 N. Y. 165, 25 N. E. 303 (1890). Corporate paper signed by one said not to have authority.

<sup>10</sup> *Missouri Pacific Ry. v. Mercantile Trust Co.*, 76 Misc. 10, 134 Supp. 548 (1912).

<sup>11</sup> *Pollitz v. Wabash R. R. Co.*, 207 N. Y. 113, 100 N. E. 721 (1912).

<sup>12</sup> *Moch Co. v. Security Bank*, 176 A. D. 842, 163 Supp. 277 (1917).

On ratification of acts of directors by vote of stockholders including those who are directors, see note in 36 L.R.A.(N.S.) 199.

On implied ratification of unauthorized loan effected by agent, see notes in 6 L.R.A.(N.S.) 311; 52 L.R.A.(N.S.) 571.

On ratification of contract of promoters, see note in 50 L.R.A.(N.S.) 980.

agreement not to exercise a discretionary power given by statute, such as authority to increase or decrease the capital stock or to increase or decrease the number of the directors, it would seem that the agreement would not be binding on subsequent owners of the stock who purchased in good faith and without notice of the agreement.<sup>13</sup> A scheme to share by certain allotments in the capitalized profits from construction, accruing to a corporation, to which all the then members of the corporation assent, is not such a fraud on the corporation as will enable persons becoming stockholders after the transaction to bring a derivative suit, asserting rights of the corporation itself, against individuals profiting by the scheme who were directors and incorporators of the corporation.<sup>14</sup>

**§ 173. Id.: To Deal With Their Corporation.**—"When a person in substantial control of a corporation resigns his office, rids himself of his holdings of stock and then acquires by transfer to himself all the assets of the corporation, he must at least take care to provide himself with and to preserve the clearest possible evidence that every step in the transaction was unobjectionable and that creditors were not injured."<sup>15</sup> A corporation may give its bond secured by mortgage on its property to one who has been one of its stockholders in order to secure a loan by him to it and the unpaid amount due on its purchase by it from him of his stockholdings.<sup>16</sup> Purchases by a stockholder from his corporation of materials on the same terms as buyings by strangers are voidable, not void; and not to be complained of by another stockholder who knew about them.<sup>17</sup>

**§ 174. Id.: To Complain of Corporate Acts of Which They Knew or to Which They Assented.**—" . . . the act of a corporation that is *ultra vires* cannot be questioned by a stockholder who has assented to it."<sup>18</sup> A stockholder who has never objected to a course by his corporation known to him and which he claims to be *ultra vires* though profitable cannot succeed in his claim.<sup>19</sup> One signing a subscription book reciting the formation and existence of a corporation, the filing of articles and necessary affidavits, is estopped to deny its

<sup>13</sup> Bond v. Atlantic Terra Cotta Co., 137 A. D. 671, 122 Supp. 425 (1910).

<sup>14</sup> Continental Securities Co. v. Belmont, 168 A. D. 483, 154 Supp. 54 (1915).

<sup>15</sup> Littmann v. Harris, 157 A. D. 909, 142 Supp. 341 (1913).

<sup>16</sup> Moses v. Soule, 63 Misc. 203,

118 Supp. 410 (1909); aff'd 136 A. D. 904, 120 Supp. 1136.

<sup>17</sup> Murray v. Smith, 166 A. D. 528, 152 Supp. 102 (1915).

<sup>18</sup> Burden v. Burden, 159 N. Y. 287, 54 N. E. 17 (1899).

<sup>19</sup> McNab v. McNab & Harlin Mfg. Co., 62 Hun, 18, 16 Supp. 448 (1891); aff'd 133 N. Y. 687, 31 N. E. 627.

corporate character.<sup>20</sup> One who has become a stockholder in a corporation, acted for several years as a trustee, taken part in its management and contracted with it as a corporation cannot dispute the validity of its incorporation.<sup>1</sup> A stockholder who has long known of a transaction between the corporation and one of its directors is precluded from complaining thereof after it has been entirely consummated.<sup>2</sup> Acquiescence by a stockholder in an alleged illegal act of a corporation's directors may arise from his conduct relating to the transaction subsequent to its rise, justifying the reasonable conclusion that he had accepted the transaction, *i. e.*, implied ratification; or from his silence or inactivity when there was opportunity and duty to speak or act, *i. e.*, equitable estoppel.<sup>3</sup> Holders of shares of corporate stock issued by a corporation, in good faith and in an attempted compliance with all legal requirements, who have accepted them and participated in whatever benefits accrued until the corporation became insolvent, cannot then question the legality of the issue.<sup>4</sup> Stockholders (as distinguished from creditors) of a corporation who for upwards of four years after knowledge of a transfer by its trustees in good faith and in settlement of a claim against it of all its property take no steps to impeach the transfer (during all which time the transferee has conducted business made possible by the transfer) are estopped from disputing the validity of the transfer.<sup>5</sup> One who has accepted a directorship and the presidency in a corporation, acted as such, and assumed duties in recognition of his connection with the company as a stockholder, cannot disclaim such connection.<sup>6</sup> A stockholder cannot object to security taken as security by his corporation from a debtor if he refuses its president's offer to pay the corporation in cash and himself take over the security.<sup>7</sup> A stockholder and director of a corporation which loans money to one not a stockholder with his knowledge cannot complain of the loan, if it is made from surplus and no demand has been made for distribution of sur-

<sup>20</sup> Black River & Utica R. R. Co. v. Clarke, 25 N. Y. 208 (1862).

<sup>1</sup> Phoenix Warehousing Co. v. Badger, 67 N. Y. 294 (1876).

<sup>2</sup> Steinway v. Steinway, 2 A. D. 301, 37 Supp. 742 (1896); *aff'd* 157 N. Y. 710, 53 N. E. 1132.

<sup>3</sup> Pollitz v. Wabash R. R. Co., 207 N. Y. 113, 100 N. E. 721 (1912).

<sup>4</sup> People v. New York Building-Loan Banking Co., 119 A. D. 830, 104 Supp. 892 (1907); *aff'd* 189 N. Y. 547, 82 N. E. 1131.

<sup>5</sup> Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Machine Co., 90 N. Y. 607 (1882).

<sup>6</sup> Beals v. Buffalo Construction Co., 49 A. D. 589, 63 Supp. 635 (1900).

<sup>7</sup> McNab v. McNab & Harlin Mfg. Co., 62 Hun, 18, 16 Supp. 448 (1891); *aff'd* 133 N. Y. 687, 31 N. E. 627.

plus or for dividends.<sup>8</sup> A transaction involving the purchase by one corporation of the stock of another cannot be objected to by the stockholders of the selling corporation as *ultra vires* the buying corporation: only the stockholders of the latter or the People can raise the point.<sup>9</sup>

**§ 175. Id.: To Demand and Receive Financial Statement from Treasurer of Corporation, Governing Statutes.**—Stockholders owning five or three per centum of the capital stock of a corporation according as such capital stock is under or above one hundred thousand dollars may make a written request to the treasurer or chief fiscal officer thereof for a statement of its affairs under oath embracing a particular account of all its assets and liabilities.<sup>10</sup> The treasurer must (1) make such statement; (2) deliver it to the person presenting the request within thirty days thereafter, and (3) keep on file for twelve months thereafter a copy of such statement.<sup>11</sup> The copy kept on file must at all times during business hours be exhibited to any stockholder demanding an examination thereof, but the treasurer or chief fiscal officer is not required to deliver more than one such statement in any one year.<sup>12</sup> The supreme court, or any justice thereof, may upon application for good cause shown extend the time for making and delivering such certificate.<sup>13</sup> For every neglect or refusal of the treasurer or other chief fiscal officer thereof to comply with the provisions of the sixty-ninth section of the Stock Corporation Law he must forfeit and pay to the person making such request the sum of fifty dollars, and the further sum of ten dollars for every twenty-four hours thereafter until such statement is furnished.<sup>14</sup>

**§ 176. Id.: Who May Compel.**—What stockholder may request a statement of his corporation's affairs depends upon the amount of its capital stock: If the capital stock is not over one hundred thousand dollars only a stockholder owning five per centum thereof may make the request; while if the capital stock is above one hundred thousand dollars a stockholder owning but three per centum thereof may make the request.<sup>15</sup>

<sup>8</sup> Murray v. Smith, 166 A. D. 528, 152 Supp. 102 (1915).

<sup>9</sup> Oelbermann v. New York & Northern R. R. Co., 7 Misc. 352, 27 Supp. 945 (1894).

On effect of assent of all stockholders at time of transaction to promoter's sale of property to corporation, see note in 18 L.R.A. (N.S.) 1116.

<sup>10</sup> St. Corp. L. § 69 (L. 1909, c. 61).

<sup>11</sup> St. Corp. L. § 69 (L. 1909, c. 61).

<sup>12</sup> St. Corp. L. § 69 (L. 1909, c. 61).

<sup>13</sup> St. Corp. L. § 69 (L. 1909, c. 61).

<sup>14</sup> St. Corp. L. § 69 (L. 1909, c. 61).

<sup>15</sup> St. Corp. L. § 69 (L. 1909, c. 61).

A treasurer of a corporation may be compelled to state under oath the condition of its affairs at the instance of a stockholder who is a director as well as of a stockholder who is not a director, if the stockholder owns five per cent of its capital stock.<sup>16</sup> "If the stockholder wishes to enforce the penalty he must see to it that he is a stockholder of record at the time of making the demand upon the treasurer for a statement of the affairs of the corporation."<sup>17</sup> The executor of a deceased holder of half of a corporation's stock who has been refused a demand for information of its affairs by its officers is entitled to an order for the names and salaries of its officers and directors; its net profits for two years past; the names of its banks and deposits therein; its cash on hand, accounts and bills receivable, and liabilities outside of capital stock, its total indebtedness due from its two largest creditors; changes in salaries and whose were increased; and overdrafts of officers and employees.<sup>18</sup>

**§ 177. Id.: How Often.**—The treasurer or chief fiscal officer of a corporation is not required to deliver more than one statement of its affairs in any one year.<sup>19</sup> The statute permitting one holding five per cent of the stock of a corporation to compel its treasurer to give him a sworn statement of its affairs expressly provides that the treasurer shall not be required to deliver more than one statement in any one year, thus showing that a particular stockholder cannot have more than one such statement a year; so that one suing to recover the statutory penalty for the treasurer's neglect to give the statement must allege that the latter has not delivered a statement during the fiscal year within which the demand was made.<sup>20</sup> "The statute provides that this statement [of the affairs of a corporation], when made, shall be open to the inspection of any stockholder demanding an examination thereof, and that only one such statement can be required during any one year."<sup>1</sup>

**§ 178. Id.: What Statement Suffices.**—The statement should be (1) of the corporation's affairs, (2) under oath and (3) one embracing a particular account of all its assets and liabilities.<sup>2</sup> A statute requiring a treasurer of a corporation to give a

<sup>16</sup> *Townsend v. Davis*, 153 A. D. 599, 138 Supp. 758 (1912); St. Corp. L. § 69.

<sup>17</sup> *Pray v. Todd*, 71 A. D. 391, 75 Supp. 947 (1902); St. Corp. L. § 52 (L. 1892, c. 688). See now § 69.

<sup>18</sup> *Matter of Hastings*, 56 Misc. 45, 106 Supp. 938 (1907).

<sup>19</sup> St. Corp. L. § 69 (L. 1909, c. 61).

<sup>20</sup> *Troughton v. Grace*, 151 A. D. 655, 136 Supp. 200 (1912); St. Corp. L. § 69.

<sup>1</sup> *Matter of Hitchcock*, 149 A. D. 824, 134 Supp. 174 (1912).

<sup>2</sup> St. Corp. L. § 69 (L. 1909, c. 61).

stockholder thereof upon demand a "statement of the affairs of said company, under oath, embracing a particular account of all its assets and liabilities, in minute detail," is satisfied by a sworn statement of its assets and liabilities.<sup>3</sup> A treasurer furnishing a stockholder demanding the statutory statement under oath of the corporation's affairs with a sufficient statement save that it is not sworn to is liable to the statutory penalty for failure to furnish the prescribed statement, unless the stockholder waive the oath.<sup>4</sup> Acceptance without objection that it was not verified of an unverified statement by a corporate treasurer of his corporation's condition up to a date earlier than that first asked for, in pursuance of a modification of the demand for a statement to a later date, precludes recovery of the penalty for refusing to give such statement or the right to any other statement during that year.<sup>5</sup>

**§ 179. Id.: Suit for Penalty.**—For every neglect or refusal of the treasurer or other chief fiscal officer of a corporation to comply with the provisions of the statute permitting a stockholder to obtain a statement of the corporation's affairs he must forfeit and pay to the person making the request for the statement the sum of fifty dollars and the further sum of ten dollars for every twenty-four hours thereafter until such statement is furnished.<sup>6</sup> A suit to recover from a corporate treasurer the penalty imposed upon him by statute for failure to give a statement of its affairs to a stockholder on demand must be based upon and comply with the statute as amended and effective when the default occurred.<sup>7</sup> In order to hold the treasurer of a corporation liable for the penalty imposed by statute for failure to give a stockholder a financial statement of corporate affairs demanded by the latter, the demand must be delivered to the treasurer personally and not by mail, and must give the treasurer some reasonable form of notice that the stockholder is seeking to obtain information pursuant to legal right, as distinguished from a possible act of business courtesy.<sup>8</sup> A demand by a stockholder of his corporation's treasurer of a statement of its affairs, without requiring that

<sup>3</sup> French v. McMillan, 43 Hun, 188 (1887); L. 1854, c. 201, § 27. See now St. Corp. L. § 69.

<sup>4</sup> St. John v. Eberlin, 23 Misc. 585, 51 Supp. 998 (1898); St. Corp. L. § 52 (L. 1892, c. 688). See now § 69.

<sup>5</sup> Sutton v. MacBride, 176 A. D. 362, 162 Supp. 1023 (1917); St. Corp. L. § 69 (L. 1909, c. 61).

<sup>6</sup> St. Corp. L. § 69 (L. 1909, c. 61).

<sup>7</sup> McCrea v. Bedell, 9 Misc. 372, 29 Supp. 705 (1894); L. 1890, c. 564, § 52, as amend. L. 1892, c. 688, § 52. The amendment required compliance within thirty instead of twenty days of demand and the complaint alleged failure within twenty instead of thirty days.

<sup>8</sup> Troughton v. Grace, 84 Misc. 577, 147 Supp. 993 (1914); St. Corp. L. § 69, (L. 1909, c. 61). "Will you please send me a state-

it be sworn to, is sufficient basis for a suit to recover the penalty imposed by statute on failure to give it.<sup>9</sup>

§ 180. **Id.: Of Majority, In General.**—"An illegal corporate act cannot be ratified by majorities of stockholders."<sup>10</sup> "It is well established that the ownership of a majority of the stock of a corporation, while it gives a certain control of the corporation, does not give that control of corporate transactions which makes the holder of the stock responsible for the latter."<sup>11</sup> One who is president and owner of a large part of the stock of a corporation has no power to give away its property.<sup>12</sup> The courts, on the application of a stockholder controlling the corporation by his holdings prior to an issue of stock which he seeks to have cancelled, cannot *pendente lite* enjoin the corporate officers and directors from exercising or interfering with the corporate management in any way, because "presumably the power of managing the business of a corporation is vested solely in its officers and directors . . . . The court may arrest such officers in some proposed course or halt them in the doing of some specific act, but it cannot . . . . virtually remove the directors, for it thereby practically winds up the corporation *pendente lite*, or, if not, it vests some of the corporate powers in a mere stockholder by virtue of such status, which it cannot do."<sup>13</sup> The persons who, though minority stockholders, constitute the majority of the directors, will not be temporarily enjoined from selling further stock at the instance of a majority stockholder who would not remain so if the further stock were sold and who is at odds with them in an action by the latter ostensibly to obtain a permanent injunction but really to get such temporary injunction so as to tie up the corporation's board till the next stockholders' meeting whereat the existing board could be changed.<sup>14</sup> One taking stock in a corporation formed to build an apartment the by-laws of which subject all questions as to the purchase of land and erection of buildings and lease of apartments to the vote of the majority stockholders takes

ment of the assets and liabilities, also a copy of the balance sheet," etc., held insufficient demand.

<sup>9</sup> *McCrea v. Bedell*, 9 Misc. 372, 29 Supp. 705 (1894); L. 1890, c. 564, § 52, as amend. L. 1892, c. 688, § 52. See now St. Corp. L. § 69.

<sup>10</sup> *Pollitz v. Wabash Railroad Co.* No. 1, 150 A. D. 709, 135 Supp. 785 (1912). The illegal act was the issue of preferred stock without the consent, required by the Missouri Constitution, of all the stockholders.

<sup>11</sup> *Stone v. Cleveland, C. C. & St. L. Ry. Co.*, 202 N. Y. 352, 35 L.R.A.(N.S.) 770, 95 N. E. 816 (1911); *dictum*.

<sup>12</sup> *Worthington v. Worthington*, 100 A. D. 332, 91 Supp. 443 (1905).

<sup>13</sup> *Moore v. Moore Mica Paint Co.*, 150 A. D. 792, 135 Supp. 210 (1912).

<sup>14</sup> *Gillette v. Noyes*, 92 A. D. 313, 86 Supp. 1062 (1904).

title to an apartment in a building erected by the company not legally but as an equitable right upon the reasonable conditions imposed by the majority stockholders under the by-laws.<sup>15</sup> An agreement evidencing nothing more than an attempt by two parties holding the majority of the stock of a corporation to perpetuate, by their personal contract, their joint control of the corporate affairs, cannot be considered a partnership agreement warranting an application for judgment annulling the agreement and dissolving the partnership.<sup>16</sup> An agreement by a majority of the directors and the owners of a majority of the stock of a corporation for the purpose of perpetuating themselves and their successors in office and control of the company, not only during their own lives, but for years after their death, without regard to the rights of a minority of the directors or stockholders, is an unlawful combination, whether morally corrupt or intended for the benefit of all stockholders and the corporation.<sup>17</sup> One corporation has the right to buy the stock of another and vote it; buy the mortgage bonds of such other, foreclose and use the property bought on foreclosure in any way allowed by law; and minority stockholders suffering thereby cannot justly complain; but it cannot directly injure the minority stockholders by doing anything unlawful in its corporate affairs which is a breach of trust toward such minority.<sup>18</sup> The powers, privileges and duties of minority stockholders in general are shortly discussed.<sup>19</sup>

**§ 181. Id.: Voting Salaries in Fraud of Minority.**—A court of equity will always give relief to a minority stockholder from the acts of a majority in disposing of all the profits by voting themselves salaries not commensurate with the work done by them.<sup>20</sup> The general rule that acts done in the interest of the corporation, not fraudulent or *ultra vires*, may be ratified by a majority of the shareholders does not enable majority stockholders for selfish purposes to act in hostility to the interests of the corporation with the intention of defrauding the non-assenting stockholders, by voting, after the commencement by a minority stockholder of a representative action to compel the directors or officers of the corpo-

<sup>15</sup> *Compton v. The Chelsea*, 128 N. Y. 537, 28 N. E. 662 (1891).

<sup>16</sup> *Whittingham v. Darrin*, 45 Misc. 478, 92 Supp. 752 (1904).

<sup>17</sup> *Snow v. Church*, 13 A. D. 108, 42 Supp. 1072 (1897). The agreement was to vote always for three directors named by one and two named by others; and to keep cer-

tain persons in stated offices at an increased salary.

<sup>18</sup> *Oelbermann v. New York & Northern Ry. Co.*, 14 Misc. 131, 36 Supp. 1096 (1895).

<sup>19</sup> See § 183, *infra*.

<sup>20</sup> *Fitchett v. Murphy*, 46 A. D. 181, 61 Supp. 182 (1899).

ration to account for salaries they had voted themselves, as such majority stockholders, to ratify the acts of the directors.<sup>1</sup> A minority stockholder suing in equity to remedy the use of all profits by the majority stockholders in the shape of salaries to themselves should allege a demand by him of the corporation for redress.<sup>2</sup> An administrator of a minority stockholder suing in equity to redress disposition by the majority stockholders of the entire corporate profits by way of salaries to themselves must allege that the decedent was a stockholder at the date of his death, or that the administrator is the owner of such stock.<sup>3</sup> A minority stockholder may sue to recover back for the corporation money paid as salaries to the majority stockholders by the vote of the latter as the corporation's only directors when such salaries practically use up the entire corporate earnings; and the directors voting themselves the salaries have the burden of overcoming the presumption which comes into being with their vote that they voted in their own and against the corporation's interest.<sup>4</sup> A majority of a corporation's stockholders cannot ratify salaries voted by its directors consisting of money taken from its treasury without any authority for services performed without any agreement that the company would pay for them; but such a majority may ratify salaries fixed for the future by the board.<sup>5</sup>

**§ 182. Id.: Selling Corporate Property in Fraud of Minority.**—Equity will charge with a constructive trust the property of a corporation in the hands of one who is its majority stockholder and one of its officers and who has put it up for sale and bought it himself to exclude a minority stockholder; or, if he transferred it elsewhere, will make him account to the corporation for the loss it has suffered through his waste of its property.<sup>6</sup> Majority stockholders may, each in his own interest, vote to discontinue the corporation's business; but they cannot lawfully do that in bad faith for the purpose of turning its business and good will over to another corporation without compensation so as to exclude minority stockholders

<sup>1</sup> *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L.R.A.1915D, 632, 105 N. E. 818 (1914).

<sup>2</sup> *Fitchett v. Murphy*, 46 A. D. 181, 61 Supp. 182 (1899).

<sup>3</sup> *Fitchett v. Murphy*, 46 A. D. 181, 61 Supp. 182 (1899).

<sup>4</sup> *Davids v. Davids*, 135 A. D. 206, 120 Supp. 350 (1909). Plaintiff owned one-sixth of the stock of a

corporation the remaining five-sixths being owned by the three who as directors increased their salaries by their three votes from \$6,750 to \$24,000.

<sup>5</sup> *Lewis v. Matthews*, 161 A. D. 107, 146 Supp. 424 (1914).

<sup>6</sup> *Drucklieb v. Harris*, 84 Misc. 291, 147 Supp. 298 (1914).

from participating therein.<sup>7</sup> One of few stockholders in a corporation who has a controlling interest in its stock and its whole management must account to the others for profits made by him on sale of the whole stock over and above what they receive for their holdings under a sale negotiated by him without knowledge by them of its terms.<sup>8</sup> The rights of minority stockholders to prevent the sale of corporate assets and stock by the majority is shortly discussed.<sup>9</sup>

**§ 183. Id.: Of Minority, In General.**—The powers, privileges and duties of majority stockholders in general have been treated.<sup>10</sup> When holders of over half of a corporation's stock are prevented by temporary injunction from participating in the election of directors so that control of the company is obtained by a minority of the stockholders, the election will be set aside on the injunction's subsequent dissolution.<sup>11</sup> One minority stockholder in a corporation being consolidated with another who contributes individually to the cost of an investigation conducted by another stockholder to ascertain the value of their holdings may recover his contribution even though he makes a different arrangement from a committee of minority stockholders into which such other stockholder's activities grew and refuses to deposit his stock with such committee, if the corporation pays to such committee an amount to cover the cost of such investigation which includes the sum contributed by the minority stockholder in question.<sup>12</sup> A minority stockholder cannot set aside a contract made by his corporation if he waits for eight years before bringing suit, meanwhile taking benefits from the contract, and if he does not show any demand on his corporation to set aside the contract.<sup>13</sup> A minority stockholder is entitled to an accounting by his corporation though left practically alone by staying out of a general sale of his corporation's stock without a merger

<sup>7</sup> *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L.R.A.1915D, 632, 105 N. E. 818 (1914).

<sup>8</sup> *McManus v. Durant*, 168 A. D. 643, 154 Supp. 580 (1915). D. got other stockholders to sell their holdings at par while he sold all the stock at \$150. He was president, director and general manager. He controlled 70 per cent. of the stock. He never told them any details of the sale save that they would get par. He guaranteed an indebtedness of the company, but got \$8,000 instead of \$5,000 salary thereafter.

<sup>9</sup> See §§ 185, 186, *infra*.

On power of majority stockholders against consent of minority to sell property of corporation essential to its existence as a going concern, see note in 35 L.R.A.(N.S.) 396.

<sup>10</sup> See § 180, *supra*.

<sup>11</sup> *Matter of Townsend*, 24 Misc. 80, 53 Supp. 289 (1898).

<sup>12</sup> *Metropolitan Life Ins. Co. v. Read*, 168 A. D. 828, 154 Supp. 523 (1915).

<sup>13</sup> *Norman v. Federal Mining & Smelting Co.*, 180 A. D. 325, 167 Supp. 794 (1917).

which emptied the corporation of its property and ended the functions of its board of directors.<sup>14</sup>

**§ 184. Id.: Invoking Court Protection Against Acts of Majority.**—The interference of a court in the internal management of a corporation is hereinafter discussed.<sup>15</sup> The power of majority stockholders to vote salaries in fraud of the minority has been discussed.<sup>16</sup> The court will not at the request of a minority of the holders of corporate certificates determine whether the minority or the majority are right as to the goodness of the policy of entering into an agreement, not *ultra vires*, which a trustee acting for the majority has deliberately ratified in good faith, to which the majority have not objected and under which third parties have acquired substantial rights.<sup>17</sup> “. . . the court should not interpose in a dispute between the majority and minority stockholders in relation to the ordinary control and management of its corporate affairs, or substitute its judgment as to the proper management and control of the corporation for that of the directors elected by and representing the majority stockholders. It is the duty of the court, however, to interfere, if called upon, when the proposed action of the majority is so detrimental to the interests of the corporation itself as to lead to the necessary inference that the interests of the majority of the shareholders lie wholly outside of, and in opposition to, the interests of the corporation and of a minority of the shareholders, and its consummation would be a wanton or fraudulent destruction of the rights of the minority stockholders.”<sup>18</sup> “To warrant the interposition of the court in favor of the minority shareholders in a corporation or joint-stock association, as against the contemplated action of the majority, where such action is within the corporate powers, a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company and in a manner inconsistent with its interests.”<sup>19</sup> “To

<sup>14</sup> Logan v. New York Sugar Refining Co., 176 A. D. 660, 163 Supp. 214 (1917).

On right of minority stockholders to representation in new or re-organized corporation, see note in 10 L.R.A.(N.S.) 725.

<sup>15</sup> See § 421, *infra*.

<sup>16</sup> See § 181, *supra*.

<sup>17</sup> Kissel v. Chicago & Eastern Illinois R. R. Co., 126 A. D. 852, 111 Supp. 937 (1908).

<sup>18</sup> Robinson v. New York, Westchester & Boston R. Co., 123 A. D. 339, 108 Supp. 91 (1908).

<sup>19</sup> Gamble v. Queens Co. Water Co., 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201 (1890).

justify the interference of the court with the management of a corporation on the application of a minority of the stockholders it must be shown that the action of the governing body complained of has been so clearly against the interests of the minority of the stockholders as to amount to a wanton and fraudulent destruction of the rights of such minority."<sup>20</sup> To enjoin majority at the instance of minority stockholders from exercising their corporate powers, an intent by the majority to subserve purposes not the corporation's must be shown, *quasi* fraudulently.<sup>1</sup> A minority of stock turned in to a corporation by those to whom it had been issued for property cannot maintain an action to compel the owners of such property, *i. e.*, the property they had conveyed to the corporation for all its stock, to pay back any portion of the consideration paid, *i. e.*, the stock, without a rescission of the sale and a retransfer to the vendors of the property which had been transferred to the corporation and for which the vendors had received the consideration agreed upon, even though the law of the state of the corporation's organization provided its stock should not be disposed of at less than par.<sup>2</sup> The only question that survives the approval by the majority of stockholders of the action of the directors in leasing corporate property is whether their action was so plainly unfair and oppressive of the minority stockholders that the court should interfere.<sup>3</sup>

**§ 185. *Id.*: Preventing Sale of Corporate Assets by Majority.**—The power of majority stockholders to sell corporate property in fraud of the minority has been discussed.<sup>4</sup> A minority stockholder is entitled to an injunction temporarily enjoining the lump sale of all the property of his corporation in dissolution proceedings which are a step towards reorganization in another state if the property is worth many millions, the advertisement of its sale gives but four weeks' notice and is obscurely printed, no one except its directors can know the value or nature of a large part of the property to be sold, the terms of sale are more favorable to the trustees on dissolution, who desire to bid for consenting stockholders, than to anyone else; and the reorganization committee which proposes to bid in the property in behalf of the stockholders to

<sup>20</sup> *Hart v. Ogdensburg & Lake Champlain R. R. Co.*, 89 Hun, 316, 35 Supp. 566 (1895).

<sup>1</sup> *McLeary v. The Erie Telegraph & Telephone Co.*, 38 Misc. 3, 76 Supp. 712 (1902).

<sup>2</sup> *Insurance Press v. Montauk*  
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*Wire Co.*, 103 A. D. 472, 93 Supp. 134 (1905).

<sup>3</sup> *Westchester Fire Ins. Co. v. Syracuse, Binghamton & N. Y. R. R. Co.*, 97 Misc. 471, 161 Supp. 759 (1916).

<sup>4</sup> See § 182, *supra*.

protect their interests alone is not disposed to secure any larger price than is necessary merely to bid it in.<sup>5</sup> A minority stockholder of a domestic corporation may properly in equity and in the right of his company sue to prevent the transfer without consideration by the directors and officers of his corporation to a foreign corporation of which they are also officers and directors of the legal title to all the domestic corporation's property; and this suit may be brought without a demand on his directors to bring it.<sup>6</sup> A minority stockholder in an old corporation may on its behalf set aside a sale at a grossly inadequate price of all its property by a majority of its stockholders and its directors to a new corporation organized by them of which they are directors, stockholders and officers.<sup>7</sup>

**§ 186. Id.: Preventing Sale of Stock by Majority.**—A minority stockholder cannot restrain the majority stockholders from disposing of their stock to another person or company because such disposition would result in the control of the stockholders' company by such person or corporation, as "a violation of the duty of the holders of a majority of the stock to manage a corporation in good faith in the interest of its stockholders impose[s] a liability in favor of the corporation and this obligation can be enforced only by the corporation or by a suit instituted in its behalf. . . . a depreciation in the value of the stock as the result of wrongs committed against the corporation (does) not give to a stockholder suffering from such a depreciation a cause of action against the holders of a majority of the stock."<sup>8</sup> The fact that stockholders of a corporation have illegally agreed to transfer its

<sup>5</sup> *Treadwell v. United Verde Copper Co.*, 47 A. D. 613, 62 Supp. 708 (1900).

<sup>6</sup> *Boaz v. Sterlingworth Ry. Supply Co.*, 68 A. D. 1, 73 Supp. 1039 (1902).

<sup>7</sup> *Hinds v. Fishkill & Matteawan Gas Co.*, 96 A. D. 14, 88 Supp. 954 (1904). "Directors who own a majority of the stock can no more for their own benefit and advantage appropriate the property of the corporation than the directors who own a minority . . ."; *Lewisohn Bros. v. Anaconda Copper Mining Co.*, 26 Misc. 613, 56 Supp. 807 (1899). The head note reads in part: "A minority stockholder of a foreign corporation will not be granted an injunction by our courts to restrain

the corporation and the other stockholders from voting on their stock or taking any action toward perfecting a private sale by the corporation of certain of its mining claims in the foreign state, lying between the properties of rival mining companies, under an offer from one of them, which the board of directors of the foreign corporation has accepted, merely because at its stockholders' meeting, called in the foreign state to confirm the sale, the minority stockholder made a larger offer in the interest of the other mining company, it appearing," etc.

<sup>8</sup> *Delevan v. New York, New Haven and Hartford R. R. Co.*, 154 A. D. 8, 139 Supp. 17 (1912).

stock, but which the corporation has not agreed to, does not warrant a minority stockholder in restraining the consummation of the agreement.<sup>9</sup>

**§ 187. Id.: Actions By, In General.**—In a stockholder's representative action the hurt or benefit not of the stockholders individually but of the corporate entity is alone in issue.<sup>10</sup> One bringing a representative stockholder's action has no standing to proceed until he can have issued to himself the stock to which he claims he is entitled.<sup>11</sup> "If a stockholder brings an action against the corporation and fails, the payment by him of the judgment for costs puts him in the same relations to it that he had occupied before. The directors could not resist his application to transfer his stock by setting up a claim that the corporation, by reason of the suit, was obliged to pay out large sums for counsel fees and expenses in the litigation which were not covered by the taxable costs."<sup>12</sup> When corporate stock is delivered by one to another for use for a designated purpose and it is used for another, the transferrer is not limited to an action for recovery of his damages but may sue in equity for a rescission of the transaction and return of the stock, or an accounting.<sup>13</sup> An action by minority stockholders in their own interest, solely against a majority corporate stockholder, based on an alleged trust relationship between them to compel the latter to account directly to the former for profits it holds to their exclusion, lies far outside the limits of an action in behalf of a corporation against many defendants as alleged workers of fraud whereby the corporation has been stripped of its property to recover back such property.<sup>14</sup> A stockholder enjoined from disposing of his holdings pending an action by the corporation to rescind as fraudulent the contract by which he acquired them is not guilty of contempt through joining in an action in

<sup>9</sup> *Delevan v. New York, New Haven & Hartford R. R. Co.*, 154 A. D. 8, 139 Supp. 17 (1912); *Sherman Act*, 26 U. S. Stat. at Large, 209, §§ 1, 2.

On right of minority stockholder to restrain voluntary dissolution of corporation by directors or majority stockholders, see note in 23 L.R.A. (N.S.) 1177.

<sup>10</sup> *Archer v. Hesse*, 164 A. D. 493, 150 Supp. 296 (1914).

<sup>11</sup> *Bergen v. National Architects' Bronze Co.*, 173 A. D. 680, 160 Supp. 331 (1916).

<sup>12</sup> *Cassagne v. Marvin*, 143 N. Y.

292, 25 L.R.A. 670, 38 N. E. 285 (1894). The case involved the transfer of a certificate evidencing an interest in property held in trust, rather than a certificate of corporate stock proper.

<sup>13</sup> *Slayback v. Raymond*, 93 A. D. 326, 87 Supp. 931 (1904). S. delivered stock to R. to deliver to H. to induce H. to sustain the credit of the corporation so that the corporation securities which S. held might remain valuable. R. instead transferred the stock to his relatives.

<sup>14</sup> *MacArdell v. Olcott*, 189 N. Y. 368, 82 N. E. 161 (1907).

another state to compel the corporation's directors to restore to it realty in that state which they had fraudulently acquired.<sup>15</sup>

**§ 188. Id.: What Stockholders May Sue.**—The equitable owner of stock in a corporation may properly bring suit in equity to protect his interest and that of other stockholders in the corporate property.<sup>16</sup> One showing a legal right, by reason of owning corporate stock, to question the corporation's acts (in issuing preferred stock) and having a personal interest in obtaining the judgment which he seeks, is not liable to have his motives inquired into by the court.<sup>17</sup> One buying stock to bring and carry on litigation against the corporation will not be allowed to have or retain an injunction if his rights can be preserved by awarding damages for such injury as he may have sustained.<sup>18</sup> One who has placed his holdings of corporate stock in a voting trust may nevertheless bring a representative action to enjoin corporate acts.<sup>19</sup> Stockholders of a holding company may maintain a representative action for the benefit and in behalf of the subsidiary company, the directors of both companies having refused, after due request, to institute an action in the name of either company.<sup>20</sup> One pledging his corporate stock with a voting trustee with whom all other stock is also deposited has no individual cause of action for mismanagement of the corporation against the trustee resulting in an injury to the corporation, common to all stockholders, although such injury incidentally depreciate the value of his pledge; but for a direct injury to his stock, not common to all stockholders as such, the pledgor may have his action notwithstanding he is also a stockholder.<sup>1</sup> “. . . a stockholder may bring an action in behalf of the corporation for the benefit of himself and all other stockholders, to set aside as fraudulent an improper transaction consummated at the expense of the corporation before he acquired his stock.”<sup>2</sup>

<sup>15</sup> *Maine Products Co. v. Alexander*, No. 3, 115 A. D. 475, 101 Supp. 464 (1906).

<sup>16</sup> *Baum v. Sporborg*, 146 A. D. 537, 131 Supp. 267 (1911).

<sup>17</sup> *Pollitz v. Wabash Railroad Co.* No. 1, 150 A. D. 709, 135 Supp. 785 (1912). The defense was that the plaintiff knew of the matters of which he complained when he bought his stock, and bought the stock as an interloper to bring the action.

<sup>18</sup> *Kingman v. Rome, Watertown*

& Ogdensburgh R. R. Co., 30 Hun, 73 (1883).

<sup>19</sup> *Robinson v. New York, Westchester & Boston Ry. Co.*, 55 Misc. 516, 105 Supp. 897 (1907).

<sup>20</sup> *Holmes v. Camp*, 180 A. D. 409, 167 Supp. 840 (1917); *C. C. P.* 438, subd. 5.

<sup>1</sup> *Milliken v. McGarrah*, 159 A. D. 728, 144 Supp. 964 (1913).

<sup>2</sup> *Pollitz v. Gould*, 202 N. Y. 11, 38 L.R.A.(N.S.) 988, 94 N. E. 1088 (19—); *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 51 L.R.A.(N.S.) 112, 99 N. E. 138 (1912).

In the absence of special circumstances a stockholder may bring an action on behalf of himself and all other stockholders to set aside as fraudulent a transfer and exchange of the corporation's stock for the purpose of avoiding the transfer and exchange as an improper transaction consummated at the expense of the corporation even though the consummation took place before he acquired his stock.<sup>3</sup> A stockholder in existence before stock of his corporation is issued at gross overvaluation for patents, or the corporation itself may disaffirm the agreement for such stock issue; but if all the stock is so issued there can be no existing stockholder and no one can complain — not even one buying some of such stock at less than par after its issue and return as a gift to the corporation by the person to whom originally issued for patents.<sup>4</sup> A complaint by one not alleged at the time of the commencement of the action to hold stock in a corporation against an individual to recover damages for injury by the reduction in value of such stock through wrongful acts of the individual in taking possession of the corporate office and business at best sets forth a cause of action in the corporation rather than in an individual stockholder and will not lie: certainly it will not warrant attachment.<sup>5</sup>

**§ 189. Id.: When Corporation Must Sue or Be Asked to Sue.**—In determining whether an action at law for recovering damages should be brought by a stockholder of the corporation damaged as an individual, or for and on behalf of the corporation and its stockholders as a whole, the question is whether the damages belong to the individual stockholder or the corporation; and in determining this question, it must be borne in mind that the rights of creditors are superior to those of stockholders: *e. g.*, the action should be brought by a stockholder as an individual when he has been induced to purchase stock and pay a higher price than it was fairly worth, or when he has been induced to part with his stock for less than its value through false and fraudulent representations of others; but the action should be brought in the name of the corporation or as representative of all stockholders when the acts complained of are waste and destruction of the corporation's property and franchises through obtaining a controlling stock interest, refusing opportunities for business, diverting its

<sup>3</sup> Pollitz v. Gould, 202 N. Y. 11, 38 L.R.A.(N.S.) 988, 94 N. E. 1088 (1911). There was no question raised of consent by the holder of the stock.

<sup>4</sup> Insurance Press v. Montauk

Wire Co., 103 A. D. 472, 93 Supp. 134 (1905).

<sup>5</sup> Dudley v. Armenia Insurance Co., 115 A. D. 380, 100 Supp. 818 (1906); C. C. P. § 635.

business so as to prevent payment of bond-interest, buying in control of such bonds, foreclosing and so acquiring the corporate property at an unfair price.<sup>6</sup> " . . . the exercise of jurisdiction in equity rests in the sound discretion of the court, and depends upon the special circumstances disclosed . . . to enable a stockholder in a corporation to sustain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, there must exist as a foundation for the suit, ' some action or threatened action of the managing board of directors or trustees of the corporation, which is beyond the authority conferred on them by their charter or other source of organization; or such a fraudulent transaction, completed or contemplated by the acting managers in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders; or where the board of directors, or a majority of them, are acting for their own interest in a manner destructive of the corporation itself, or of the rights of the other shareholders.' " " If a right of action belong to a corporation, a stockholder cannot sue in his own name unless he has demanded of the board of directors that it sue and it has refused; unless hostility of the directors or connection by them with the transaction sued on is shown.<sup>8</sup> Before a stockholder may successfully sue representatively for spoliation of his corporation's property by its officers and directors he must allege or prove demand upon the corporation or its board of directors to bring the same suit.<sup>9</sup> A stockholder may sue to nullify an action by his corporation, which is in fraud of its stockholders' rights and renders their stock valueless, if the corporation itself refuses on demand to bring the action.<sup>10</sup> A stockholder bringing a representative action to secure a return to his corporation of assets fraudulently dissipated need not allege a demand on the corporation to bring the action if all its directors and officers and all its stockholders known to the plaintiff are charged with active

<sup>6</sup> *Niles v. New York Central & H. R. R. Co.*, 176 N. Y. 119, 68 N. E. 142 (1903).

<sup>7</sup> *Leslie v. Lorillard*, 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363 (1888), approving doctrine of *Dodge v. Woolsey*, 18 How. (U. S.) 331, as laid down in *Hawes v. Oakland*, 104 U. S. 450.

<sup>8</sup> *Dillon v. Pan-American Theatri-*

*cal Co.*, 96 Misc. 501, 160 Supp. 549 (1916); *Godley v. Godley & Crandall Co.*, 181 A. D. 75 (1917).

<sup>9</sup> *Norman v. Federal Mining & Smelting Co.*, 180 A. D. 325, 167 Supp. 794 (1917).

<sup>10</sup> *Pondir v. New York, Lake Erie & Western R. R. Co.*, 72 Hun, 384, 25 Supp. 560 (1893).

participation in the fraud.<sup>11</sup> A stockholder suing officers of a corporation for waste of its assets through a conspiracy to which they all were parties to benefit themselves need not as a condition precedent to his suit demand that they or the corporation sue.<sup>12</sup> Stockholders, individually or collectively, have no cause of action because a director or officer of their corporation unlawfully obtains its property. The action is in the corporation, or in its receiver if one has been appointed, and in the directors as trustees on dissolution if the receiver appointed has been discharged.<sup>13</sup> “. . . there may be a fraudulent issue of stock not in the interests of the corporation, but in the interest of the individual directors and with a view to enabling them to obtain and maintain control of the corporation and to appropriate to themselves to the exclusion of other stockholders all profits of the business, and if so an action may be maintained by a stockholder in the right of the corporation to enjoin the further consummation of the conspiracy and for an accounting to the corporation.”<sup>14</sup> A stockholder in a successful, dividend-paying corporation, with large assets and good prospects, compelled by the vote of its directors and the other stockholders, induced by fraud, to surrender a part of his interest in the corporate assets represented by his stock, without any real consideration, is entitled in equity to have the transaction set aside and the delinquent parties account, but the right of action belongs not to him individually, but to the corporation, and should be brought by it unless after due demand and refusal, or unreasonable neglect to proceed, it refuses to proceed, whereupon the stockholder may himself bring it and make the corporation a defendant, upon proper averments.<sup>15</sup> One claiming to be a stockholder in a corporation which has distributed dividends among its stockholders without recognizing the claimant as such cannot in the first instance sue one of the recognized stockholders to recover a portion of his dividends on the theory that the dividends such recognized stockholder received were greater than he was entitled to if the claimant had been recognized too, in payment of dividends.<sup>16</sup> The stockholders of a lessor corporation wholly under the control of a lessee corporation

<sup>11</sup> Weber v. Wallerstein, No. 1, 111 A. D. 693, 97 Supp. 846 (1906).

<sup>12</sup> Kelsey v. Sargent, 40 Hun, 150 (1886).

<sup>13</sup> Michel v. Betz, 108 A. D. 241, 95 Supp. 844 (1905).

<sup>14</sup> Brewster v. Brewster Co., 138 A. D. 139, 122 Supp. 1019 (1910).

<sup>15</sup> Flynn v. Brooklyn City R. R. Co., 158 N. Y. 493, 53 N. E. 520 (1899).

<sup>16</sup> Peckham v. Van Wagenen, 83 N. Y. 40 (1880).

which refuses to pay rent may themselves enforce in equity its rights.<sup>17</sup>

**§ 190. Id.: Grounds for Suit by Stockholder.**—A stockholder may bring a representative action to enforce a contract made by a promoter for its benefit, adopted by it, which it refuses to enforce.<sup>18</sup> “. . . at common law an action can be maintained by the stockholders of a corporation to have declared void a contract with another corporation when the two corporations are controlled by common directors where the acts of the two corporations are based upon a fraudulent combination by which a majority of the directors of the two companies seeks to defraud one corporation for the benefit of the other.”<sup>19</sup> A stockholder of a corporation of this State may sue to set aside as illegal a conveyance of all its property to a foreign corporation in consideration of shares of the latter's stock authorized by majority vote of the former's stockholders in which he did not concur, if the domestic corporation refuses to bring the suit at his request, as such a method of terminating a New York corporation's existence is not recognized.<sup>20</sup> A stockholder may sue in equity to restrain his corporation from forfeiting his stock for non-payment of assessments and for an accounting for such sums as might be due him from it, if its books are confused and were kept partly while he and partly while another was president.<sup>1</sup> A stockholder may sue to recover on behalf of his corporation moneys received by individuals as its agents who were also its officers and make the corporation a defendant, if these individuals themselves refuse to bring the suit.<sup>2</sup>

**§ 191. Id.: Pleading, Practice and Evidence.**—One having elected to be deemed excluded from his alleged rights as a stockholder and having brought his action for damages for such exclusion cannot at the same time claim to be treated as a stockholder and to be entitled to receive the dividends on the shares of which he claims to have been unjustly deprived.<sup>3</sup> A complaint will not be dismissed on the ground that it does

<sup>17</sup> *Barr v. New York, Lake Erie & Western R. R. Co.*, 125 N. Y. 263, 26 N. E. 145 (1891).

<sup>18</sup> *Cummings v. Brown*, 122 A. D. 505, 107 Supp. 498 (1907).

<sup>19</sup> *Jacobs v. Mexican Sugar Refining Co., Ltd.*, 104 A. D. 242, 93 Supp. 776 (1905). B. and C. controlled a majority not only of stock but the directors of each corporation, though much larger stock interest in Company I than II, and

therefore cancelled the lease of II and took possession of its property for the benefit of I.

<sup>20</sup> *Taylor v. Earle*, 8 Hun, 1 (1876).

<sup>1</sup> *Schultz v. German-American Real Estate Co.*, 21 A. D. 163, 47 Supp. 500 (1897).

<sup>2</sup> *Sheridan v. Sheridan Electric Light Co.*, 38 Hun, 396 (1886).

<sup>3</sup> *Hughes v. Vermont Copper Mining Co.*, 72 N. Y. 207 (1878).

not allege ownership in the plaintiff of corporate stock during the time he seeks to recover from defendants on their guaranty of payment of certain dividends thereon if it alleges purchase thereof and payment therefor by the plaintiff in reliance upon such guaranty.<sup>4</sup> In a stockholder's representative suit in equity for an accounting and setting aside as fraudulent of a transaction consummated at the corporation's expense it is not necessary to allege that the predecessors in title of the plaintiff did not assent to or acquiesce in the alleged fraud, unless such assent or acquiescence is to be presumed from delay in bringing suit or generally from the complaint's allegations.<sup>5</sup> "In a derivative action . . . 'the complaint should allege that the corporation, on being applied to, refused to prosecute, and . . . this averment constitutes an essential element of the cause of action' . . . subject to this exception, that where facts are alleged showing that the demand would be unavailing, a demand is unnecessary. . . ."<sup>6</sup> An action by a stockholder on behalf of the corporation being derivative, he must allege: "first, a good cause of action in favor of the corporation; second, facts which authorized his intervention and the institution of his suit in behalf of his corporation."<sup>7</sup> A complaint by a stockholder in a representative action need not allege plaintiff was a stockholder at the time demand was made upon the corporation to bring the action if it allege plaintiff was still a stockholder, though it must be shown on the trial that he was a stockholder when the demand was made.<sup>8</sup> A stockholder of a solvent corporation which has appointed a committee and gone into voluntary liquidation need not in suing, either before or after the committee was appointed, in the right of the corporation for an accounting by directors for mismanagement, allege a demand upon such committee in addition to

<sup>4</sup> *Crook v. Scott*, 65 A. D. 139, 72 Supp. 516 (1901); *aff'd* 174 N. Y. 520, 66 N. E. 1106.

<sup>5</sup> *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 51 L.R.A. (N.S.) 112, 99 N. E. 138 (1912).

<sup>6</sup> *O'Connor v. Virginia Passenger & P. Co.*, 184 N. Y. 46, 76 N. E. 1082 (1905). Complaint alleged a board of directors subservient to the stockholder complained of under whose domination it issued bonds to him at an inadequate price; but did not allege board at time of the action was the same as when the bonds were issued.

<sup>7</sup> *O'Connor v. Virginia Passenger & P. Co.*, 184 N. Y. 46, 76 N. E. 1082 (1906).

<sup>8</sup> *Holmes v. Camp*, 176 A. D. 771, 162 Supp. 1014 (1917). ". . . it is not necessary to decide whether the stockholders of a corporation which owns stock in another corporation may, on the failure of their corporation to act on due demand, make the demand on such other corporation and, on a failure to comply therewith, maintain the action which their corporation as such stockholder could have maintained had it made the demand."

the board of directors as a condition precedent to his suit.<sup>9</sup> A stockholder seeking to set aside as unconscionable a contract by which the corporation retained a lawyer to represent it in certain proceedings must either allege a demand of and refusal by the corporation to bring the action or show the futility thereof—which is not done by showing that a majority of the directors who authorized the employment are still in office.<sup>10</sup> A stockholder of a lessor company excuses himself from a demand upon his company to take action which he himself is taking when he alleges that the management of such company is wholly in the interest of the lessee corporation; that he and the other stockholders he represents have no means of causing a demand by the lessor corporation on the lessee corporation for unpaid rent out of which dividends may be declared, and that there is a conspiracy to deprive himself and others of their rights as stockholders.<sup>11</sup> An objection to a stockholder's suit that the plaintiff does not sue in behalf of all other stockholders who might come in as well as himself is waived if not raised either by answer or by demurrer.<sup>12</sup> A complaint merely alleging a duty on defendant as trustee to hold an old stock certificate of plaintiff for which an interim certificate was given till new shares were issued and given a depository for delivery, and to cancel the old certificate on issue of the new shares; and that the new shares have long been ready; but not alleging their issue, states no cause of action.<sup>13</sup> A complaint by a stockholder in a representative action based on a conspiracy to impair the value of the corporate stock by the declaration of scrip dividends must appropriately allege that the undivided profits of the company did not amount to as much as the total sum for which the scrip dividend was authorized; an allegation that the company did not have surplus profits available for the payment of dividends in that sum is not sufficient.<sup>14</sup> A stockholder's representative action against another corporation to enforce the latter's agreement to pay his corporation money pursuant to contract should not make

<sup>9</sup> *Planten v. National Nassau Bank*, 174 A. D. 254, 160 Supp. 297 (1916); *aff'd* 220 N. Y. 677, 116 N. E. 1070.

<sup>10</sup> *McCoy v. Gas Engine & Power Co.*, 135 A. D. 771, 119 Supp. 864 (1909).

<sup>11</sup> *Barr v. New York, Lake Erie & Western R. R. Co.*, 96 N. Y. 444 (1884).

<sup>12</sup> *Hiscock v. Lacy*, 9 Misc. 578, 30 Supp. 860 (1894); C. C. P. §§ 488, 498, 499.

<sup>13</sup> *Petty v. Emery*, 96 A. D. 35, 88 Supp. 823 (1904).

<sup>14</sup> *Bankers Trust Co. v. Dietz Co.*, 157 A. D. 594, 142 Supp. 847 (1913).

parties the directors of either corporation.<sup>15</sup> It is proper for stockholders suing in their individual right to regain their stock and position as controlling stockholders to attack in one cause of action all the acts and join all the parties who took part in the acts which have impaired their rights and which are barriers between them and the relief they seek.<sup>16</sup> Both in an action by a stockholder in his own right or as representative in behalf of his corporation, acts of directors and of third persons, though constituting independent causes of action in favor of the corporation, may be so connected as to constitute a single cause of action in favor of a stockholder against all of the wrongdoers.<sup>17</sup> It is proper in a representative action by a stockholder setting forth a cause of action in the corporation's favor to combine allegations of neglect of directors with allegations of their willful wrongdoing.<sup>18</sup> A complaint in a representative action by a stockholder cannot join without separately stating a cause of action in favor of the corporation, both to recover damages for injury to its own business and to recover damages for the diminution in the value of the stock of another corporation owned by it.<sup>19</sup> An individual cannot in one complaint unite a cause of action as a representative stockholder in which the corporation, although a nominal defendant, is really a plaintiff in the sense that it has rights against the other defendants which the plaintiff is entitled as stockholder to have it enforce, with another cause of action to destroy the corporate life of the corporation.<sup>20</sup> In an action by an individual stockholder alleging that the corporation's assets were consideration for the issue of stock of a second corporation which the individual defendant received as trustee for the holders of stock in the first company, and seeking to recover from such trustee his share of the second company's stock, the first company is a necessary party defendant, as well as its stockholders, granting that a cause of action by plaintiff, individually and not as representative

<sup>15</sup> Case v. New York Mutual Savings & Loan Assn., 88 A. D. 538, 85 Supp. 104 (1903); C. C. P. § 484.

<sup>16</sup> Witherbee v. Bowles, 201 N. Y. 427, 95 N. E. 27 (1911).

<sup>17</sup> Meredith v. Art Metal Construction Co., 97 Misc. 69, 161 Supp. 1 (1916).

<sup>18</sup> Fleitmann v. United Gas Improvement Co. 174 A. D. 781, 161

Supp. 650 (1916); C. C. P. § 481, subd. 2, and § 483.

<sup>19</sup> Fleitmann v. United Gas Improvement Co., 174 A. D. 781, 161 Supp. 650 (1916); C. C. P. § 481, subd. 2, and § 483.

<sup>20</sup> Dusenberry v. Sagamore Development Co., 157 A. D. 485, 142 Supp. 595 (1913).

of all stockholders, lies at all, which is doubtful.<sup>1</sup> A representative action by a stockholder to recover of stockholders of his corporation sums unpaid on their stock, to adjust the claims of its creditors and to pay in full or ratably, should have all stockholders as parties and when reduced to judgment will inure to the benefit of all other creditors who prove their claims and contribute their proportion to the expenses of the litigation; but original subscribers to the stock who never paid ten per cent. on their subscriptions need not be made parties, nor stockholders who subscribed certain amounts and then released the corporation from all obligations on account of their subscription which was then declared forfeited by the directors, even though the details essential to forfeiture be not alleged.<sup>2</sup> In a derivative action by minority stockholders to recover an amount in the hands of the vendor of property to their corporation, alleged to have been fraudulently obtained, the burden is on them to prove over his denial that this amount, which they seek to hold him for under an obligation created by operation of law, is still in his hands.<sup>3</sup> The statute of limitations against proceedings by a stockholder and director to compel restitution to his corporation by a representative stockholders' action of loans made by it to another stockholder and director is the ten year statute and does not begin to run till the death of the latter if he continues as stockholder and director till such death.<sup>4</sup> A judgment in a successful representative action by a stockholder to have paid back into the corporate treasury money improperly voted therefrom as officers' salaries should not also direct the distribution of such sum among stockholders by the corporation, as the declaration of a dividend should not be made by the court.<sup>5</sup> A stockholder who has received certain property on account of stock which he has released and surrendered to other stockholders and the corporation, if he desires to have that transaction set aside as fraudulent and his original stock restored to him, should, it seems, either tender back what he has received before bringing his action or offer in his complaint to restore what he has received as the proceeds of the alleged fraudulent transaction.<sup>6</sup> " . . .

<sup>1</sup> *Knickerbocker v. Conger*, 110 A. D. 125, 97 Supp. 127 (1905).

<sup>2</sup> *Ford v. Chase*, 118 A. D. 605, 103 Supp. 30 (1907); *aff'd* 189 N. Y. 500.

<sup>3</sup> *Ebling v. Nekarda*, 148 A. D. 193, 132 Supp. 309 (1911); *aff'd* 210 N. Y. 566, 104 N. E. 1129.

<sup>4</sup> *Murray v. Smith*, 166 A. D. 528, 152 Supp. 102 (1915); C. C. P. § 388; Gen. Corp. L. § 28.

<sup>5</sup> *Miller v. Crown Perfumery Co.*, 125 A. D. 881, 110 Supp. 806 (1908).

<sup>6</sup> *Brock v. Poor*, 216 N. Y. 387, 111 N. E. 229 (1915).

No valid reason exists, either in law or equity, why several stockholders of a corporation seeking redress of those who are conspiring to defeat their rights should not be allowed to unite in a single action for that purpose. . . . where the board of directors of a corporation is acting in a manner destructive of the rights of the other shareholders, or where the majority of the shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation which is in violation of the rights of the other shareholders and which can only be restrained by the aid of a court of equity, an action to obtain relief may be maintained by a stockholder."<sup>7</sup> There is a distinction between the liability of a corporation owing its stockholders dividends from money which has never been severed from the mass of the corporate property, which must be enforced by an action at law, and the liability of its directors who have set apart the money into a distinct fund to pay dividends and hold that fund as the stockholders' trustees, but refuse to distribute it, and the former is an individual stockholder's action while the latter is a stockholder's representative suit, which cannot be joined in one complaint.<sup>8</sup> A plaintiff bringing a cause of action as a stockholder of a corporation to enforce a right of action existing in favor of the corporation cannot join the other stockholders as parties defendant when no relief is asked against them and when in no aspect of the case can they be entitled to any relief or be subject to any liability.<sup>9</sup> A stockholder's action to compel an individual as such, and with another as members of a partnership, to account to the corporation of which the plaintiff is a stockholder and they both were directors and one an officer, as its financial agents, will not be sustained when the gravamen of the complaint is simply their failure to cause the corporation to keep what the plaintiff considered proper books of account and to render proper accounts from the plaintiff's viewpoint.<sup>10</sup> A representative action by a stockholder to recover for acts prejudicial to stockholders' rights may be brought against the corporation without alleging its refusal to act for their relief upon demand if such wrongs are alleged as existing and continuing down to the time of the commencement of the action, and without hav-

<sup>7</sup> *Barr v. New York, Lake Erie & Western R. R. Co.*, 96 N. Y. 444 (1884).

<sup>8</sup> *Searles v. Gebbie*, 115 A. D. 778, 101 Supp. 199 (1906); *aff'd* 190 N. Y. 533, 83 N. E. 1131.

<sup>9</sup> *McCrea v. McClenahan*, 114 A. D. 70, 99 Supp. 689 (1906).

<sup>10</sup> *Clubb v. Cook*, 161 A. D. 775, 147 Supp. 94 (1914).

ing the president, originally made a party as a co-conspirator, continued as a party after his demurrer has been sustained.<sup>11</sup> An examination of a sole surviving director of a corporation before trial to enable stockholders to frame their complaint against him for an accounting will be denied if the plaintiff alleges enough to make out a good complaint.<sup>12</sup> A discussion of the costs properly payable by stockholders after dissolution of an injunction against issue of securities by their corporation under an injunction bond, including attorneys' allowances, is found in the note case.<sup>13</sup>

**§ 192. Id.: Objections To.**—“ . . . Where the objection to the acts of a corporation is that they are *ultra vires* without being either *mala prohibita* or *mala in se*, a stockholder cannot maintain an action in his own behalf based on such objection, where he himself, with knowledge of the character of the acts, has acquired and accepted pecuniary benefits thereunder.”<sup>14</sup> The right of a stockholder to maintain a representative action to compel another stockholder to account to the corporation is not affected by its bankruptcy after the action is begun, as the accounting will then be to the trustee in bankruptcy instead of to the corporation.<sup>15</sup> The fact that in an action there have been joined one cause accruing to the plaintiff in his individual right and another derived from and asserted in behalf of the corporation of which he is stockholder is not proven so as to make his complaint demurrable simply because the acts in the alleged second cause of action might be made the basis of an action by or in behalf of the corporation if they also worked injury to plaintiff's individual rights and the complaint in the main shows an intent to recover or be restored in plaintiff's individual capacity.<sup>16</sup> A holder of preferred stock of a corporation having a right of action to hold it to payment of passed dividends is not guilty of such laches as to be barred from complaining because he awaited the result of suits by other stockholders, or in any event if the company sought to be held liable necessarily was acquainted with the claim of stockholders for such dividends and nevertheless proceeded to divert the corporate funds from distribution as dividends on

<sup>11</sup> *Brown v. Buffalo, New York & Erie R. R. Co.*, 27 Hun, 342 (1882).

<sup>12</sup> *De Martini v. McCaldin*, 176 A. D. 541, 163 Supp. 484 (1917).

<sup>13</sup> *Continental Securities Co. v. New York Central R. R. Co.*, 179 A. D. 355, 166 Supp. 499 (1917).

<sup>14</sup> *Treadwell v. United Verde Copper Co.*, 134 A. D. 394, 119 Supp. 112 (1909).

<sup>15</sup> *Meyer v. Page*, 112 A. D. 625, 98 N. Y. Supp. 739 (1906).

<sup>16</sup> *Witherbee v. Bowles*, 201 N. Y. 427, 95 N. E. 27 (1911).

preferred stock, so that its conduct was not affected by this particular stockholder's delay in suing.<sup>17</sup> A stockholder suing for frauds culminating in an injury to the corporation must show a refusal or neglect of the corporation to sue after his demand that it do so; and in such an action by the stockholder any defense which a defendant would have if the corporation itself were the actual plaintiff may be interposed to bar the stockholder.<sup>18</sup> If individuals sued on behalf of a corporation by a stockholder in a representative action have illegally and wrongfully occasioned a loss to the corporation "it is neither a defense nor a mitigating circumstance that despite such illegal and wrongful acts the corporation is still solvent, or that the stock has increased in value during the time when the alleged illegal and wrongful acts have been committed."<sup>19</sup> One who is a stockholder in a corporation which operates and sues for his benefit cannot set up the failure of its organizers to perform a duty initiatory to its legal existence in an action, the plaintiffs in which could not set up the same fact as a defense to them if sued by the corporation for such one's benefit.<sup>20</sup>

**§ 193. Id.: Liabilities of, In General.**— Every business corporation formed under the Business Corporation Law may be or become a full liability corporation by inserting a statement in the certificate of incorporation that the corporation thereby formed is intended to be a full liability corporation.<sup>1</sup> Where there is no common-law liability on the part of a holder of stock, the legal presumption is that any statutory conditions imposed upon the corporation, non-compliance with which may subject him to liability, have been complied with; and one seeking to establish his liability must show noncompliance with such conditions.<sup>2</sup> "There is no provision of law . . . that makes the holder of capital stock of a corporation liable *to the corporation* for the difference between the par value of

<sup>17</sup> Boardman v. Lake Shore & Michigan Southern Ry. Co., 84 N. Y. 157 (1881).

<sup>18</sup> Alexander v. Donohue, 143 N. Y. 203, 38 N. E. 263 (1894). The plaintiff stockholder was held bound by an adjudication in an action of foreclosure against the corporation.

<sup>19</sup> Jacobson v. Brooklyn Lumber Co., 184 N. Y. 152, 76 N. E. 1075 (1906).

<sup>20</sup> Eaton v. Aspinwall, 19 N. Y. 119 (1859). The failure was of payment of 10 per cent. of the capital stock under a statute requiring it.

<sup>1</sup> Bus. Corp. L. § 6 (L. 1909, c. 12).

<sup>2</sup> Chase v. Lord, 77 N. Y. 1 (1879).

the stock and the amount that under an agreement between the corporation and the stockholder the stockholder has paid the corporation therefor.”<sup>3</sup> One buying as a speculation the stock of a company which has substantially given up its business cannot hold a stockholder who took no part in the negotiations liable for a statement of its affairs on which he did not rely for fraud, or recover the consideration paid.<sup>4</sup> Stockholders electing their creatures as directors by using stock not legally outstanding are liable to account to the corporation for large blocks of stock given away without consideration by such directors, mortgage bonds sold by such directors at less than the authorized price, and so forth.<sup>5</sup> When a number of stockholders in a corporation give their joint and several note as individuals for its accommodation, they are liable as individuals each for the whole and to contribute among themselves each that fraction of the note which their total number was, and not each according to the amount of stock he held as compared with the others.<sup>6</sup> “There is no rule of law which charges a director or stockholder of a corporation with actual knowledge of its business transactions merely because he is such director or stockholder.”<sup>7</sup>

**§ 194 Id.: Of Representative of Deceased Stockholder.**—Executors of the estate of a holder of corporate stock take it subject to any liability which existed on account of it.<sup>8</sup> “. . . . When a stockholder in any corporation dies his estate succeeds him in the title to, and the rights in, the stock he held. . . . it must take that title and those rights subject to any liability then existing upon them; and so long as the estate is, by operation of law, the holder of such stock, the estate must become responsible for any obligations accruing during that time, which the law may impose upon any holder of the stock, as such.”<sup>9</sup> The statutory liability of a stockholder of a corporation for its debts to an amount equal to the amount of his holdings of stock until the corporate capital

<sup>3</sup> *Thompson v. Knight*, 74 A. D. 316, 77 Supp. 599 (1902). The general assignee of the corporation was suing. The liability in such a case to a corporate creditor is settled.

<sup>4</sup> *Garrett Co. v. Appleton*, 101 A. D. 507, 92 Supp. 136 (1905); aff'd 184 N. Y. 557, 76 N. E. 1099.

<sup>5</sup> *O'Connor v. Virginia Passenger and Power Co.*, 46 Misc. 530, 92 Supp. 525 (1905).

<sup>6</sup> *Coburn v. Wheelock*, 34 N. Y. 440 (1866).

<sup>7</sup> *Rudd v. Robinson*, 126 N. Y. 113, 12 L.R.A. 473, 26 N. E. 1046 (1891).

<sup>8</sup> *Chase v. Lord*, 77 N. Y. 1 (1879).

<sup>9</sup> *Bailey v. Hollister*, 26 N. Y. 112 (1862).

stock is wholly paid in is inherent in every contract that the corporation makes with creditors prior to the time that its certificate of payment of capital stock is filed, is therefore contractual, survives the death of the stockholder, and may be laid at the door of his representatives.<sup>10</sup>

**§ 195. Id.: For Debts, Governing Statutes.**—Every holder of capital stock in any stock corporation is personally liable to its creditors for debts of the corporation, provided (1) his stock is not fully paid, and (2) the debts of the corporation were contracted while such stock was held by him; but in any event only to an amount equal to the amount unpaid on the stock held by him.<sup>11</sup> No person holding stock in any corporation is personally subject to liability as a stockholder if he holds it (1) as collateral security, (2) as executor, (3) as administrator, (4) as guardian, or (5) as trustee, unless he voluntarily invested the trust funds in such stock; but the person pledging such stock is considered the holder thereof and liable as stockholder, and the estates and funds in the hands of the executor, administrator, guardian or trustee are liable in the like manner and to the same extent as the testator, intestate, ward or person interested in such trust fund would have been if he had been living and competent to act and held the stock in his own name (unless, as already said, it appears that such executor, administrator, guardian or trustee voluntarily invested the trust fund in such stocks, in which case he is personally liable as a stockholder).<sup>12</sup> No stockholder is personally liable for any debt of the corporation unless (1) it is payable within two years from the time it is contracted, and (2) an action for its collection is brought against the corporation within two years after the debt becomes due.<sup>13</sup> An action cannot be brought against a stockholder for any debt of his corporation until (1) an action has been carried to judgment against the corporation for such debt and (2) an execution on such judgment has been returned unsatisfied

<sup>10</sup> *Cochran v. Wiechers*, 119 N. Y. 399, 7 L.R.A. 553, 23 N. E. 803 (1890); L. 1875, c. 611, § 37.

<sup>11</sup> St. Corp. L. § 56 (L. 1909, c. 61): "As to existing corporations the liability imposed by this section shall be in lieu of the liability imposed upon stockholders of any existing corporation, under any general or special law, excepting laws relating to moneyed corporations, and corporations and associations

for banking purposes, on account of any indebtedness hereafter contracted on any stock hereafter issued; but nothing in this section contained shall create or increase any liability of stockholders of any existing corporation under any general or special law."

<sup>12</sup> St. Corp. L. § 58 (L. 1909, c. 61).

<sup>13</sup> St. Corp. L. § 59 (L. 1909, c. 61).

in whole or in part.<sup>14</sup> The amount recoverable against a stockholder under his statutory liability for the debts of his corporation is (1) the amount due on an execution returned unsatisfied on a judgment obtained in an action against the corporation for such debt, plus (2) the costs against the stockholder.<sup>15</sup> No action can be brought against a stockholder for any debt of his corporation after he has ceased to be a stockholder unless such action be brought within two years from the time he ceased to be a stockholder.<sup>16</sup> The liability of stockholders of a business corporation reorganized so as to put it in the class of corporations having stock without nominal or par value for corporate debts contracted or obligations incurred prior to the filing of the certificate of such reorganization is unaffected thereby, but for the purpose of enforcing and recovering upon such claims creditors have the same right of recourse against the stockholders individually that they would have had if the corporation had not been so reorganized; and all the rights and benefits conferred by sections fifty-six to fifty-nine, inclusive, of the Stock Corporation Law are especially reserved and saved to such creditors, subject to the conditions, limitations and restrictions imposed by those sections; but except for this liability the new shares issued by the reorganized corporation are deemed fully paid and non-assessable and the holder of such shares is not liable to the corporation or to its creditors in respect thereof.<sup>16a</sup>

**§ 196. Id.: In General.**—"A right of action against a stockholder for the debts of a corporation does not exist at common law, and a statute which imposes upon the stockholder personal liability for the corporate debts must be strictly construed as it is in derogation of the common law . . . ." <sup>17</sup> The liability of a stockholder for the corporation's debts though frequently called statutory is in fact contractual and springs from an implied promise.<sup>18</sup> The liability of a stockholder under statute for the debts of his insolvent corporation is not primary and contractual but statutory and secondary, conditional on the failure of the corporation itself to pay its debts.<sup>19</sup> The liability imposed by statute on holders of corporate stock not fully paid for debts up to the amount

<sup>14</sup> St. Corp. L. § 59 (L. 1909, c. 61).

<sup>15</sup> St. Corp. L. § 59 (L. 1909, c. 61).

<sup>16</sup> St. Corp. L. § 59 (L. 1909, c. 61).

<sup>16a</sup> St. Corp. L. § 24-c (L. 1917, c. 484).

<sup>17</sup> Barnes v. Wheaton, 80 Hun, 8, 29 Supp. 830 (1894).

<sup>18</sup> Howarth v. Angle, 162 N. Y. 179, 47 L.R.A. 725, 56 N. E. 489 (1900).

<sup>19</sup> Marshall v. Sherman, 148 N. Y. 9, 34 L.R.A. 757, 42 N. E. 419 (1895).

unpaid on subscriptions is supplemental to the contract liability of stockholders to pay so much of their subscriptions as may be necessary for the proper conduct of the corporate business.<sup>20</sup> "There is no substantial difference between the liability for an unpaid balance on a stock subscription, which is an express contract to take stock and pay for it (*citation*), and the liability for the unpaid deficiency of assets assumed by the act of becoming a member of the corporation through the purchase of stock, from which a contract is implied to perform the statutory conditions upon which stock may be owned."<sup>21</sup> The liability of a stockholder for the debts of his corporation must be measured by the law as it stood when the debt was contracted.<sup>22</sup> The liability of stockholders for the debt of a corporation on its promissory note is to be determined by the statute fixing the liability applicable at the time the note was made.<sup>23</sup> A right by statute to a corporate creditor to maintain an action at law against one or more of its stockholders to recover corporate indebtedness cannot be taken away by subsequent legislation.<sup>24</sup> "All that a creditor of a company, seeking to enforce this personal liability upon a stockholder, is required to prove, is the existence of the debt, and that judgment has been obtained, and execution issued and returned as the statute requires;" and it seems that the judgment entered against the company is *prima facie* evidence of the debt, and that no further proof is required, either as to the origin, existence or nature of that indebtedness.<sup>25</sup>

The Stock Corporation Law affixes three conditions to the liability of stockholders to an action: "(1) The recovery of a judgment against the corporation for the debt, and the return of an execution thereon unsatisfied in whole or in part; (2) that the debt was payable within two years from the time it

<sup>20</sup> Rathbone v. Ayer, No. 2, 84 A. D. 186, 82 N. Y. Supp. 235 (1903); St. Corp. L. §§ 43, 54 (L. 1901, c. 354). See now § 56.

<sup>21</sup> Howarth v. Angle, 162 N. Y. 179, 47 L.R.A. 725, 56 N. E. 489 (1900).

<sup>22</sup> By analogy to the decisions in Close v. Potter, 2 Misc. 1, 21 Supp. 1086 (1892); L. 1890, c. 564, § 72, and same case in 5 Misc. 543, 25 Supp. 972 (1893), rendered when the liability of the stockholder existed not only while his own stock was not fully paid for but until the corporation's capital stock was fully paid for.

<sup>23</sup> Leighton v. Leighton Lea Assn., 146 A. D. 255, 130 Supp. 935 (1911).

<sup>24</sup> Lang v. Lutz, 180 N. Y. 254, 73 N. E. 24 (1904); Stock Corp. L. § 54 (L. 1892, c. 588, amended by L. 1901, c. 354). See now § 56.

<sup>25</sup> Belmont v. Coleman, 21 N. Y. 96 (1860); L. 1852, act passed April 12, § 6 *et seq.*, making stockholders liable to creditors to an amount equal to their holdings until its capital is fully paid in, and making execution returned unsatisfied on judgment against it a prerequisite.

was contracted; (3) that the action against the corporation for the debt is brought within two years after it became due, and if the action is brought against the stockholder after he ceased to be a stockholder, it must be brought within two years after that time.”<sup>6</sup> Ratification by owners of all the stock of a corporation of an act by one of them as officer using the corporate funds to pay his personal indebtedness does not impair the rights of the corporate creditors.<sup>7</sup>

**§ 197. Id.: For What Debts.**—A stockholder is only liable under the statute for debts of the corporation (1) which were contracted while he held his stock in such corporation, and (2) not exceeding the amount unpaid on the stock he holds, (3) payable within two years from the time they were contracted, (4) on which action for collection has been brought against the corporation within two years after they became due; (5) on which judgment against the corporation has been had; and (6) on which judgment-execution has been returned unsatisfied, in part at least.<sup>8</sup> “Within the limitations of the statute the stockholders are liable for ‘all debts and contracts made by such company,’ irrespective of the circumstances under which they were made. . . . There is no exemption from liability because credit was imprudently given by the creditor, or because he supposed that the property of the corporation was sufficient to pay its debts.”<sup>9</sup> “An obligation incurred by a corporation for the rendition of professional service is a debt in the strict sense of the term, and may be enforced by the same remedies by which commercial debts are enforced” against its stockholders.<sup>10</sup> For corporate debts incurred in the process of organization or in preparing to begin business actual subscribers to stock are liable.<sup>11</sup> Persons who become stockholders in a corporation after its organization and receive a dividend after the time limited in its charter for duration of corporate life, but without knowl-

<sup>6</sup> *Hirschfeld v. Bopp*, 145 N. Y. 84, 39 N. E. 817 (1895); *St. Corp. L.* § 55; see now § 59.

<sup>7</sup> *Ward v. City Trust Co.*, 192 N. Y. 61, 84 N. E. 585 (1908).

On right of corporation to take stock of another corporation in payment of debts, see note in 18 L.R.A. 253.

<sup>8</sup> *St. Corp. L.* § 56 (L. 1909, c. 61).

<sup>9</sup> *Nat. Tube Works Co. v. Gilfillan*, 124 N. Y. 302, 26 N. E. 538 (1891); L. 1848, c. 40, § 10.

<sup>10</sup> *Hallett v. Metropolitan Messenger Co.*, 69 A. D. 258, 74 Supp. 639 (1902); *St. Corp. L.* § 54 (L. 1892, c. 688), see now § 56. The statute as it stood when this case was decided made stockholders liable until the corporation's capital stock was fully paid.

<sup>11</sup> *Myers v. Sturgis*, 123 A. D. 470, 108 Supp. 526 (1908); *aff'd* 197 N. Y. 526, 90 N. E. 1162.

edge that such time has expired, cannot be held liable as individuals or partners for an indebtedness incurred by an agent of the corporation after the expiration of its life, as "during the life of the corporation the body corporate was the legal owner [of its property], and upon the expiration of the charter the legal title vested in the trustees in office, at the time, in trust for the creditors and stockholders," who are merely *cestuis que trust*.<sup>12</sup>

**§ 198. Id.: Who May Enforce.**—The statute makes stockholders liable to the "creditors" of their corporation for its debts; but only to creditors who, directly or indirectly, have obtained judgment for their claims against the corporation and who have had execution returned unsatisfied thereon in whole or in part; and, furthermore, only to such creditors whose claims against the corporation are payable within two years from the time they were contracted and who have, directly or indirectly, sued the corporation thereon within two years after the claims became due.<sup>13</sup> An endorser of a corporate note is a creditor who may take advantage of the statutory liability of a stockholder for a corporate debt.<sup>14</sup> One receiving for adequate cash from another a certificate of stock in a corporation of which such other is treasurer signed by the latter and the corporation's president is a creditor of the company and not of the treasurer as an individual, even though the corporation never became qualified to do business and it was understood the treasurer individually might use the money in his business (which was to be turned over to the corporation when it was qualified to do business) until the corporation began to do business.<sup>15</sup> An assignee of a joint claim against a corporation which has been reduced to judgment is not debarred from holding a stockholder thereof liable therefor to the amount unpaid on his subscription to its stock because one of his assignors was a stockholder of the same corporation.<sup>16</sup> The liability imposed by statute on holders of corporate capital stock not fully paid for corporate debts up

<sup>12</sup> Central Savings Bank v. Walker, 66 N. Y. 424 (1876).

On liability of members of mutual fire insurance companies, see note in 32 L.R.A. 481.

On liability of incorporated religious society for its debts, see note in 69 L.R.A. 256.

On liability of stockholders of insolvent insurance company for debts, see note in 38 L.R.A. 110.

<sup>13</sup> St. Corp. L. §§ 56, 59 (L. 1909, c. 61).

<sup>14</sup> Moss v. Averell, 10 N. Y. 449 (1853); L. 1837, c. 441, § 9.

<sup>15</sup> Matter of Frye, 75 Hun, 402, 27 Supp. 14 (1894).

<sup>16</sup> Montgomery v. Brush Electric Illuminating Co., 48 A. D. 12, 62 Supp. 606 (1900); aff'd 168 N. Y. 657, 61 N. E. 1131; St. Corp. L. § 54 (L. 1892, c. 688); see now § 56.

to the amount unpaid on their holdings is wholly statutory, in the nature of a penalty, given to the corporation's creditors and not to it, and does not, therefore, pass to its trustee in bankruptcy.<sup>17</sup> The statutory liability of a stockholder to corporate creditors is not an asset of the corporation, and a trustee of the corporation in bankruptcy cannot enforce such a liability.<sup>18</sup> A receiver appointed upon the petition of a judgment creditor of a corporation may sue a stockholder of the corporation though he was appointed receiver by a state court after a United States Court had adjudged the corporation bankrupt.<sup>19</sup> Decisions as to who is to be considered a creditor of a corporation entitled to hold stockholders to various liabilities under statutes no longer on the books are collected in the note, because, though the statutes under which the decisions were rendered are no longer extant, yet the opinions of the courts therein given as to who are and who are not to be considered creditors are helpful.<sup>20</sup>

<sup>17</sup> *Rathbone v. Ayer*, No. 2, 84 A. D. 186, 82 Supp. 235 (1903); St. Corp. L. §§ 43, 54 (L. 1901, c. 354). See now § 56.

<sup>18</sup> *Breck v. Brewster*, 153 A. D. 800, 138 Supp. 821 (1912); St. Corp. L. § 56; Bankruptcy Act, § 47 (30 U. S. Stat. at Large, 557, § 4; as amended 36 id. 840, § 8, in 1910).

<sup>19</sup> *Holsinger v. Wood*, — Misc. — (1918); N. Y. L. J., *Mch.* 23, 1918, p. 2008; Sup. Ct. Spec. T. Pt. III.

<sup>20</sup> An assignee after a corporation's dissolution of a claim owing by it prior thereto is a creditor with just as much right to hold subscribers to its stock for the debt because of failure to file a certificate of full payment of capital stock as the assignor. *Moosbrugger v. Walsh*, 89 Hun, 564, 35 Supp. 550 (1895); L. 1890, c. 567, § 7. The liability of stockholders for the debts of a corporation the capital stock of which is not fully paid is "a fund which any creditor of the company may reach," and if the stockholder sought to be held for his liability "is himself such creditor to an amount equaling his statutory liability, he has quite as good a right to the fund which is pursued as the pursuer." If the stockholder is not a creditor

when accounts are adjusted between himself and the company he has no equity against the fund. *Wheeler v. Millar*, 90 N. Y. 353 (1882); Gen. Mfg. Act, L. 1848, c. 40, § 10. In an action against a stockholder of a corporation who is also a creditor thereof to hold him to his liability for its debts by reason of the fact that its capital stock is not fully paid, the stockholder has an interest, as a creditor, in the fund constituted by statute from the several liability of the stockholders, irrespective of whether the money advanced by him to the corporation was used to pay obligations for which he was individually liable or not, and may defend by setting up his advances against his stockholdings. "A stockholder owning \$1,000 of stock with a debt against the company of \$5,000, sued by a creditor for \$1,000, would himself be entitled to five-sixths of the \$1,000, if there were no other stockholders personally liable and no other debts; and if there were other personal liabilities to the amount of \$5,000, and no other debts, he would be entitled to \$5,000 of the \$6,000 constituting the fund. Hence it would be inequitable to permit a recovery

**§ 199. Id.: Who Liable, In General.**—A holder of capital stock in a stock corporation is not liable to its creditors for its debts unless (1) his stock is not fully paid, (2) the debts were contracted while such stock was held by him, (3) he holds the stock as absolute owner and not as collateral security, or as executor, administrator, guardian or trustee (unless he voluntarily invested the trust funds in such stock).<sup>1</sup> The statute making stockholders liable for their corporation's debts contemplates a several liability; and, therefore, a demurrer on the ground of non-joinder of them all will be overruled.<sup>2</sup> One holding stock of a corporation which has become insolvent in his own name though under an unwritten agreement that he did so for another who paid interest on the purchase price advanced by the holder and agreed to pay the price itself when called upon is liable to the company's creditors as a stockholder, but may hold him for whom he holds it for the amount he is compelled to pay.<sup>3</sup> A decision, helpful by analogy, of the liability of a stockholder under a statute no longer on the books is given in the note.<sup>4</sup>

**§ 200. Id.: Subscribers.**—On signature by one to a certificate of incorporation he becomes personally liable to the cor-

against a stockholder thus situated." *Mathez v. Neidig*, 72 N. Y. 100 (1878); L. 1848, c. 40, § 12. That a creditor of a corporation seeking to hold one of its stockholders for the debt of the corporation due him, by reason of its failure to file its annual report, is himself a stockholder, is no hindrance to his suit. *Sanborn v. Lefferts*, 58 N. Y. 179 (1874); *Gen. Mfg. Act*, L. 1848, c. 40, § 12. ". . . a creditor of a corporation, the stockholders of which are liable for its debts, may bring a suit in equity against all stockholders liable to him, and in favor of all creditors jointly interested with him who choose to come in and share in the benefits and expenses of his suit for the establishment of a fund, for the adjustment of all liabilities to contribute thereto, and of all claims thereon. . . . It matters not whether the right of action to so many arises from general principles of law, or from particular provisions of constitution or of statute. . . . The provision in the charter of the cor-

poration that the stockholders shall be severally liable, does not have such reach as that it precludes the attaching and exercise of this jurisdiction of equity." *Pfohl v. Simpson*, 74 N. Y. 137 (1878); L. 1868, c. 816, §§ 13, 14.

<sup>1</sup> *St. Corp. L.* §§ 56, 58 (L. 1909, c. 61).

<sup>2</sup> *Roebbling's Sons Co. v. Federal Storage Battery Car Co.*, — *Misc.* — (1918); N. Y. L. J. Feb. 27, Sp. T. N. Y. Co.; *St. Corp. L.* § 56.

<sup>3</sup> *Stover v. Flack*, 30 N. Y. 64 (1864).

<sup>4</sup> One not a stockholder at the time of a sale to the corporation is not liable for the purchase price on the ground that the whole capital stock is not paid up because he has become one at the time suit for the purchase price is instituted. *Tracy v. Yates*, 18 Barb. 152 (1854); L. 1848, p. 54, § 10.

Discharge of corporation as affecting stockholder's liability for its debts, see note in 38 L.R.A.(N.S.) 648.

poration's creditors for the difference between the amount of stock for which he subscribes by such certificate and the amount he has paid in on his subscription, irrespective of his having paid ten per cent. down on all the shares he subscribed to, or of the full amount of the capital stock having been paid.<sup>5</sup> One is a stockholder so as to be liable for unpaid amounts due for his holdings of stock if he subscribes a subscription paper preliminary to the certificate of incorporation which provides for the organization of a corporation subsequently incorporated as therein provided, though with somewhat broader powers, notwithstanding he does not sign the certificate of incorporation itself.<sup>6</sup> A person is subject to the statutory liability of a stockholder in a corporation for its debts because of failure to pay for holdings by him of its stock even though he has but subscribed for it (though not paid for it) if, in addition, "the corporation has explicitly recognized the alleged stockholder as such, and the latter has acted in that capacity."<sup>7</sup> A contractor agreeing to take bonds and stock of a corporation for building its road cannot be considered a subscriber to stock, so as to be liable for the par value thereof to corporate creditors: the issue thereof is dependent on construction of the road.<sup>8</sup> Decisions as to the liability of stockholders under statutes no longer on the books are collated in the note because of their helpfulness as analogies.<sup>9</sup>

On issuance of stock at discount as affecting stockholder's liability for debts, see note in 38 L.R.A.(N.S.) 263; 51 L.R.A.(N.S.) 56.

Does statutory liability of officer for debts of corporation include liability for torts, see notes in 22 L.R.A.(N.S.) 256.

<sup>5</sup> Irish Paper Corporation v. White, 91 Misc. 261, 154 Supp. 778 (1915); St. Corp. L. §§ 53, 56.

<sup>6</sup> Lyell Avenue Lumber Co. v. Lighthouse, 137 A. D. 422, 121 Supp. 802 (1910); St. Corp. L. §§ 56, 59. The subscriber owned realty mentioned in the paper he signed as to be bought and paid for by the corporation's bonds when organized and otherwise had knowledge of the incorporation and held himself out as a stockholder therein.

<sup>7</sup> Wheeler v. Miller, 90 N. Y. 353 (1882); Gen. Mfg. Act, L. 1848, c. 40, § 10. See now St. Corp. L. § 56,

*et seq.* The person held for the corporate debt "was one of the original incorporators, and signed the articles of incorporation; . . . subscribed for . . . shares . . . ; was a trustee of the company . . . ; . . . was secretary of the company and actively engaged in the management of its affairs; . . . appeared upon the stock-book . . . as a stockholder . . . ; . . . called upon to produce such book, he failed to do so, alleging that it was lost."

<sup>8</sup> Bostwick v. Young, 118 A. D. 490, 103 Supp. 607 (1907); *aff'd* 194 N. Y. 516, 87 N. E. 1115.

<sup>9</sup> Immediately upon acceptance by a corporation of transfers of property to it by individuals under an agreement for the issue of stock therefor the individuals become stockholders and liable for debts of the corporation to the extent of

**§ 201. Id.: One Becoming Stockholder After Debt Incurred.**

—The statute makes a stockholder liable for such debts of his corporation only as were contracted while such stock was held by him.<sup>10</sup> Decisions under analogous but no longer extant statutes are found in the note.<sup>11</sup>

**§ 202. Id.: On Increase or Reduction of Capital Stock.**—If the capital stock of a domestic corporation be increased in the manner provided in the Stock Corporation Law the holders of the additional stock issued are subject to the same liabilities with respect thereto as are provided by law in relation to the original capital; and if such stock be in like manner reduced the owner of any stock is not relieved from any liability existing prior to the reduction of the capital stock of any stock corporation.<sup>12</sup> Decisions under analogous but superseded statutes are collated in the note.<sup>13</sup> The liability of stockholders on reorganization of their corporation to permit issu-

their stockholdings until the whole of the outstanding capital stock has been fully paid. *Flower City National Bank v. Shire*, 88 A. D. 401, 84 Supp. 810 (1903); *St. Corp. L. § 54* (L. 1892, c. 688). One signing the original certificate for the incorporation of a company, acting as trustee or director, indorsing certificates of its stock made out to him and frequently declaring himself a stockholder may claim it is still a question of fact if he ever contracted with the company to become owner of some of its stock so as to be liable for its debts on failure of full payment of its capital stock, if other circumstances show he acted as a dummy; but when he with others also signed an agreement to take and pay for shares of stock, that agreement and his other acts looking toward incorporation together debar him from denying his liability. *Powers v. Knapp*, 71 Hun, 371, 25 Supp. 19 (1893); L. 1848, c. 40, § 10.

<sup>10</sup> *St. Corp. L. § 56* (L. 1909, c. 61).

<sup>11</sup> A stockholder of a corporation, the capital stock of which is not fully paid may be held for an amount due by the corporation under a contract made before he be-

came a stockholder but which did not become payable until certain services had been rendered, which were not rendered till after he became a stockholder. *McMaster v. Davidson*, 29 Hun, 542 (1883). Before a stockholder can be charged with the debts of his corporation, under the statute making him so to the extent of his holdings until its capital stock shall have been fully paid in, it must appear that he was such stockholder at the time the debt was created. *Close v. Brady*, 4 Misc. 474, 24 Supp. 567 (1893); *aff'd* 144 N. Y. 648, 39 N. E. 493; L. 1890, c. 564, § 57.

<sup>12</sup> *St. Corp. L. § 62* (L. 1909, c. 61).

<sup>13</sup> A stockholder becoming such by an increase of the corporation's stock is liable for a debt owing a lawyer for the corporation under a retainer entered into before the increase and while all the corporate stock was fully paid, if the services thereunder did not terminate till after the increase which was not fully paid. *Hallett v. Metropolitan Messenger Co.*, 69 A. D. 258, 74 Supp. 639 (1902); *St. Corp. L. § 54* (L. 1892, c. 688). In considering the liability of a stockholder for the debts of his corporation prior to the filing of a

ance by it of shares without nominal or par value has been already stated.<sup>13a</sup>

**§ 203. Id.: After Disposal of Holdings by Sale, Transfer, on Books, etc.**—The statute provides that no transfer of the stock of a corporation is valid as against its creditors for any purpose except to render the transferee liable for the debts of the corporation to the extent provided therein until such transfer has been entered in the corporate stock book as required by the statute, by an entry showing from and to whom transferred.<sup>14</sup> A judgment creditor of a corporation seeking to hold a stockholder for the amount unpaid on his holdings makes out a *prima facie* case of ownership by showing his name on the company's books as holder of such stock.<sup>15</sup> The statute making a holder of stock liable for any amount unpaid thereon imposes the liability upon every *holder* of stock, but it is a question of fact for the jury to decide whether one appearing on the corporate books as holder of stock who testifies that he simply signed an assignment in blank on a certificate of stock presented to him by his employer who beneficially held the stock is a holder so as to be liable under such statute.<sup>16</sup> It was held in an old case, decided before the present statute, that a receiver of a corporation cannot hold liable for the unpaid balance on its stock one who has at one time held the stock but has transferred it by signing the power of attorney on the certificate of such stock in blank and delivering it to the transferee, to whom the corporation has paid dividends thereon, even though the transfer has never

certificate of full payment of its capital stock, it must be borne in mind that if the corporation files such certificate and later increases its stock, the stockholder who was such before the increase is no longer liable for corporate debts, but only the stockholders who become holders of stock after the increase, and they only to the amount of the increase. *Veeder v. Mudgett*, 95 N. Y. 295 (1884); *Gen. Mfg. Act*, L. 1848, c. 40, §§ 10, 11, 20, 21, 22. "... the consequences of the omission [by a corporation] to file a certificate as to the payment of the increase of capital were to subject, not the holders of the capital stock which had been fully paid up, and as to which there was no statutory default, but the holders of the new issue of capi-

tal stock to liability for corporate debts." *Griffeth v. Green*, 129 N. Y. 517, 29 N. E. 838 (1892); *Gen. Mfg. Act*, L. 1848, c. 40, § 10.

<sup>13a</sup> See § 195, *supra*. The governing statute is *St. Corp. L. § 24-c* (L. 1917, c. 484).

<sup>14</sup> *St. Corp. L. § 32* (L. 1916, c. 127).

<sup>15</sup> *Breck v. Brewster*, 150 A. D. 202, 134 Supp. 697 (1912); *St. Corp. L. § 59*.

<sup>16</sup> *Breck v. Brewster*, 150 A. D. 202, 134 Supp. 697 (1912); *St. Corp. L. § 56*. The ostensible owner also signed a proxy, a consent to an increase of capital and a waiver of notice of a special meeting in which he described himself as a stockholder of record.

been recorded in the corporate stock book.<sup>17</sup> The owners of corporate stock made liable to respond to the demands of the corporation's creditors "divest themselves of the liabilities incident to their relation to the corporation when they have actually transferred their stock in the manner provided by the law," viz.: in good faith, at a time when the corporation is a going and solvent concern, by entry of the transfer upon its books.<sup>18</sup> A presumption that a transfer by stockholders of their holdings was made to avoid their personal liability, up to the amounts unpaid thereon, for their corporation's debts, arises if the transfer on the corporate books was made while the corporation was financially embarrassed to their knowledge, and they all joined at the same time in making the transfer to a person employed by one of them and of no pecuniary responsibility; and if they do not rebut this presumption they will continue to be held to their statutory liability as stockholders.<sup>19</sup> "Fully paid-up shares are transferable, and the holder of such shares (though he be a director), who has lost faith in the management and future success of a corporation which is engaged in business, may sell them to whosoever will buy, and for such a price as he can get, and if the transfer is absolute and registered he ceases to be a director and is not liable to the future creditors of the corporation, and the transfer is not void as to them."<sup>20</sup> A stockholder cannot be held personally liable for a debt due by his corporation contracted after he disposed of his stock, even though he is liable to a suit by the corporation for a portion of the purchase price remaining unpaid.<sup>1</sup> "A *bona fide* purchaser for value and without notice of stock issued by a corporation as paid up cannot be held liable on such stock in any way either to the corporation, corporate creditors or other persons even though the stock was not actually paid up as represented."<sup>2</sup> One who has contracted to buy all the stock of a corporation at the time a judgment is had against it but had not yet paid the agreed price cannot be held liable for the judgment in equity.<sup>3</sup> Deci-

<sup>17</sup> Cutting v. Damerel, 88 N. Y. 410 (1882).

<sup>18</sup> Tucker v. Gilman, 121 N. Y. 189, 24 N. E. 302 (1890).

<sup>19</sup> Veiller v. Brown, 18 Hun, 571 (1879).

<sup>20</sup> Sinclair v. Dwight, 9 A. D. 297, 41 Supp. 193 (1896); aff'd 158 N. Y. 607, 53 N. E. 510; St. Corp. L. §§ 30, 48 (L. 1892, c. 688), and § 54 (2 R. S. 9th ed. 1025). See now St. Corp. L. § 56.

<sup>1</sup> Veiller v. Brown, 18 Hun, 571 (1879).

<sup>2</sup> Van Slochem v. Villard, No. 1, 154 A. D. 161, 138 Supp. 852 (1912); aff'd 207 N. Y. 587, 101 N. E. 467, quoting from Cook Corp. 6th ed. § 50.

<sup>3</sup> Tilley v. Coykendall, 69 A. D. 92, 74 Supp. 631 (1902); aff'd 172 N. Y. 587, 65 N. E. 574.

sions under analogous but repealed statutes are given in the note.<sup>4</sup>

**§ 204. Id.: To What Extent Liable, In General.**—The statute makes a stockholder liable to corporate creditors for debts contracted while such stock was held by him only up to an amount equal to the amount unpaid on the stock held by him.<sup>6</sup> “Before 1901, a stockholder who had paid in full for his stock, nevertheless could be compelled, under the statute, to pay creditors an amount equal to his stock, if the entire capital stock, by whomsoever subscribed, had not been paid in

<sup>4</sup> An assignment by a stockholder of his holdings, not entered in the stock-transfer book prescribed by statute for corporations, cannot relieve him from liability for the corporation's debts if its capital is not fully paid up. *Powers v. Knapp*, 71 Hun, 371, 25 Supp. 19 (1893); *L. 1848, c. 40, § 25*. One holding stock of a corporation issued in payment for property bought by it and fairly worth the face value of the stock is not liable for corporate debts under a statute making stockholders so liable until their corporation's capital stock has been fully paid in and a certificate thereof filed. *Powers v. Knapp*, 85 Hun, 38, 32 Supp. 622 (1895); *aff'd* 158 N. Y. 733, 53 N. E. 1131; *L. 1848, c. 40, § 10*; *L. 1853, c. 333, § 2*. A statute enabling a corporation's creditor, entitled to enforce its stockholders' liability for its debts, to recover “of the stockholders who were such when the debt was contracted or the loss or damage sustained, or of any subsequent stockholder,” means “that in respect of every share of stock issued by the corporation there shall be a stockholders' liability to an amount equal to the par value thereof, against either the stockholder who was such when the debt was contracted or the loss or damage sustained, or by any subsequent stockholder;” and the vendor and the vendee of shares of stock may be both made defendants, though there can be but one recovery. *The Mosler Safe Co. v. Guardian Trust Co.*, 208 N. Y. 524, 101 N. E.

786 (1913); *Banking L. § 303*. An unsatisfied judgment creditor of a corporation cannot hold liable for his claim a stockholder on the ground that no certificate of payment of its capital stock had been filed and no such payment had in fact been made if the facts were that the particular stockholder received his holdings gratuitously from one to whom all the capital stock had been issued for a patent, unless it be shown that, besides purchasing such patent at an over-valuation, the corporation agreed on the price in bad faith and to evade the statute. *Knowles v. Duffy*, 40 Hun, 485 (1886); *L. 1848, c. —, §§ 10, 11 (Gen. Mfg. Act)*. A stockholder is individually liable for a debt of his corporation if he paid nothing for his stock but received it as part of \$400,000 of stock issued for a patent to one who kept but \$80,000 and surrendered the rest. *Thurston v. Duffy*, 38 Hun, 327 (1885); *L. 1853, c. 333*.

<sup>6</sup> *St. Corp. L. § 56 (L. 1909, c. 61)*: “As to existing corporations the liability imposed by this section shall be in lieu of the liability imposed upon stockholders of any existing corporation, under any general or special law . . . on account of any indebtedness hereafter contracted on any stock hereafter issued; but nothing in this section contained shall create or increase any liability of stockholders of any existing corporation under any general or special law.”

full; but, in 1901, the statutory liability was reduced as to claims originating after that time, so that now, aside from the special liability to laborers, the stockholder is liable, under section 54, to creditors only for the amount which is unpaid upon his own stock; in which respect the statutory liability and the liability in equity are alike. The distinction between the two forms of action is retained, however . . . .”<sup>7</sup> Creditors of a corporation are only entitled to collect on unpaid subscriptions to stock so far as necessary, and although as to them two or more defendants may be liable only one satisfaction may be had as to the same stock or that issued in place thereof.<sup>8</sup> No suit can be brought in this State by a judgment-creditor of a corporation to hold its bonus stockholders to an amount equal to the par value of their holdings under a foreign statute unless such a statute giving such right is alleged.<sup>9</sup> Decisions under repealed statutes are collected in the note.<sup>10</sup>

<sup>7</sup> *Leighton v. Leighton Lea Assn.*, 62 Misc. 73, 114 Supp. 918 (1909).

<sup>8</sup> *Stevens v. Episcopal Church History Co.*, 140 A. D. 570, 125 Supp. 573 (1910).

<sup>9</sup> *Holsinger v. Wood*, — Misc. — (1918), N. Y. L. J. Mch. 23, 1918, p. 2008, Sup. Ct. Spec. T. Pt. III.

<sup>10</sup> “A stockholder may be absolutely discharged from all liability under . . . [the statute making him liable for corporate debts of a corporation the capital stock of which is not fully paid] by payment, on legal compulsion, to any creditor or creditors for whose debts he is liable, if such payment equals the amount of his stock. His liability is measured by the amount of stock held by him. To entitle a stockholder to interpose such discharge as an absolute bar to a claim by other creditors, either at law or in equity, it would . . . be incumbent upon him to show that the payment was made to a creditor or creditors for whose debts he was liable under the statute. He is only liable to pay the amount once; but the payment must be made in discharge of a statute liability. Probably the same effect would result from a voluntary payment.” *Mathez v. Neidig*, 72

N. Y. 100 (1878); L. 1848, c. 40, § 12. “By the provision of this section liability is created against every stockholder according to the amount of his holdings so long as any of the stock of the corporation issued and outstanding shall not have been fully paid.” *Hallett v. Metropolitan Messenger Co.*, 69 A. D. 258, 74 Supp. 639 (1902); St. Corp. L. § 54 (L. 1892, c. 688). “The statutory liability [of a stockholder for the debts of a corporation the capital stock of which is not fully paid] arises whenever the whole capital stock has not been paid in. The stockholder sued may have paid in full, but that does not relieve him, if others are in default (*citation*). He is still liable to an amount equal to his stock, so long as the whole capital is not fully paid.” *Wheeler v. Millar*, 90 N. Y. 353 (1882); Gen. Mfg. Act, L. 1848, c. 40, § 10. When judgment has passed against a stockholder of a corporation, the capital stock of which is not fully paid, for a corporate debt, “and his personal liability is fixed for the debts of the corporation to an amount equal to the stock held by him, or when he has paid debts of the corporation to

§ 205. *Id.*: **When Stock Fully Paid.**—The cases now cited were rendered under former statutes; but the principles set forth seem soundly applicable to the present law. In determining whether or not stockholders are personally liable for the debts of their corporation, on the ground that their holdings were not fully paid for because of the issue of their stock for property less valuable than the stock issued therefor, the real question is of fact, viz.: whether the property was placed and taken at a higher valuation with a fraudulent purpose, with the intent of evading the provisions of the statute.<sup>11</sup> “ . . . to charge a holder of stock, issued upon and for the purchase of property, individually for the debts of the company, it is not enough to prove that the property has been purchased and paid for at an over-valuation through a mere mistake or error of judgment on the part of the trustees, but . . . it must be shown that the purchase at the price agreed upon was in bad faith and to evade the statute.”<sup>12</sup> “ . . . a mere mistake or error of judgment by the trustees [of a corporation], either as to the necessity or value of property, purchased by them in good faith ” with stock of the company will not subject a stockholder to liability on the ground that the stock of the company is not full paid.<sup>13</sup> In determining the personal liability of holders of stock of a corporation issued for property on the ground that it is not fully paid it must be borne in mind that “ a discretion is vested in the trustees which calls for the honest exercise of their judgment. If they acted in good faith [in issuing stock for certain property] the stockholders could not be made liable. The real question in cases of this character is whether the property was placed and taken at a high valuation with a fraudulent intent of evading the provisions of the statute. . . . where property, the value of which is well known and understood, or capable of

that amount,” he is relieved from further liability. *Weeks v. Love*, 50 N. Y. 568 (1872); *Gen. Mfg. Act*, L. 1848, c. 40, § 10.

On personal liability at common law of stockholders of a corporation to the other party to an act or transaction in excess of the corporate or in violation of law, see note in 6 L.R.A.(N.S.) 1003.

<sup>11</sup>*Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87 (1882); *Gen. Mfg. Act*, L. 1848, c. 40, as amend'd L. 1853, c. 333, § 10. All the stock

was issued for patents under an agreement that part should be put in trust for sale at half of par value, one-sixth of the proceeds to go to the owners of the patents and the five-sixths to the company as working capital.

<sup>12</sup>*Douglass v. Ireland*, 73 N. Y. 100 (1878); L. 1848, c. 40; L. 1853, c. 33.

<sup>13</sup>*Schenck v. Andrews*, 57 N. Y. 133 (1874); *Gen. Mfg. Act*, L. 1848, c. 40, § 10, as amend'd L. 1853, c. 333.

being easily ascertained, is taken at a most exorbitant estimate, far beyond any intrinsic and real value, it raises a strong presumption that the valuation is not in good faith and was made for a fraudulent purpose. This presumption will be conclusive unless it is rebutted by evidence which fully explains the apparent bad faith."<sup>14</sup> "While in equity the capital stock of a corporation is a fund for the payment of debts, and upon the dissolution of such corporation stockholders may be compelled to pay the amount unpaid upon the stock owned by them for the benefit of creditors, such stockholders can only be made liable where it is shown that the stock has been actually taken by them, or fraudulently received, and not where it has been delivered, in good faith and for an adequate consideration, by the corporation to the stockholder."<sup>15</sup> In an action to hold a stockholder liable because his corporation's capital stock has never been paid in and no certificate of payment thereof has been recorded the plaintiff may prove any fact tending to show that the stock issued as full-paid stock was not in fact paid for, such as the issue of shares for services rendered by a promoter.<sup>16</sup> In the note are collected cases dealing with the requirement of the former statute that a stockholder should not be relieved from liability to creditors of the corporation until a certificate of full payment of its capital stock should have been filed.<sup>17</sup>

<sup>14</sup> *Boynton v. Andrews*, 63 N. Y. 93 (1875); *Gen. Mfg. Act*, L. 1848, c. 40, § 10, as amend'd L. 1852, c. 333.

<sup>15</sup> *Van Cott v. Van Brunt*, 82 N. Y. 535 (1880). The construction of a railroad was all paid for in its stock — and properly.

<sup>16</sup> *Herbert v. Duryea*, 34 A. D. 478, 54 Supp. 311 (1898); *aff'd* 164 N. Y. 595.

<sup>17</sup> "The liability of stockholders differs from that of officers of a corporation who have neglected to file annual reports, in that the latter is in the nature of a penalty. The statutory obligation which a stockholder assumes becomes a part of the contracts made by the company with its creditors until the corporation is so far organized and completed that its stock is subscribed for and paid in, at which time the statute relieves the stockholder from further liability. Until that time his

relation is deemed contractual." *Close v. Potter*, 155 N. Y. 145, 49 N. E. 686 (1898). The statute making a stockholder liable for his corporation's debt until filing of a certificate of full payment of its capital stock in effect "withdraws the protection of the corporation from the stockholders, and regards them liable to the extent of the amount of their stock as copartners." *Wiles v. Suydam*, 64 N. Y. 173 (1876); L. 1848, c. 40, §§ 10, 12; *Code*, § 167. Under the statute making a stockholder liable for his corporation's debts until its stock is fully paid in "two things are requisite to end the stockholder's liability. The whole amount of capital stock must be paid in, and the certificate of that fact . . . must be made and recorded. A false assertion of compliance does not make compliance with the first condition." *Veeder v. Mudgett*, 95 N. Y. 295 (1884);

**§ 206. Id.: Action, Judgment and Execution Against Corporation Condition Precedent To, Governing Statutes.**—No stockholder is personally liable for any debt of the corporation unless (1) an action for its collection is brought against the

Gen. Mfg. Act, L. 1848, c. 40, §§ 10, 11, 20, 21, 22. A creditor of a corporation who has a judgment against it on which execution has been returned unsatisfied may hold a stockholder individually liable therefor to the amount of his holdings, if its capital stock is not fully paid, without waiting till the two years have expired during which such full payment of capital stock may be made, although he may not hold the stockholder if the debt is not to be paid within one year from the time it is contracted, and for such a debt must sue the company within a year of its due date in order to hold the stockholder. *King v. Duncan*, 38 Hun, 461 (1886); L. 1848, c. 40, §§ 10, 24. A subscriber to capital stock is not liable for a corporate debt up to the amount of his holdings on the ground that he certified the stock was fully paid when he knew it was not unless he knew that others putting up property for the stock they got in bad faith put a fictitious value on such property in order to evade the statute. *Van Vleet v. Jones*, 75 Hun, 340, 26 Supp. 1082 (1894); L. 1848, c. 40, § 10. "... persons contracting with a corporation, by which they give credit to it, have the right to rely upon the liability of all the stockholders, and not a portion thereof, until the certificate [of payment of the whole amount of capital stock] is given; and ... persons becoming stockholders before the stock is paid in, and a certificate given, must be understood as contracting that they will be personally liable to creditors to an amount equal to the stock held by them until the terms of the statute are filled. It may be very different with persons who have acquired stock in a corporation after the certificate has been

made and recorded." *White, Corbin & Co. v. Jones*, 167 N. Y. 158, 60 N. E. 422 (1901); L. 1848, c. 40, and amendments, §§ 10, 11, making stockholders individually liable to creditors upon their holdings until certificate of payment of whole capital stock had been recorded. The purpose of the law making corporate stockholders individually liable for their corporation's debts to the amount of their stockholdings until its whole capital shall have been certified to have been paid in is to provide a fund for the security of creditors; and if payment is taken for stock in property, it must be properly necessary for the business of the company and of the value of the stock paid for it, so that the transaction may always be impeached for fraud, of which an actual value of the property at one-half the price paid for it in stock is evidence. *Boynton v. Hatch*, 48 N. Y. 225 (1872); Gen. Mfg. Act, L. 1848, c. 40, as amended L. 1853, c. 333. The object of a statute making stockholders of a corporation individually liable for its debts up to the amount of their holdings until a certificate of payment of its capital stock in full has been recorded "in the office of the secretary of state, and of the county in which the principal business office of such corporation is situated" is to protect persons giving credit to the corporation by requiring its capital to be paid in promptly and the fact announced to the world by a certificate filed in a public office; and, though the statute read literally requires the certificate to be filed in the office of the secretary of state, and, also, either in the office of the county, or of the secretary of the county, yet if it be duly filed in the office of the secretary of state alone

corporation within two years after the debt becomes due; (2) such action against the corporation has been carried to judgment against it; (3) an execution on such judgment against the corporation has been returned unsatisfied in whole or in part.<sup>18</sup>

**§ 207. Id.: In General.**—The decisions under statutes which were the forerunners of the existing statute are freely used because deemed in point as regards the requirement in the present statute, which also had its place in its predecessors, that action, judgment and unsatisfied execution against the corporation were conditions precedent to the stockholder's liability. A suit against the corporation is a condition precedent to holding its stockholders personally liable for its debts under a statute making them so liable until the whole

a stockholder will be protected from liability under the statute at the suit of a creditor of the corporation, brought over four years after such filing on the ground of the technical violation of the statute in not filing the certificate also in the office of the secretary of the county or of the county, either of which the statute might be construed to intend. *Jones v. Butler*, 146 N. Y. 55, 41 N. E. 633 (1895); *Bus. Corp. Act*, § 37 (L. 1875, c. 611). A certificate of full payment of capital stock is sufficient to relieve the corporation's stockholders of liability for its debts though not recorded with the statutory limitation of time, provided the omission to record was that of a clerk directed to record it. *Veeder v. Mudgett*, 95 N. Y. 295 (1884); *Gen. Mfg. Act*, L. 1848, c. 40, §§ 10, 11, 20, 21, 22. Certificates of payment of capital stock paid in, required by statute to be filed in the county clerk's office and to be "signed and sworn to" by the corporate officers, which are not sworn to but simply acknowledged are not a compliance with the statute, and the liability of owners of shares of stock for corporate debts imposed by statute if such certificate be not properly executed and filed is not terminated. *Hardman v. Sage*, 124 N. Y. 25, 26 N. E.

354 (1891); *Gen. Mfg. Act*, L. 1848, c. 40, § 11. Under a statute making corporate stockholders liable to the corporation's creditors for its debts until a certificate of payment of all its capital stock shall have been filed, but permitting full-paid, non-assessable stock to be issued in payment of property, the failure to file the certificate when the stock is issued for property is in itself no ground of liability. *Rowell v. Janvrin*, 151 N. Y. 60, 45 N. E. 398 (1896); L. 1848, c. 40, § 10 *et seq.*, as amend'd L. 1853, c. 333, § 2. ". . . a person to whom stock has been issued for a manufactory, or other property purchased by a corporation, is not liable to the creditors of the company because of a failure on the part of the president and trustees to file the certificate" of full payment of the company's capital stock; and if the stock is issued in payment of the rent of premises necessarily leased for the company's business, they are a manufactory and "property" within the meaning of the statute so as to absolve the person to whom the stock is issued from liability. *Closer v. Noye*, 147 N. Y. 597, 41 N. E. 570 (1895); L. 1853, c. 333, amend'g *Mfg. Act* of 1848, c. 40, § 10.

<sup>18</sup> *St. Corp. L.* § 59 (L. 1909, c. 61).

amount of its capital stock shall have been paid.<sup>19</sup> To hold a stockholder liable to a creditor of his corporation for its indebtedness to the creditor on the ground that the whole of its outstanding capital stock has not been fully paid, pursuant to a statute, the return unsatisfied of an execution in the creditor's favor against the corporation is all that is required; and it is not necessary that the creditor should set aside in equity or recover property of the corporation fraudulently sold to cheat the sheriff.<sup>20</sup> The statute making stockholders of a corporation liable to its creditors until its capital stock is wholly paid in made "it a condition precedent to maintaining an action against a stockholder . . . that the creditor should have obtained judgment upon his claim against the company, and that an execution should have been issued thereon and returned unsatisfied;" and this condition applies to the case of a continuing stockholder as well as to that of one who has ceased to be such.<sup>1</sup> A *bona fide* purchaser for value before maturity of corporate notes is not thereby relieved from procuring judgment thereon and execution returned unsatisfied as a prerequisite to holding a stockholder to his statutory liability for the corporation's debts.<sup>2</sup> The issuing and return of an execution upon a judgment of a creditor against a corporation on his claim is a condition precedent to his right to maintain an action against one of its stockholders for an amount equal to the stock held by the latter in the corporation on the grounds stipulated in a statute that its whole capital stock has not been paid in and that no certificate of such payment has been made and recorded.<sup>3</sup> The judgment against a corporation which must be recovered and be unsatisfied by execution as a condition precedent to the right of a creditor of the corporation to sue a stockholder thereof for his debt must be a judgment recovered and an execution returned unsatisfied in this State.<sup>4</sup> In order to hold

<sup>19</sup> Birmingham National Bank v. Mosser, 14 Hun, 605 (1878); L. 1848, c. 40. See now St. Corp. L. § 59.

<sup>20</sup> Berwind-White Mining Co. v. Wadsworth, 27 A. D. 550, 50 Supp. 501 (1898); St. Corp. L. §§ 54, 57 (L. 1892, c. 688; L. 1890, c. 564. See now St. Corp. L. § 59.

<sup>1</sup> Handy v. Draper, 89 N. Y. 334 (1882); Gen. Mfg. Act, L. 1848, c. 40, § 10; Rocky Mountain Nat. B'k v. Bliss, 89 N. Y. 338 (1882). See now St. Corp. L. § 59.

<sup>2</sup> Close v. Potter, 155 N. Y. 145, 49 N. E. 686 (1898).

<sup>3</sup> Berwind-White Coal Mining Co. v. Ewart, 90 Hun, 60, 35 Supp. 573 (1895).

<sup>4</sup> Rocky Mountain Nat. B'k v. Bliss, 89 N. Y. 338 (1882); Gen. Mfg. Act, L. 1848, c. 40, §§ 10, 24. See now St. Corp. L. § 59. A proceeding *in rem* against the corporation in a foreign state held insufficient.

a stockholder personally liable for his corporation's debt an execution must have been issued and returned unsatisfied on the judgment which is the foundation of the plaintiff's suit — not on some other judgment.<sup>5</sup> A creditor's action against a stockholder in a limited liability company for its debt, when it is organized under a statute providing that suit on the debt must first have been brought against the company but not requiring that execution against the company must have been returned unsatisfied before an enforceable liability arises against the stockholder, may be maintained after a suit to recover the debt has been commenced against the corporation, but before judgment has been obtained thereon against the corporation.<sup>6</sup> A cause of action in favor of a receiver of a corporation incorporated in a State the laws of which make its stockholders liable, above the stock owned by them and any amount unpaid thereon, to a further sum at least equal to the amount of such stock, does not accrue till judgment is rendered fixing and determining the amount of the assessment upon the stock.<sup>7</sup>

**§ 208. Id.: Not When Corporation Dissolved, Bankrupt, etc.**—The decisions under statutes which were the parents of the present statute are used as freely as the decisions under the existing law because of the similarity of the present statute and its predecessors as to the necessity of the return of an execution against the corporation unsatisfied as a condition precedent to the stockholder's liability. The complaint in an action under the statute to hold stockholders for debts of their corporation need not allege recovery of judgment and return unsatisfied of execution thereon in an action against the corporation if it allege excuse for failure to obtain such judgment, etc.<sup>8</sup> The statutory condition precedent to maintenance of an action to enforce the liability of a stockholder in a manufacturing company that "an execution against the company shall have been returned unsatisfied in whole or in part" will be dispensed with only "(1) where the corporation has been dissolved by judicial decree; (2) where by final judgment in an action for sequestration a perpetual injunction has

<sup>5</sup> *Terry v. Rothschild*, 83 Hun, 486, 31 Supp. 1119 (1895); *St. Corp. L.* § 24. See now § 59.

<sup>6</sup> *Walton v. Coe*, 110 N. Y. 109, 17 N. E. 676 (1888); *Bus. Corps. Act*, L. 1875, c. 611, § 37. The act of 1848 for organizing manufacturing corporations has a different provision in part.

<sup>7</sup> *Shipman v. Treadwell*, 208 N. Y. 404, 102 N. E. 634 (1913).

<sup>8</sup> *Roebeling's Sons Co. v. Federal Storage Battery Car Co.*, — Misc. — (1918), N. Y. L. J. Feb. 27, Sp. T. N. Y. Co.; *St. Corp. L.* § 56.

been issued restraining suits by creditors, and (3) where, by statute, such suits are prohibited;" the fact that a receiver has been appointed in a stockholder's suit who has been rendered immune from suit by court order is insufficient, certainly in the absence of any effort for a modification of such order.<sup>9</sup> When the performance of the condition, that judgment must be had and be unsatisfied against a corporation before its stockholders can be held, under the statute, for its debt evidenced thereby, is rendered "impossible by the operation and effect of a statute, that is, becomes illegal, the performance is excused, and the rights of the parties will be preserved."<sup>10</sup> The statutory requirement that judgment shall have been recovered against a corporation and execution thereon returned unsatisfied before an action can be brought against a stockholder to hold him for the amount unpaid on his stock does not hold when the recovery of the judgment and the return of execution unsatisfied are rendered impossible by a law of the United States and the action of its courts thereunder.<sup>11</sup> The condition of execution returned unsatisfied on a judgment obtained against a corporation which is required as a prerequisite to an action against its stockholders under a statute making them liable for its debts if the stock is not fully paid in is not dispensed with by allegations that a proceeding for the corporation's voluntary dissolution had been begun, a receiver appointed and an injunction against suits granted before the action was begun.<sup>12</sup> Under a statute relieving a stockholder from personal liability for corporate debts "not to be paid within one year from the time the debt is contracted," unless suit be brought against the company within one year after debt is due, a final judgment dissolving the corporation entered so as to make it impossible for the corporate creditors to recover a judgment

<sup>9</sup> *United Glass Co. v. Vary*, 152 N. Y. 121, 46 N. E. 312 (1897); L. 1848, c. 40, § 24. See now *St. Corp. L.* § 59.

<sup>10</sup> *Shellington v. Howard*, 53 N. Y. 371 (1873); *Gen. Mfg. Act*, L. 1848, c. 40, § 24. See now *St. Corp. L.* § 59. Plaintiff commenced his action against the corporation in time but was prevented from prosecuting it to judgment by the act of the defendant and the operation of the Bankrupt Act of the United States.

<sup>11</sup> *Firestone Tire and Rubber Co. v. Agnew*, 194 N. Y. 165, 24 L.R.A.

(N.S.) 628, 86 N. E. 1116 (1909); *St. Corp. L.* §§ 54, 55. See now *St. Corp. L.* § 59; *Bankruptcy L.* §§ 12, 14, 1 (subd. 12), (4 subd. b). The debtor corporation had been adjudged bankrupt, its assets distributed under a composition approved by the Federal court and discharged.

<sup>12</sup> *United States Glass Co. v. Levett*, 24 Misc. 429, 53 Supp. 688 (1898); *St. Corp. L.* §§ 54, 55 (L. 1892, c. 688). See now *St. Corp. L.* § 59.

and have an execution returned unsatisfied enables the creditors to maintain an action for the recovery of any debt which, within the meaning of the statute, fell due during the preceding year without first obtaining judgment against the corporation and having an execution returned unsatisfied.<sup>13</sup> Although as a condition precedent to holding a stockholder liable for his corporation's debt no judgment recovered against it and execution returned thereon unsatisfied is necessary if it has been dissolved, yet no such dissolution results from the appointment of a receiver for it and injunction upon it from exercising its franchise or intermeddling with its property; and in such a case one seeking to hold a stockholder for a corporate debt must still get his judgment against the corporation.<sup>14</sup>

**§ 209. Id.: Judgment Against Corporation as Measure of Stockholder's Liability.**—The statute provides that the amount due on the execution returned unsatisfied in whole or in part on the judgment recovered against the corporation is the amount recoverable.<sup>15</sup> “. . . the provision of the statute prohibiting the bringing of an action against a stockholder for a debt of the corporation until judgment therefor has been recovered against the corporation and an execution thereon has been returned unsatisfied in whole or in part at least requires a verdict determining the amount of the plaintiff's claim and that the stockholder, when he is called upon to pay, cannot be required to ascertain the amount from estimates and figures made by the plaintiff's brother as to the various items included by the jury in their verdict.”<sup>16</sup> The provision of the statute that the amount due on an unsatisfied execution issued after a judgment against a corporation shall be the amount recoverable against a stockholder is not equivalent to saying that the judgment and execution shall be all the evidence necessary to fix the amount recoverable from the stockholder but means that the amount due on the execution required to be issued shall be a limitation of the stockholder's liability and not proof of an indebtedness for which the stockholder is liable.<sup>17</sup> As an analogous provision to that contained

<sup>13</sup> *Hardman v. Sage*, 124 N. Y. 25, 26 N. E. 354 (1891); Gen. Mfg. Act, L. 1848, c. 40, § 24.

<sup>14</sup> *Kincaid v. Dwinelle*, 59 N. Y. 548 (1875); Gen. Mfg. Act, L. 1848, c. 40, §§ 18, 24. See now St. Corp. L. § 59.

<sup>15</sup> St. Corp. L. § 59 (L. 1909, c. 61).

<sup>16</sup> *Card v. Groesbeck*, 204 N. Y. 301, 97 N. E. 728 (1912); St. Corp. L. § 59.

<sup>17</sup> *Assets Realization Co. v. Howard*, 211 N. Y. 430, 105 N. E. 680 (1914); St. Corp. L. § 59.

in the present statute was contained in statutes which were precursors of the present law the decisions under the former statutes are given in the note.<sup>18</sup> The extent to which a judgment against the corporation is evidence of the debt owing from a stockholder is discussed in cases decided under old statutes and collated in the note.<sup>19</sup>

**§ 210. Id.: Statute of Limitations Against.**—No stockholder is liable personally for any debt of the corporation unless an action for its collection is brought against the corporation within two years after the debt becomes due, nor for any debt of the corporation not payable within two years from the time it is contracted, nor to any action after he has ceased to be a

<sup>18</sup> In an action against a stockholder, to enforce his liability under a statute making him individually liable to corporate creditors to an amount equal to the amount unpaid on the stock held by him for all its debts until the whole capital stock held by him has been paid, a judgment recovered by him against the company is competent evidence of his status as a creditor of the company and of the amount due him (from the corporation). *Stephens v. Fox*, 83 N. Y. 313 (1881); *Gen. R. R. Act*, L. 1850, c. 140, § 10, as amend'd L. 1854, c. 282. In an action by a judgment creditor of a corporation to hold a stockholder for the debt, under a statute making stockholders liable to an amount equal to their capital stock until the whole capital stock shall have been paid and a certificate thereof filed, the judgment against the corporation is of no virtue against the stockholder and is only evidence as proving the performance of the condition precedent, and the stockholder may show there was no debt due from the corporation to the plaintiff. *Lawyer v. Rosebrook*, 48 Hun, 453 (1888). A stockholder of a corporation the capital of which is not fully paid and sued, therefore, under a statute, for a debt of the company on its draft, is *prima facie* bound by a judgment in evidence on the draft insofar as the legality of the draft is concerned.

*Hoagland v. Bell*, 36 Barb. 57 (1861).

<sup>19</sup> It seems to be questionable "whether a judgment against a company is in a separate action against a stockholder for the recovery of the same debt, evidence of the debt sued upon." *McMahon v. Macy*, 51 N. Y. 155 (1872); *Gen. R. R. Act*, L. 1850, c. 140, §§ 10, 11, as amend'd L. 1854, c. 284. It seems that in a statutory action against a stockholder to recover a debt contracted by his corporation, "a judgment previously recovered by the plaintiff against the corporation upon the same demand, . . . [is] *prima facie* evidence of a debt against the defendant; but subject to be impeached for collusion or mistake." *Moss v. Averell*, 10 N. Y. 449 (1853); L. 1837, c. 441, § 9. A judgment debt against a corporation, unless shown to have been had by collusion or fraud, is binding on a stockholder in an action to hold him individually for such debt. *Conklin v. Furman*, 57 Barb. 484 (1865); *aff'd* 48 N. Y. 527; L. 1847, c. 210, § 14, making stockholders liable for corporate debts to the amount of their holdings. A judgment against a corporation is as obligatory on its stockholders when they are sought to be charged with their statutory liability for its debts as it is on the corporation itself. *Moss v. McCullough*, 7 Barb. 279 (1849).

stockholder unless brought within two years from the time he ceased to be a stockholder.<sup>20</sup> Decisions under former statutes containing statutes of limitation of similar period are used in the text as well as opinions concerning the statute now in force, because of the similarity of all such laws. While the power of the legislature is undoubted to alter or amend the Statute of Limitations and apply it to existing liabilities, yet it cannot change the period of time for which a stockholder shall be personally liable for his corporation's debts, so as to bind stockholders who are such at the time of the statute's amendment; because a stockholder's liability for the corporate debts accrues only after judgment had against the corporation and execution thereon returned unsatisfied, and is that of a surety, guaranteeing the solvency of the corporation during that period only for which the statute made him liable when he became a stockholder.<sup>1</sup> The legislature may change the limitation upon an action by a corporate creditor to enforce the liability of corporate stockholders for corporate debts to the extent of unpaid subscriptions on their stockholdings.<sup>2</sup> " . . . whenever an existing stockholder shall be divested of his interest in or control over the affairs of a corporation, whether by voluntarily transferring his share to another person, or compulsorily as by forfeiture upon the declaration of the company . . . ; time begins to run, and at the end of two years the statutory limit is reached and he is no longer liable for any debt of the corporation. The same result must follow upon the actual dissolution of the corporation by formal judgment, or by a surrender of its corporate rights, privileges and franchises. Organization then ceases and the artificial entity is resolved into its independent parts. The thing itself therefore no longer existing, there can be no shares in the thing and of course no stockholders."<sup>3</sup> A time limitation imposed by statute on an action by a creditor of a corporation against one of its stockholders for recovery of the debt on the ground that the whole of the corporate stock has not been paid in is a matter of defense, waived if not plead by answer, which need

<sup>20</sup> St. Corp. L. § 59 (L. 1909, c. 61).

<sup>1</sup> *Close v. Potter*, 155 N. Y. 145, 49 N. E. 686 (1898).

<sup>2</sup> *Lang v. Lutz*, 180 N. Y. 254, 73 N. E. 24 (1904); *Stock Corp. L. § 54* (L. 1901, c. 354, amend'g L. 1892, c. 688). See now § 59.

<sup>3</sup> *Hollingshead v. Woodward*, 107

N. Y. 96, 13 N. E. 621 (1887); *Gen. Mfg. Act, L. 1848, c. 40, § 24*: "No suit shall be brought against any stockholder . . . who shall cease to be a stockholder . . . unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder."

not be negated by allegations of the complaint.<sup>4</sup> When under a statute stockholders are liable for their corporation's debts to the amount of their stockholdings from the time the corporation is liable, the fact that they cannot be sued separately until judgment is had against the corporation does not prevent the statute of limitations from beginning to run against a suit against them separately from the time the corporation became liable rather than from the time judgment is had against it.<sup>5</sup> Renewal notes given by a corporation do not operate to prevent the running of the statute of limitations against a claim against the stockholder on his personal liability by statute for the corporate debts.<sup>6</sup> The statute limiting the time within which a stockholder may be sued for an indebtedness of his corporation is a general statute of limitations which affects full liability business corporations as well as others.<sup>7</sup> Though there is an apparent conflict between the statute providing that stockholders of a full liability corporation shall be liable for all debts and the statute providing that stockholders shall not be liable for any corporate debt not payable within two years from the time it is contracted, yet the latter statute is applicable as a statute of limitations to an action brought under the former.<sup>8</sup> The purpose of the statute providing that no stockholder shall be personally liable for any debt of his corporation not payable within two years from the time it is contracted is "to prevent the extension of a credit to a corporation for a longer period than two years;" and, therefore, the fact that an original debt, later assumed by a corporation, has run for a longer period than two years before sued upon against the corporation is immaterial, if the company becomes chargeable with it (because of its maturity) within two years from the time it assumes payment, as not till such assumption does it become the corporate debt.<sup>9</sup> The liability of stockholders of a business corporation individually for its liabilities is contingent on an

<sup>4</sup> *Castner v. Duryea*, 16 A. D. 249, 44 Supp. 708 (1897); L. 1848, c. 40, §§ 10, 20. See now St. Corp. L. § 59.

<sup>5</sup> *Conklin v. Furman*, 57 Barb. 484 (1865); aff'd 48 N. Y. 527; L. 1847, c. 210, § 4.

<sup>6</sup> *Close v. Potter*, 155 N. Y. 145, 49 N. E. 686 (1898).

<sup>7</sup> *Adams v. Wallace*, 82 A. D. 117, 81 Supp. 848 (1903); St. Corp. L. § 55; Gen. Corp. L. § 33, 2; Bus.

Corps. L. § 6. See now St. Corp. L. § 59.

<sup>8</sup> *Sanford v. Rhoads*, 113 A. D. 782, 99 Supp. 407 (1906); Bus. Corps. L. § 6 (L. 1892, c. 691); St. Corp. L. § 55 (L. 1892, c. 686). See now St. Corp. L. § 59.

<sup>9</sup> *Ford v. Chase*, 118 A. D. 605, 103 Supp. 30 (1907); aff'd 189 N. Y. 504, 81 N. E. 1164; St. Corp. L. § 54 (L. 1901, c. 354). See now § 59.

action having been brought against it for the liability in question within two years after it became due.<sup>10</sup> In applying the statute releasing stockholders from liability for a debt of their corporation payable over two years from the time it is contracted, a lease by the corporation under which the rent is payable quarterly becomes a debt only as the installments become due.<sup>11</sup> The period for which creditors of a corporation are enjoined from suing it is not part of the two-year period prescribed by statute as the time a stockholder shall be liable for the corporation's debt "unless an action for its collection shall be brought against the corporation within two years after the debt becomes due."<sup>12</sup> Decisions under former statutes providing different statutes of limitations are given in the note.<sup>13</sup>

**§ 211. Id.: For Interest On.**—The statute makes no provision for holding a stockholder liable for interest on a claim of a corporate creditor; but some decisions under the predecessor-laws of the existing statute are given, though the parent statutes differed from the one now in force. Interest on a creditor's claim against a stockholder of a corporation the capital stock of which is not fully paid should be allowed

<sup>10</sup> *Adams v. Slingerland*, 87 A. D. 312, 84 Supp. 323 (1903); *Bus. Corps. L. § 6* (L. 1892, c. 691); *St. Corp. L. § 55* (L. 1892, c. 688). See now § 59.

<sup>11</sup> *Sanford v. Rhoads*, 113 A. D. 782, 99 Supp. 407 (1906); *Bus. Corps. L. § 6* (L. 1892, c. 691); *St. Corp. L. § 55* (L. 1892, c. 688). See now § 59.

<sup>12</sup> *Ford v. Chese*, 118 A. D. 605, 103 Supp. 30 (1907); *aff'd* 189 N. Y. 504, 81 N. E. 1164; *St. Corp. L. § 55*. See now § 59.

<sup>13</sup> "The year within which an action must be begun for the recovery of a debt owing by a manufacturing corporation so as to lay a foundation for a recovery against a stockholder, begins to run on the day when the debt first became due, and if the time of its payment is extended by a promissory note which is sued within a year from the date of its maturity, but more than a year after the date when the debt for which it was given first became due, and a

judgment is recovered and an execution returned unsatisfied, it is not a compliance with the section quoted, and stockholders cannot be charged with the payment of the debt." *Hardman v. Sage*, 124 N. Y. 25, 26 N. E. 354 (1891); *Gen. Mfg. Act, L. 1848, c. 40, §§ 10, 24*. Under a statute that stockholders are personally liable for debts contracted by their corporation after judgment has been had and unsatisfied against the corporation, an action against them is barred by the six and not the three year statute. *Corning v. McCullough*, 1 N. Y. 47 (1847); *L. 1837, c. 445, § 9*. "No action can be maintained against a stockholder for a liability under . . . [the statute because of nonpayment of capital stock and filing of a certificate thereof] after the expiration of six years from the time it is incurred." *Knox v. Baldwin*, 80 N. Y. 610 (1880); *Gen. Mfg. Act, L. 1848, c. 40, § 10*.

only from the time of the commencement of the suit.<sup>14</sup> When the debt of a corporation the capital of which is not fully paid to a creditor is less than the liability of a stockholder for such debt under the statute, and the allowance of interest on the creditor's claim does not, therefore, swell the recovery sought against such stockholder beyond the statutory limit, the creditor is entitled to be allowed interest as against the stockholder from the maturity of the debt.<sup>15</sup>

**§ 212. Id.: Defenses Of and Contributions Among Stockholders.**—Decisions under statutes preceding the present law and differing in some respects from it are made use of, as well as opinions rendered under the exact text of the law as it now stands. On the grounds of sound public policy and the plain rules of good faith one who has agreed with a corporation to take shares of its stock for a stated sum, though he has later paid less than ten per centum of his subscription, if he has acted as director of the corporation, received dividends from and sold his stock, will be held a stockholder liable to pay to its trustee in bankruptcy so much of the amount unpaid on his subscription as is necessary to satisfy its creditors.<sup>16</sup> A stockholder cannot be held to his statutory liability for his corporation's debts based on notes given by it out of the regular or ordinary course of its business as part of a scheme by those acting as corporate officers to saddle its liability upon its stockholders and in that way make good their own claims against the company.<sup>17</sup> While the language of a statute making corporate stockholders liable to creditors of the corporation for the amount of their holdings of stock until the capital stock is wholly paid in may be broad and general, yet it must not be construed to permit directors of a moribund corporation to constitute themselves creditors for salaries or wages and thus impose liabilities upon confiding and innocent stockholders.<sup>18</sup> The fund created by a statute from the personal liability of a stockholder to an amount equal to his holdings on failure to file a certificate of payment of its capital stock is a trust which the corporate officers and directors must

<sup>14</sup> *Handy v. Draper*, 89 N. Y. 334 (1882); Gen. Mfg. Act, L. 1848, c. 40, § 10.

<sup>15</sup> *Wheeler v. Miller*, 90 N. Y. 353 (1882); Gen. Mfg. Act, L. 1848, c. 40, § 10.

Does statutory liability of stockholders for debts of corporation include interest thereon, see note in 19 L.R.A.(N.S.) 428.

<sup>16</sup> *Jeffery v. Selwyn*, 220 N. Y. 77, 115 N. E. 275 (1917); St. Corp. L. § 53 (L. 1909, c. 61).

<sup>17</sup> *Close v. Potter*, 155 N. Y. 145, 49 N. E. 686 (1898).

<sup>18</sup> *McDowall v. Sheehan*, 129 N. Y. 200, 29 N. E. 299 (1891); Gen. Mfg. Act, § 10 (L. 1848, c. 40).

apply honestly and in good faith for the interest of the company and its creditors; and a director cannot, therefore, buy up the company's outstanding debts for his own benefit, knowing it to be insolvent, so that as a stockholder, liable under the statute for the corporate debts, he may offset the debts he has bought against his personal liability.<sup>19</sup> A stockholder of a corporation liable for an indebtedness by it to another because of non-filing of a certificate of payment of capital stock, pursuant to a then-existing statute, is not relieved from such liability by reason of the fact that a note was given by it for its indebtedness, as the note does not merge or extinguish the demand for which it is taken and the original consideration remains.<sup>20</sup> " . . . a defect in the proceedings to organize a corporation is no defense to a stockholder sued to enforce his individual liability [for its debts under a statute because of its failure to file an annual report], who has participated in its acts of user as a corporation *de facto*, and appeared as a stockholder upon its books, when the debt for which he is sued was contracted."<sup>21</sup> The dissolution of a corporation and the appointment of a receiver of its assets operates to terminate the relation of its stockholders to it, so that no action may be brought against them after the passage of two years after dissolution on their statutory liability for its debts.<sup>2</sup> A stockholder who as an officer of a private corporation signs its notes is estopped from disputing their validity in an action by its creditor to hold him to his liability for its debts under a statute making stockholders liable therefor.<sup>3</sup> In an action to charge a stockholder for stocks and bonds of a corporation received under circumstances by which he incurred a liability to pay an unsatisfied judgment against his corporation, an offset of judgments against the corporation in favor of the stockholder is allowable.<sup>4</sup> A stockholder of a safe deposit company who is also a creditor in a class which would entitle him to enforce the personal liability of other stockholders may properly offset his loans to the company against his liability as a stockholder; but he cannot use such offset against a stockholder suing him and other stockholders to enforce their statutory liability as such for the company's debts when the

<sup>19</sup> Bulkley v. Whitecomb, 121 N. Y. 107, 24 N. E. 13 (1890); Mfg. Act, L. 1848, c. 40, § 10.

<sup>20</sup> Jagger Iron Co. v. Walker, 76 N. Y. 521 (1879).

<sup>21</sup> Aspinwall v. Sacchi, 57 N. Y. 331 (1874); L. 1852, c. 228, §§ 6, 7.

<sup>2</sup> Smith v. Quale, 86 Misc. 259, 148 Supp. 448 (1914); St. Corp. L. § 59.

<sup>3</sup> Moss v. Averell, 10 N. Y. 449 (1853); L. 1837, c. 441, § 9.

<sup>4</sup> Christensen v. Colby, 43 Hun, 362 (1887).

plaintiff stockholder is not in the class who are entitled to share in the fund.<sup>5</sup> When by statute all stockholders are made individually liable for the debts of a corporation, one compelled to pay may seek and recover contribution in equity from the others.<sup>6</sup> "An action will not lie by one stockholder against a fellow stockholder of a corporation, to enforce a personal liability for a debt of the company."<sup>7</sup>

**§ 213. Id.: Pleading, Practice, and Evidence in Actions Against, In General.**—The liability of a stockholder for the debts of his corporation rests on contract and is one of which the municipal and city courts have jurisdiction.<sup>8</sup> "In order to sue a stockholder of an incorporated company, it is not necessary to aver that the corporation was insolvent, except in those cases in which the charter makes the liability subject to the existence of such insolvency, and requires the creditor to exhaust his remedy against the corporation before proceeding against the stockholder. In other cases, when a debt is unpaid at maturity, there is nothing to prevent the creditor from proceeding to collect his claim either from the corporation or those who by their charter are made responsible for the debts without any limitation."<sup>9</sup> An assignee of a cause of action by a creditor of an insolvent corporation brought under agreement with its receivers on behalf of himself and all other creditors similarly situated to enforce the statutory liability of the corporation's stockholders with the understanding that the action was to be conducted and controlled by the receivers and their counsel in consideration of their stipulation to hold such creditor harmless and to pay the expenses from the general fund in their hands as receivers cannot have a substitution of attorneys if he thereafter

<sup>5</sup> The Mosler Safe Co. v. Guardian Trust Co., 208 N. Y. 524, 101 N. E. 786 (1913); Banking L. § 303.

<sup>6</sup> Aspinwall v. Sacchi, 57 N. Y. 331 (1874); L. 1852, c. 228, §§ 6, 7.

<sup>7</sup> Richardson v. Abendroth, 43 Barb. 162 (1864); L. 1848, c. 40, § 18. A corporation's secretary sued a stockholder for his personal liability for the debt to the secretary by the corporation for salary, under the statute making stockholders liable for debts due their corporation's "laborers, servants and apprentices, for services performed for such corporation." The secretary was also a stockholder and it was held he

could not sue his co-stockholder. "To the extent of the personal liability created by the statute, the corporations are partners, and one partner can not sue a co-partner for a debt due from all."

On right of one stockholder to sue another for contribution outside state of incorporation, see note in 33 L.R.A.(N.S.) 909.

<sup>8</sup> Girberkian v. Costikyan, 126 A. D. 812, 111 Supp. 243 (1908); old Mun. Ct. Act, § 1, subd. 1, amended L. 1905, c. 513.

<sup>9</sup> Perkins v. Church, 31 Barb. 84 (1859).

intends to discontinue the action and the Statute of Limitations has run against a fresh action by any of the other creditors.<sup>10</sup> In an action to hold a stockholder liable for a corporate debt, "evidence that the stock in question was assigned to the defendant as collateral security" is competent.<sup>11</sup> In order that a creditor of a corporation may hold one of its stockholders liable under a statute making a stockholder liable to the creditors of the company to an amount equal to the amount unpaid on the stock held by him, until the whole amount of the capital stock so held by him shall have been paid to the company, the creditor must prove that the defendant is a stockholder and is still liable on unpaid subscription; no presumption will avail him.<sup>12</sup> It is not necessary for a trustee in bankruptcy of a corporation to go into a bankruptcy court to ascertain the amount of the indebtedness of the corporation in order to know for how much he may hold stockholders on their unpaid stock subscriptions.<sup>13</sup> In an action by a judgment creditor whose execution has been returned unsatisfied to reach certain shares of corporate stock, alleged to belong to the debtor but which stand in his wife's name on the corporation's books, it is proper to appoint a receiver if there is reasonable ground to apprehend that before the suit can be determined the stock will be removed beyond the court's jurisdiction or lost in some adverse turn of the defendant's affairs.<sup>14</sup> In an action by a corporate creditor to hold stockholders liable for unpaid subscriptions on their stock it is not necessary to join the receiver of the corporation, because the stockholders are sued upon a personal liability.<sup>15</sup> The statutory liability of stockholders for corporate debts "is a several individual liability of each stockholder, directly to such of the creditors as have complied with the requisite conditions precedent"; and "there is no statutory provision by which the rights of such creditors can be vested in a receiver of the corporation."<sup>16</sup> "The courts in

<sup>10</sup> *Hirschfeld v. Bopp*, 5 A. D. 202, 39 Supp. 24 (1896).

<sup>11</sup> *McMahon v. Macy*, 51 N. Y. 155 (1872); Gen. R. R. Act, L. 1850, c. 140, §§ 10, 11, as amended L. 1854, c. 284.

<sup>12</sup> *Wellington v. Continental Construction and Improvement Co.*, 52 Hun, 408, 5 Supp. 587 (1889); Gen. R. R. Act, § 10, as amended L. 1854, c. 282.

<sup>13</sup> *Rathbone v. Ayer*, No. 2, 84 A. D. 186, 82 Supp. 235 (1903); St.

Corp. L. §§ 43, 54 (L. 1901, c. 354). See now St. Corp. L. § 56 *et seq.*

<sup>14</sup> *State Bank of Syracuse v. Gill*, 23 Hun, 410 (1881); C. C. P. § 713.

<sup>15</sup> *Lang v. Lutz*, 180 N. Y. 254, 73 N. E. 24 (1905); Stock Corp. L. § 54.

<sup>16</sup> *Farnsworth v. Wood*, 91 N. Y. 308 (1883). "The plaintiff is a receiver of a corporation created under the General Manufacturing Law of 1848, appointed upon the sequestration of its property on the

this State hold that in order to charge the holders of stock individually for the debts of the corporation, it must be proved that the property was purchased and paid for at an overvaluation, and it must be shown that the purchase at the price agreed upon was made in bad faith and to evade the statute."<sup>17</sup> When an action is brought by a creditor of a corporation and the law makes its stockholders, directors, trustees or other officers, or any of them, liable in any event or contingency for the payment of his debt, they may be made parties defendant by the original or by a supplemental complaint and their liability may be declared and enforced by the judgment in the action; or the plaintiff in the action may, instead of making them parties, maintain a separate action against them to procure a judgment declaring, apportioning and enforcing their liability; and in either kind of action the court must when it is necessary cause an account to be taken of the property and of the debts of the corporation and thereupon the defendants' liability must be apportioned accordingly, though if it affirmatively appears that the corporation is insolvent and has no property to satisfy its creditors the court may, without taking such an account, ascertain and determine the amount of each defendant's liability, and enforce the same accordingly.<sup>18</sup> When the stockholders of the corporation are parties to the action, if the property of the corporation is not sufficient to discharge its debts, the interlocutory or final judgment, as the case requires, must adjudge that each stockholder pay into court the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the corporation.<sup>19</sup> If it appears that the property of the corporation and the sums collected or collectable from the stockholders upon their stock subscriptions are or will be insufficient to pay the debts of the corporation the court must ascertain the several sums for which the directors, trustees or other officers, or the stockholders of the corporation, being parties to the action, are liable; and must adjudge that the same be paid into court, to be applied, in such proportions and in such

return of an execution, and seeks by this action to enforce against the stockholders, the personal liability to creditors which is imposed by that act upon stockholders in such corporations." It was held he could not do so.

<sup>17</sup> *Barber Asphalt Paving Co. v.*

*Gaglez*, — Misc. — (1918); N. Y. L. J. Feb. 26, Sp. T. N. Y. Co.; St. Corp. L. § 56.

<sup>18</sup> Gen. Corp. L. §§ 109, 110, 111 (L. 1909, c. 28).

<sup>19</sup> Gen. Corp. L. § 113 (L. 1909, c. 28).

order as justice requires, to the payment of the debts of the corporation.<sup>20</sup>

**§ 214. Making All Creditors or Any One Plaintiffs or Plaintiff.**—An action against a stockholder of a corporation, the capital stock of which has not been fully paid, to recover a debt owing by it, may be brought by a single creditor, without making other corporate creditors parties.<sup>1</sup> A creditor may alone sue a stockholder, without joining as parties the corporation and other creditors, for a debt payable by the corporation within two years from the date it was incurred, on which he has had judgment with execution returned unsatisfied.<sup>2</sup>

**§ 215. In Equity, Making All the Stockholders Ratably Liable or In Law Against Any Stockholder.**—When an action authorized by the law of the State of New York is brought against one or more persons as stockholders of a corporation, an objection to any of the proceedings cannot be taken by a person properly made a defendant in the action on the ground that the plaintiff has joined with him as a defendant in the action a person whose name appears on the stock-books of the corporation as a stockholder thereof by the name so appearing, but who is misnamed or dead or is not liable for any cause.<sup>3</sup> In such a case the court, at any time before final judgment, may, upon motion of either party, amend the pleadings and other papers without prejudice to the previous proceedings by substituting the true name of the person intended, or by striking out the name of the person who is dead or not liable and, in a proper case, inserting the name of his representative or successor.<sup>4</sup> “It is a very plain proposition that the stock and property of every corporation is to be regarded as a trust fund for the payment of its debts, and its creditors have a lien and the right to priority of payment over any stockholder;” and, if some of such property be found in a stockholder’s hands after division thereof among its stockholders but before discharge of all the corporate debts, a creditor may maintain an action against such stockholder alone without bringing a suit both on his own behalf and that

<sup>20</sup> Gen. Corp. L. § 114 (L. 1909, c. 28).

<sup>1</sup> *Weeks v. Love*, 50 N. Y. 568 (1872); Gen. Mfg. Act, L. 1848, c. 40, § 10. See now St. Corp. L. § 56 *et seq.*

<sup>2</sup> *Citizens’ Bank of Buffalo v. Weinberg*, 26 Misc. 518, 57 Supp.

495 (1899); St. Corp. L. §§ 54, 55 (L. 1892, c. 688). See now St. Corp. L. §§ 56, 59.

<sup>3</sup> Gen. Corp. L. § 309 (L. 1909, c. 28).

<sup>4</sup> Gen. Corp. L. § 309 (L. 1909, c. 28).

of all other creditors, and against all stockholders.<sup>5</sup> "In the absence of statutory authority for an action directly against the stockholder of a corporation to secure payment of his debt to the extent of the former's unpaid balance upon the stock owned by him," the corporate creditor cannot sue the stockholder direct.<sup>6</sup> A statute amending a prior law giving a corporate creditor a right of action at law against the corporate stockholders who have not fully paid for their stock, jointly or severally, for the corporate indebtedness to him, by providing that "every holder of capital stock not fully paid, in any stock corporation, shall be personally liable to its creditors, to an amount equal to the amount unpaid on the stock held by him for debts of the corporation contracted while such stock was held by him," probably "prescribes a new rule of liability under which the remedy available to a creditor is intended to be by way of an equitable action, or proceeding, wherein all the stockholders of the corporation should be made equally and ratably responsible for the payment of the corporate debts."<sup>7</sup> A creditor seeking to hold the subscribers to stock of his debtor corporation to payment thereof must first recover a judgment against it, and must then — if he sues in equity for the benefit of all creditors — join as defendants all stockholders who are liable and the personal representatives of any who have died, to the end that stockholders be not compelled to pay more than their *pro rata* share and that multiplicity of suits be avoided.<sup>8</sup> Decisions under the statutes as they existed before the amendment of nineteen hundred and one are collated in the note.<sup>9</sup>

<sup>5</sup> *Bartlett v. Drew*, 57 N. Y. 587 (1874). "Where stock and property has been divided between stockholders before all the debts of the corporation have been discharged, if any one stockholder is compelled to pay more than his fair share of any unpaid debt he may resort to his associates for equitable contribution; but with that proceeding the creditor has nothing to do, unless he chooses to intervene to settle equities that may exist between his debtors."

<sup>6</sup> *Manufacturers' Commercial Co. v. Heckscher*, 144 A. D. 601, 129 Supp. 556 (1911); *aff'd* 203 N. Y. 560; Act Concerning Corporation, N. J. Revision of 1896. The corresponding New York law, St. Corp. L. §§ 55, 56 and 59, creates a direct

relationship between stockholder and creditor.

<sup>7</sup> *Lang v. Lutz*, 180 N. Y. 254, 73 N. E. 24 (1904); St. Corp. L. § 54 (L. 1901, c. 354, amending L. 1892, c. 688). See now St. Corp. L. § 56.

<sup>8</sup> *Warth v. Moore Blind Stitche & Overseamer Co.*, 146 A. D. 28, 130 Supp. 748 (1911); *aff'd* 207 N. Y. 673, 100 N. E. 1128. The stockholders may be discovered by examination of the corporate officers. The suit, it will be noted, was not to enforce the remedy by a creditor in his own right against the stockholders severally, under St. Corp. L. § 56.

<sup>9</sup> Under a statute rendering stockholders jointly and severally person-

**§ 216. Sufficiency of Allegations in Complaint.**—A trustee in bankruptcy suing by authority of the Federal Court a stockholder of the bankrupt corporation to recover amounts unpaid on his subscription to its stock need not in his complaint show the necessity of collecting the full amount of the subscription to pay the corporate creditors.<sup>10</sup> In an action against a stockholder to hold him for the debt of his corporation it is sufficient if the complaint allege that at the time the debt was created the defendant was a stockholder; and that he ceased to be such or that the action was not brought within two years thereafter are matters to be plead in defense.<sup>11</sup>

ally liable to the corporation's creditors up to the amount of their holdings until the whole capital stock outstanding at the time the corporate debts were incurred had been fully paid, any number or all of the stockholders may be made defendants. *Lang v. Lutz*, 180 N. Y. 254, 73 N. E. 24 (1904); *St. Corp. L. § 54* (L. 1892, c. 688), before 1901 amendment. ". . . a creditor may proceed by suit, in the nature of a common law action, against a single stockholder . . . But if the stockholder thus prosecuted can show that he has already paid, on account of the debts of the corporation, a sum equal to the liability which the statute has imposed, namely, the amount of his stock, he will, so far as that remedy is concerned, have defeated the action. . . . If the creditor cannot find a responsible stockholder, who is not, at the same time, a creditor to the amount of his stock, he must proceed for an account, if he ascertains that such a proceeding will result in recovering his debt. So, if a stockholder be sued to enforce his individual liability in a case where an account and the enforcing of all the liabilities would relieve him from the whole or a part of the debt claimed, he may himself resort to a suit for such account and for distribution." *Garrison v. Howe*, 17 N. Y. 458 (1858); *Gen. Mfg. Act, L. 1848, c. 40, § 12*. A creditor of a corporation the capital stock of which is not fully paid has his elec-

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tion to bring an action for his debt against a stockholder under the statute, or to bring a suit in equity, and have an accounting between all the stockholders and all the creditors, when the rights of each can be ascertained and protected. *Mathez v. Neidig*, 72 N. Y. 100 (1878); *L. 1848, c. 40, § 12*. A receiver of a corporation appointed at the instigation of a judgment creditor whose execution has been returned unsatisfied may bring separate suit against each shareholder to recover the amount of his unpaid subscription, and is not confined to an omnibus suit to which all creditors and stockholders should be parties. *Van Wagenen v. Clark*, 22 Hun, 497 (1880); *L. 1860, c. 403; 2 R. S. 469, § 69*. An action to hold a stockholder to his statutory liability for the corporation's debts by reason of its capital not being fully paid may be brought at law by an individual creditor against an individual stockholder, and a suit in equity for an accounting with all the parties before the court is unnecessary. *Thompson v. Nicolai*, 21 Misc. 700, 49 Supp. 422 (1897); *St. Corp. L. §§ 54, 55*. See now §§ 56, 59.

<sup>10</sup> *Jeffery v. Selwyn*, 220 N. Y. 77, 115 N. E. 275 (1917); *St. Corp. L. § 53* (L. 1909, c. 61).

<sup>11</sup> *Citizens' Bank of Buffalo v. Weinberg*, 26 Misc. 518, 57 Supp. 495 (1899); *St. Corp. L. §§ 54, 55* (L. 1892, c. 688). See now §§ 56, 59.

An allegation is a complaint to hold a stockholder to the amount unpaid on his holdings for a debt of his corporation unrecoverable by execution to the effect that he has paid into the treasury not exceeding \$3,000, whereas his holdings amount to \$4,800, "leaving a balance due on said stock of at least \$1,800," does not state facts sufficient to show that defendant has not fully paid for his stock, as he may have paid the balance in services or property, and the quoted clause is but a conclusion.<sup>12</sup> A complaint to hold a stockholder to the amount unpaid on his holdings for a debt of his corporation unrecoverable by execution must show that it is a stock corporation; and this is not sufficiently shown by allegations that its name is so and so and that goods, wares and merchandise were sold by it.<sup>13</sup> In a complaint against a stockholder to recover a judgment-debt against his corporation on the theory that the holdings of the defendant have not been fully paid for it is not sufficient to allege that there was something due on the defendant's subscription at the time the corporation's debt was contracted, but it must be stated that there was something due at the time the judgment was recovered and execution thereon was returned unsatisfied.<sup>14</sup> Decisions involving the sufficiency of complaints in actions under former statutes governing the liability of stockholders for corporate debts are given in the note.<sup>15</sup>

<sup>12</sup> *Dyer v. Drucker*, 108 A. D. 238, 95 Supp. 749 (1905); St. Corp. L. § 54 (L. 1901, c. 354). See now § 56.

<sup>13</sup> *Dyer v. Drucker*, 108 A. D. 238, 95 Supp. 749 (1905); St. Corp. L. § 54 (L. 1901, c. 354). See now § 56.

<sup>14</sup> *Dyer v. Drucker*, 108 A. D. 238, 95 Supp. 749 (1905); St. Corp. L. § 54 (L. 1901, c. 354). See now § 56.

<sup>15</sup> An amendment, to a complaint seeking to hold a stockholder because of failure to file a certificate of full payment of his corporation's capital stock, which endeavors to hold the stockholder for a liability arising from the purchase of property and the issuing of stock therefor, should not be permitted. *Rowell v. Janvin*, 69 Hun, 305, 23 Supp. 481 (1893); app. dism. 138 N. Y. 656, 34 N. E. 514; *Manufacturers' Act* (L. 1848, c. 40), §§ 10, 11, and 14,

respectively. To hold one on his liability as a stockholder for debts of the company up to the amount of his holdings on the ground that the whole capital had not been paid in, it must be averred that his holdings of stock equalled the amount of the debts sued for. *Chambers v. Lewis*, 28 N. Y. 454 (1863); Gen. Mfg. Act, § 32. The causes of action given a creditor against a corporate stockholder and trustee to recover a debt due by his corporation because of its failure to file a certificate of full payment of its capital stock and to file its annual report, respectively, cannot be joined in one complaint as arising out of the same transaction or transactions connected with the same subject of action, for the reason that the former is on contract and subject to the six year statute of limitations and the latter is for a penalty and subject to the three year statute. *Wiles v. Suy-*

**§ 217. Sufficiency of Answer and Pleading Defenses.**—A defense of being not individually liable as members of a joint stock company because merely stockholders in a corporation need not be plead.<sup>16</sup> An answer which denies upon information and belief the allegations of a complaint by a judgment creditor of a corporation to hold a stockholder liable for the debt to the amount unpaid on subscriptions by him to its stock, that the corporation was organized on a certain date with certain capital authorized, subscribed and paid in, and that the amount which defendant subscribed has not been paid, is not frivolous.<sup>17</sup>

**§ 218. Id.: Judgment and Execution Against Stockholders.**—A creditor seeking to hold the stockholders of his corporate judgment debtor, which has assigned for creditors' benefit for the debt, upon the ground that the capital of the corporation is not fully paid in, is not entitled to a personal judgment against each stockholder for the full amount of his judgment against the corporation, but only a judgment for the benefit of himself and other creditors in like fix as himself.<sup>18</sup> When by a judgment against stockholders under their statutory liability for corporate debts the county treasurer is authorized to docket judgments against them all for the minimum amount of their possible liability, and to collect thereon by execution against each defendant separately enough to satisfy the claims of the creditors and their costs, and out of his payments to retain his lawful commissions, he is entitled in issuing his executions, for the purpose of providing enough to pay the creditors, to include therein the commissions thus authorized to be retained; but the plaintiff has no right to include these commissions in his bill of costs.<sup>19</sup>

**§ 219. Id.: Under Foreign Statutes.**—If a foreign statute imposing a liability upon stockholders of corporations under the jurisdiction of the foreign state also provides a remedy,

dam, 64 N. Y. 173 (1876); L. 1848, c. 40, §§ 10, 12; Code, § 167. A complaint by a corporate creditor against a person who is a stockholder and trustee to recover his debt under the statutory liability imposed on stockholders and trustees on failure of the corporation to file certificates of full payment of stock and annual reports, respectively, contains two causes of action, one on contract against the defendant as stockholder and the other for a penalty against the defendant as trustee. *Wiles v.*

*Suydam*, 64 N. Y. 173 (1876); L. 1848, c. 40, §§ 10, 12; Code, § 167.

<sup>16</sup> *Demerest v. Flack*, 128 N. Y. 205, 13 L.R.A. 854, 28 N. E. 645 (1891).

<sup>17</sup> *Trumbull v. Ashley*, 26 A. D. 356, 49 Supp. 786 (1898).

<sup>18</sup> *Hallett v. Metropolitan Messenger Co.*, 69 A. D. 258, 74 Supp. 639 (1902).

<sup>19</sup> *Veeder v. Judson*, 91 N. Y. 374 (1883); Gen. Mfg. Act, L. 1848, c. 40, § 12.

that remedy is exclusive and cannot be enforced in the courts of this State; but if the remedy is left to be worked out according to common law, it may be enforced in this State against a resident stockholder; and "it is not necessary that the procedure to enforce the liability in question should be that required by statute in this State in the case of domestic corporations, as that would frequently be impossible and would withhold the right of comity altogether," *e. g.*, the necessary return of execution unsatisfied against a domestic corporation.<sup>20</sup> "A right of action against the stockholders of a corporation does not exist at common law, and ordinarily exists only by virtue of some statutory enactment. . . . a right of action unknown to the common law and existing only by force of the statutes of another state, can be enforced [only in the courts of the corporation's domicile and not] in the courts of this State, or outside of the local jurisdiction where the corporation is domiciled."<sup>21</sup> The liability of stockholders to their corporation's creditors is not a common law but a statutory liability and such liability of the stockholders of a foreign corporation under its home laws will not be enforced in an action in this state.<sup>2</sup> The liability of resident subscribers to the capital stock of a defunct foreign corporation to its creditors for the amount unpaid up to the par value of their holdings is not based on any statute but on common law doctrines of contract, so that the statutes of the home state of the corporation imposing such liability need not be specially pleaded.<sup>3</sup> A cause of action accruing to a corporation's receiver by the laws of the state of its incorporation making its stockholders liable to a sum (beyond the stock owned by them and any amount unpaid thereon) equal to the amount of such stock, is barred in this state within the same period as it is barred by the laws of such other state.<sup>4</sup> The liability of a stockholder of a corporation incorporated in a state under the laws of which he is liable for the corporation's debts, etc., to the extent of the amount of his stock at par in addition to the amount invested in such stock rests not on contract but upon statute; and is to be enforced pri-

<sup>20</sup> *Howarth v. Angle*, 162 N. Y. 179, 47 L.R.A. 725, 56 N. E. 489 (1900).

<sup>1</sup> *Marshall v. Sherman*, 148 N. Y. 9, 34 L.R.A. 757, 42 N. E. 419 (1895).

<sup>2</sup> *Coulter Dry Goods Co. v. Rosen-*

*baum*, 74 Misc. 579, 134 Supp. 487 (1911).

<sup>3</sup> *Southworth v. Morgan*, 71 Misc. 214, 128 Supp. 598 (1911).

<sup>4</sup> *Shipman v. Treadwell*, 208 N. Y. 404, 102 N. E. 634 (1913); C. C. P. § 390-a.

marily at the home of the corporation and in the state creating the obligation, and in the form of action prescribed.<sup>5</sup>

**§ 220. Id.: For Services of Corporate Laborers, Servants and Employees, Governing Statutes.**—Stockholders of every stock corporation are (1) personally, (2) jointly and (3) severally liable for all debts due and owing for services performed for such corporation by and to any of its (a) laborers, (b) servants or (c) employees — other than contractors — provided: (1) Such laborer, servant or employee before charging such stockholder for such services gives the stockholder notice in writing within thirty days after the termination of such services that he intends to hold him liable; (2) such laborer, servant or employee (a) commences an action for such service-debt within two years after it becomes due against such corporation, (b) obtains judgment therein against the corporation, (c) has execution on such judgment returned unsatisfied in whole or in part; (3) such laborer, servant or employee commences an action for such service-debt against the stockholder within thirty days after the return unsatisfied of such execution upon the judgment for services against the corporation; (4) the stockholder holds his stock absolutely and not as collateral security or as executor, administrator, guardian or trustee (unless he voluntarily invested the trust funds in such stock); and (5) the service-debt is payable within two years from the time it is contracted.<sup>6</sup>

**§ 221. Id.: In General.**—“ . . . the scope and purpose of the statute [making stockholders liable for debts from their corporation to laborers, servants and apprentices] was to protect the classes most appropriately described by the words used, as those engaged in manual labor, as distinguished from officers of the corporation or professional men engaged in its service; in short, to furnish additional relief to a class who usually labor for small compensation, to whom the moderate pittance of their wages is an object of interest and necessity, and who are poorly qualified to take care of their own concerns, or look sharply after their employers.”<sup>7</sup> A corporation is — and *a fortiori* its stockholders are — not bound by a settlement made by its foreman after it had ceased to do business with its servant so as to have it settle the amount due the servant in an action by him against the

<sup>5</sup> *Knickerbocker Trust Co. v. Ise-lin*, 185 N. Y. 54, 77 N. E. 877 (1906); *Laws of Md.* 1904, chs. 101, 337.

<sup>6</sup> *St. Corp. L.* §§ 57, 58, 59 (*L.* 1909, c. 61).

<sup>7</sup> *Coffin v. Reynolds*, 37 N. Y. 640 (1868); *Gen. Mfg. Act*, *L.* 1848, c. —, § 18. The present statute, *St. Corp. L.* §§ 57-59, uses the word “employees” instead of “apprentices.”

stockholders under their statutory liability for the wages of their corporation's servants.<sup>8</sup> An assignee of a liability which has accrued and become fixed by a corporation to a laborer for wages may hold a stockholder to his statutory liability therefor.<sup>9</sup> A stockholder who has paid a judgment had by a laborer for wages due from the corporation may not at law sue one alone of his co-stockholders for contribution, but must bring them all in in an equitable action; because their liability is that of co-partners and is joint and several.<sup>10</sup>

**§ 222. Id.: Who Liable.**—Only a stockholder holding his stock in some way other than as collateral security, or as executor, administrator, guardian or trustee can be held liable to his corporation's laborer, servant or employee, unless he, though holding the stock as executor, administrator, guardian or trustee, voluntarily invested the trust funds in such stock.<sup>11</sup> The statute making stockholders of a corporation liable for its debts to its laborers, servant and apprentices for services rendered it "means to hold liable those stockholders who are shown to be such at the time when the debts are due and owing. And the burden of proof is upon him who sues, to show that there is a debt due and owing for services performed for the corporation, by a laborer, or a servant, or an apprentice; and that the person sued is, when the debt is due and owing, a stockholder of the company."<sup>12</sup> In order to prove that defendants are stockholders in an action by a laborer to hold them liable for wages for work done for their corporation it is sufficient to show that they were trustees or directors and that the statute under which the corporation was formed required such to be stockholders; and "having been thus shown to be stockholders at the time the corporation was formed, they will be presumed to continue such until the contrary shall be established", even though a book offered shows their resignation as trustees.<sup>13</sup> It seems that one who remains on corporate books as a stockholder is personally liable for statutory liabilities, *e. g.*, for a debt of the corporation to a servant for services rendered, although he has pledged or assigned his stockholdings.<sup>14</sup>

<sup>8</sup> Strong v. Wheaton, 38 Barb. 616 (1861).

<sup>9</sup> Krauser v. Ruckel, 17 Hun, 463 (1879); L. 1848, c. 40, § 18.

<sup>10</sup> Clark v. Myers, 11 Hun, 608 (1877); L. 1848, c. 40.

<sup>11</sup> St. Corp. L. §§ 57-59 (L. 1909, c. 61).

<sup>12</sup> Johnson v. Underhill, 52 N. Y.

203 (1873); Gen. Mfg. Act, L. 1848, c. 40, § 25. The present statute, St. Corp. L. §§ 57-59, uses the word "employees" instead of "apprentices."

<sup>13</sup> Herries v. Wesley, 13 Hun, 492 (1878); L. 1848, c. 40.

<sup>14</sup> Richardson v. Abendroth, 43 Barb. 162 (1864).

§ 223. **Id.: For What Liable.**—Stockholders are liable for all debts due and owing by their corporation only if (1) for services performed for such corporation (2) by any of its (a) laborers, (b) servants or (c) employees—other than contractors—who (3) have given the stockholders notice in writing that they intend to hold the stockholders liable (a) before charging such stockholders and (b) within thirty days after the termination of such services and (4) have commenced an action against the corporation for such debts within two years after it became due and (5) have obtained judgment therein against such corporation and (6) have had execution on such judgment returned unsatisfied in whole or in part, and (7) have commenced an action for such debts against the stockholders within thirty days after the return unsatisfied of such execution upon the judgment against the corporation, and (8) whose debt is payable within two years from the time it is contracted.<sup>15</sup> A stockholder of a corporation is not liable, under the statute making him liable for the corporation's debts to its laborers, servants or employees, for damages for breach of contract by the corporation, or for materials purchased or money borrowed by it; but only for services rendered; and he cannot, therefore, be charged with costs incurred in the defense of an action prosecuted against the corporation for damages upon causes of action other than that embraced in the statute.<sup>16</sup> A distinction is made in the statute making stockholders liable personally for the corporate debts to its "laborers, servants, and apprentices": "The stockholder must pay, not debts due to all employees of the company, but those due to 'laborers, servants, and apprentices,' and not all debts due to them, but only such as are due for 'services' performed for such corporation. . . . the services referred to are menial or manual services—he who performs them must be of a class whose members usually look to the reward of a day's labor, or service, for immediate or present support, from whom the company does not expect credit, and to whom its future ability to pay is of no consequence; one who is responsible for no independent action, but who does a day's work, or a stated job under the direction of a superior. . . . To the language of the act must be applied the rule common in the construction of statutes, that when two or more words of analogous meaning are coupled together, they are understood to be used in their cognate

<sup>15</sup> St. Corp. L. §§ 57-59 (L. 1909, c. 61).

301, 97 N. E. 728 (1912); St. Corp. L. §§ 57, 59.

<sup>16</sup> Card v. Groesbeck, 204 N. Y.

sense, express the same relations, and give color and expression to each other. Therefore, although the word 'servant' is general, it must be limited by the more specific ones, 'laborer and apprentice' with which it is associated, and be held to comprehend only persons performing the same kind of service that is due from the others. . . . The word used is no doubt broad enough, and might without exaggeration, represent all persons connected with the administration or furtherance of the affairs of a corporation; in this instance, from the one who dips or bottles the water, to the president, but this would manifestly be too general. 'Laborer or apprentice' are words of limited meaning, and refer to a particular class of persons employed for a defined and low grade of service performed . . . without responsibility for the acts of others, themselves directed to the accomplishment of an appointed task under the supervision of another."<sup>17</sup> The purpose of the statute making stockholders of a corporation personally liable for debts due its laborers, servants or employees was "the protection of those who earned their living by manual labor, and not by professional services, and who were supposed to be the least able to protect themselves", *i. e.*, "such employees as perform services in subordinate positions and for whose inclusion within the scope of the provision there is a politic reason."<sup>18</sup> A bill of exchange drawn by a laborer on a corporation for wages and accepted by it gives the transferee thereof for value not only the right to the money specified in it but the original consideration upon which the bill was drawn and accepted, so that the transferee may hold a stockholder to his personal statutory liability for such wages.<sup>19</sup> A laborer or servant of a corporation seeking to hold a stockholder for his wages, which are payable monthly, may only recover for the last year's.<sup>20</sup>

**§ 224. Id. Who Are Laborers, Servants, and Employees.**—The statute makes stockholders liable for debts of the corporation to laborers, servants and employees other than contractors.<sup>1</sup> In determining who is to be held a "servant" within a statute making stockholders of a corporation indi-

<sup>17</sup> *Wakefield v. Fargo*, 90 N. Y. 213 (1882); L. 1863, c. 63, § 2; L. 1848, c. 40, § 18. The present statute, St. Corp. L. §§ 57-59, uses the word "employees" instead of "apprentices."

<sup>18</sup> *Bristor v. Smith*, 158 N. Y. 157, 53 N. E. 42 (1899); St. Corp. L. § 54. An attorney employed by con-

tract at a weekly salary was held not within the statute.

<sup>19</sup> *Pilcher v. Brayton*, 17 Hun, 429 (1879); L. 1848, c. 40, § 18.

<sup>20</sup> *Short v. Medberry*, 29 Hun, 39 (1883); L. 1848, c. 40, § 24.

<sup>1</sup> St. Corp. L. §§ 57-59 (L. 1909, c. 61).

vidually liable for all debts owing to its "laborers, servants and apprentices, for services performed for such corporation," it must be borne in mind that "in common parlance, it [the word "servant"] is understood to relate and apply only to a person rendering service of a subordinate, but not necessarily of a menial, character to an employer, varying in its nature, according to the business or occupation in which it is rendered, and not to extend to and include every employe or party who does work for another. The context in which it is used . . . being associated with 'laborers' and 'apprentices,' indicates that it was intended to apply to a person employed to devote his time, and render his service in the performance of work, similar in its general character to that done by those employes."<sup>2</sup> Contractors with a corporation are not within the scope of the statute making its stockholders liable for debts due its laborers and servants for services performed for it.<sup>3</sup> A stockholder of a corporation is not individually liable for a debt due a laborer of a contractor of the corporation for services rendered the contractor.<sup>4</sup> A consulting engineer cannot be held an operative or laborer of a corporation so as to render its stockholders liable for the value of services he renders it.<sup>5</sup> One employed by a corporation as a civil engineer and traveling agent is a servant who may hold its stockholders for its debt to him.<sup>6</sup> One per-

<sup>2</sup> *Hill v. Spencer*, 61 N. Y. 274 (1874); Gen. Mfg. Act, L. 1848, c. 40. The plaintiff's first employment was called "that of commercial agent for the management of their commercial and financial affairs in California and Mexico;" later "to manage and conduct their business and affairs in that country, the same, in all respects, as the said company could do if located at the place;" lastly at a "salary" of \$5,000 a year. He was held not to be a "servant" within the statute. The present statute, St. Corp. L. §§ 57-59, uses the word "employees" instead of "apprentices."

<sup>3</sup> *Aikin v. Wasson*, 24 N. Y. 482 (1862); Gen. R. R. Act, L. 1850, c. —, § 10. "In some very extended cases, the directors and other principal officers of the corporation may be considered as its agents and servants, and yet no one . . . would contend that the provision was intended for their benefit."

<sup>4</sup> *Gallagher v. Ashby*, 26 Barb. 143 (1857); Gen. R. R. Act, §§ 12, 60.

<sup>5</sup> *Ericsson v. Brown*, 38 Barb. 390 (1862). The special act incorporating the company made its stockholders liable for debts "to all their laborers and operatives for services performed said corporation." The court said of such words that they would apply "to a class who obtain their living by coarse manual labor, as distinguished from professional men; men who work with their hands, rather than their heads. Operative, though of very nearly the same signification, is somewhat more comprehensive than labor. . . .

The purpose of the legislature was to protect a class of men not well qualified to protect themselves." The present statute, St. Corp. L. §§ 57-59, uses the words "laborers," "servants" and "employees."

<sup>6</sup> *Williamson v. Wadsworth*, 49 Barb. 294 (1867); L. 1848, c. 40, making stockholders liable for cor-

forming some manual labor, but merely as an incident to his position of general superintendent of a corporation, is not a laborer, servant or apprentice who may hold a stockholder for the wages due him.<sup>7</sup> In determining the liability of a stockholder for corporate debts due the corporation's laborers, servants and apprentices for services performed for it, he cannot be held for the services of a secretary.<sup>8</sup> Under a statute making stockholders personally liable for debts due by his corporation to "laborers, servants and apprentices", the stockholders are not liable to a book-keeper and general manager of the company who kept an account of all the receipts and disbursements of the company, had charge of its business in the absence of the superintendent, and worked by the year at an annual salary of \$1,200.<sup>9</sup> Under the statute making stockholders personally liable for debts of their corporation "to any of its laborers, servants or employees other than contractors" a bookkeeper paid weekly who keeps the company's books, attends to its banking business, discharges the usual duties of a bookkeeper and answers inquiries of callers in the absence of the president and the one in charge of the office when the president was not there, may recover of stockholders for his services if judgment therefor against the company is unsatisfied by execution.<sup>10</sup> A bookkeeper of a corporation may hold its stockholders personally liable for a debt due him from it for services performed for it.<sup>11</sup> One employed by a corporation at an annual compensation of \$1,000, payable monthly or as he wanted, on condition that he obtain for it a loan of \$3,000, who acts as foreman, as one of his principal duties did manual labor in manufacturing stone, kept time for the men, solicited orders, collected bills, and did whatever was required of him, all under the secretary and treasurer of the corporation who acted as general superintendent, is entitled to recover from a stockholder as being a "laborer" or "servant" of the company.<sup>12</sup>

porate debts due laborers, servants and apprentices.

<sup>7</sup> *Krauser v. Ruckel*, 17 Hun, 463 (1879); L. 1848, c. 40, § 18.

<sup>8</sup> *Coffin v. Reynolds*, 37 N. Y. 640 (1868); Gen. Mfg. Act, L. 1848, c. —, § 18.

<sup>9</sup> *Wakefield v. Fargo*, 90 N. Y. 213 (1882); L. 1863, c. 63, § 2; L. 1848, c. 40, § 18.

<sup>10</sup> *Farnum v. Harrison*, 167 A. D. 704, 152 Supp. 835 (1915); aff'd

without opinion 218 N. Y. 672, 113 N. E. 1055; St. Corp. L. § 57.

<sup>11</sup> *Farnum v. Harrison*, 83 Misc. 424, 145 Supp. 36 (1913); St. Corp. L. § 57.

<sup>12</sup> *Short v. Medberry*, 29 Hun, 39 (1883); L. 1848, c. 40, § 18.

As to who are laborers, servants or employees under statute making stockholders individually liable, see note in 18 L.R.A. 308.

**§ 225. Id.: Necessity and Effect of Judgment First Had Against Corporation.**—One seeking to hold a stockholder personally for a claim for wages due from the corporation cannot rely on a judgment and execution thereon unsatisfied in an action in a court which had no jurisdiction as satisfying the statutory condition precedent; but he can rely on a Supreme Court injunction against proceedings by creditors as excusing such a judgment, etc., although rendered in a sequestration action based on a judgment in a court which had no jurisdiction.<sup>13</sup> The statutory requirement that no action may be brought against a stockholder for an amount due a laborer for services rendered the corporation until judgment has been recovered against the corporation does not necessitate the perfecting of a judgment in a court of record in which the judgment would be a lien on the corporate realty; so that obtaining a judgment in a Justice's Court, the issuance of an execution by the justice and its return unsatisfied is a compliance with the statutory requirement.<sup>14</sup> In order that a laborer may hold a stockholder for wages due him by a corporation he must obtain a judgment in this State (not in another) against the corporation, and must prove that the wages were to be paid within one year from the time when the liability therefor was contracted (not simply allege that the labor was rendered the company during stated years).<sup>15</sup> In an action to hold stockholders for wages due by their corporation to its servants a judgment recovered against it is essential to the right of action but is proof of nothing beyond the fact of its own existence, and is not evidence of the amount the plaintiff is entitled to recover.<sup>16</sup> A judgment by one against a corporation is of itself no evidence against a stockholder of the indebtedness of the company to the judgment creditor in an action against the stockholder to recover the amount of the judgment as the amount due the judgment creditor for services rendered the corporation as laborer.<sup>17</sup> A judgment of the Supreme Court sequestrating a corporation's property, appointing a receiver and forbidding creditors from suing the corporation or interfering with its assets is a sufficient excuse for non-compliance by an employee of the corporation suing a

<sup>13</sup> *Hunting v. Blun*, 69 Hun, 562, 23 Supp. 965 (1893); *aff'd* 143 N. Y. 511, 38 N. E. 716, L. 1848, c. 40, § 18.

<sup>14</sup> *Padros v. Swarzenbach*, 134 A. D. 811, 119 Supp. 589 (1909); *St. Corp. L.* § 56 (L. 1892, c. 688, § 55). See now § 57 *et seq.*

<sup>15</sup> *Dean v. Mace*, 19 Hun, 391 (1879); L. 1848, c. 40, §§ 18, 24.

<sup>16</sup> *Strong v. Wheaton*, 38 Barb. 616 (1861).

<sup>17</sup> *Truesdell v. Chumar*, 75 Hun, 416, 27 Supp. 87 (1894); L. 1848, c. 40, § 18.

stockholder for his unpaid wages with the statutory condition precedent that judgment on the claim had been rendered against the corporation and execution thereon returned unsatisfied; and the employee is not bound to test the jurisdiction of the court to make the injunction against actions against the corporation by disregarding it and suing the corporation.<sup>18</sup>

§ 226. *Id.*: **Pleading, Practice, and Evidence.**—A complaint in an action against a stockholder to hold him to his personal, statutory liability for wages of a laborer for the corporation which alleges its incorporation under the statute imposing such liability, performance of work for it for two years prior to the date when the amount claimed became due for labor for it as its request, recovery of a judgment within a month thereafter against it for such labor, return of execution thereon unsatisfied and the standing of defendant as a stockholder now and when plaintiff performed his work, is sufficient.<sup>19</sup> A complaint in an action to hold stockholders for debts due their corporation's laborers, servants or apprentices is not sufficient if it allege that the services were rendered as the secretary to the corporation; and the addition of the words "and otherwise" does not help the pleading.<sup>20</sup> While a laborer for a corporation cannot, after bringing an action to hold stockholders liable for his wages under the statute, discontinue as to one of them, yet if such one's verified answer denied he was a stockholder, the discontinuance amounts to a withdrawal of the allegation of the complaint that he is a stockholder and the action properly continues as to the other defendants unless there be some other legal evidence that he is a stockholder.<sup>1</sup> When an action authorized by the law of the State of New York is brought against one or more persons as stockholders of a corporation, an objection to any of the proceedings cannot be taken by a person properly made a defendant in the action on the ground that the plaintiff has joined with him as a defendant in the action a person whose name appears on the stock-books of the corporation as a stockholder thereof by the name so appearing, but who is misnamed or dead or is not liable for any cause.<sup>2</sup> In such a case the court, at any time before final judgment, may, upon the

<sup>18</sup> *Hunting v. Blun*, 143 N. Y. 511, 38 N. E. 716 (1894).

<sup>19</sup> *Dempsey v. Willett*, 16 Hun, 264 (1878); C. C. P. § 519.

<sup>20</sup> *Coffin v. Reynolds*, 37 N. Y. 640 (1868); Gen. Mfg. Act, L. 1848, c. —, § 18.

<sup>1</sup> *Dean v. Whiton*, 16 Hun, 203 (1878); L. 1848, c. 40, § 18.

<sup>2</sup> Gen. Corp. L. § 309 (L. 1909, c. 28).

motion of either party, amend the pleadings and other papers without prejudice to the previous proceedings by substituting the true name of the person intended, or by striking out the name of the person who is dead or not liable, and, in a proper case, inserting the name of his representative or successor.<sup>3</sup> An action to hold a stockholder liable for a debt due by his corporation to its servant for wages cannot, under a statute declaring that persons severally liable on the same obligation may all or any be included as defendants, be brought without bringing in all other stockholders.<sup>4</sup> In an action against stockholders for wages due laborers, servants and apprentices of their corporation, in which all the stockholders are sued as joint debtors, one or more may compromise his or their liability without destroying the creditor's claim as to the others.<sup>5</sup>

<sup>3</sup> Gen. Corp. L. § 309 (L. 1909, c. 28).

<sup>4</sup> Strong v. Wheaton, 38 Barb. 616 (1861); Code, § 120.

<sup>5</sup> Herries v. Platt, 21 Hun, 132 (1880); L. 1848, c. 40, § 18; L.

1838, c. 257, authorizing one or more of several joint debtors to compound or compromise their joint indebtedness in discharge of their joint liability, without affecting the liability of the other joint debtors.

## CHAPTER VI.

### BONDS AND MORTGAGES

#### **XI. Bonds and Mortgages.**

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**§ 227. Bonds and Mortgages: Definitions, Distinctions and Nature.**—The power of a corporation to borrow money in general is discussed in the three hundred and ninety-fifth section of this book. “The distinguishing feature of a bond is that it is an obligation to pay a fixed sum, with stated interest. It may or may not be secured, but if it is, and the security proves to be insufficient, the indebtedness is not thereby wiped out. The distinguishing feature of stock is that it confers upon the holder a part ownership of the assets and the right to participate according to the amount of his stock in the surplus profits of the corporation, and ultimately, on its dissolution, in the assets remaining after the payment of its debts (*citations*). It is fundamental that a stockholder, whether common or preferred, cannot have a lien on the property of the corporation, even though the stock by its terms is accorded a lien (*citations*). . . . a form of security which should possess all the attributes of stock, including a right to share ratably in the profits and increase in value, and at the same time to preserve a specific lien upon the company’s assets which should be superior to the claims of creditors . . . cannot lawfully be done. . . .”<sup>1</sup> “The word ‘debenture’ as defined means ‘a writing acknowledging a debt;’ when, therefore, a certificate is declared to be a preferred debenture share of capital stock, it presents a legal contradiction, a debenture being the acknowledgment of a debt and a share of stock representing a contribution of capital to a corporate business equal to the amount of its face value, either in money or in property.”<sup>2</sup> “. . . mortgages mean the instruments which charge property with the liability to make good the debt its owner has contracted. They may be said to describe a property liability, which is evidenced by the promissory note, or bond of the property owner. They are collateral, or incident to the debt itself, and where made, . . . to secure the payment of bonds, they cannot properly be termed the debt or liability of the obligor, but only the liability charged upon his property. . . . The word ‘mortgage,’ taken in its literal sense, or in affecting legal conditions, means the liability impressed by the company upon the property then owned, or thereafter to be acquired. . . .”<sup>3</sup>

<sup>1</sup> *Cass v. Realty Securities Co.*, 148 A. D. 96, 132 Supp. 1074 (1911); *aff’d* 206 N. Y. 649, 99 N. E. 1105.

<sup>2</sup> *People ex rel. Cohn & Co. v.*

*Miller*, 180 N. Y. 16, 72 N. E. 525 (1904).

<sup>3</sup> *Polhemus v. Fitchburg R. R. Co.*, 123 N. Y. 502, 26 N. E. 31 (1890).

**§ 228. Id.: In General.**—Corporate bonds have their situs where they are, not where the corporation maintains a place of business, in so far as an injunction to prevent payment of interest thereon is concerned, pending determination of their ownership.<sup>4</sup> In the absence of a statute prescribing a particular form of proof or acknowledgment of a deed or mortgage made by a corporation, a form in use for many years will be held sufficient.<sup>5</sup>

**§ 229. Id.: Subscriptions.**—Under a syndicate agreement by which subscribers agree to pay certain sums for the ultimate purchase of bonds, and which shows an intention (though not an express statement) of all parties that each subscriber should pay the amount of his subscription to certain persons named as syndicate managers, who in turn should pay it to the lender of the moneys used in purchasing the bonds (taking up bonds to the amount paid and delivering them to the subscriber), the syndicate managers may sue for an unpaid subscription, and it is not necessary that the lender of the moneys, with whom the bonds were pledged, should sue.<sup>6</sup> An action to cancel a subscription to a syndicate agreement for the purchase of bonds of a corporation to be formed may successfully be maintained if the only consideration running to the subscriber is that of the syndicate managers to issue to subscribers upon payment of their subscriptions negotiable receipts in a form prescribed, as the rule that a sufficient consideration for a subscription to stock results from the rights acquired by a subscriber by acceptance of the subscription does not hold when the contract is to become a shareholder in a corporation at a future time.<sup>7</sup>

**§ 230. Id.: Issue and making, In General.**—“In general, the right to mortgage inheres in the ownership of property as much as the right of other disposition; but it is competent in the case of corporations to restrict their powers and regulate their exercise in such manner as public policy and the interests of those investing their means in these artificial organizations may dictate.”<sup>8</sup> There is no rule of law prescribing any particular form to the mortgage given by a corporation pursuant to statute and by consent of its stockholders on its

<sup>4</sup> Von Hesse v. Mackaye, 55 Hun, 365, 8 Supp. 894; aff'd 121 N. Y. 694, 24 N. E. 1099.

<sup>5</sup> Pruyne v. Adams Furniture & Mfg. Co., 92 Hun, 214, 36 Supp. 361 (1895).

<sup>6</sup> Gallogly v. Whitmore, 172 A. D.

381, 158 Supp. 830 (1916); C. C. P. § 449.

<sup>7</sup> Jermyn v. Searing, 170 A. D. 707, 156 Supp. 718 (1915).

<sup>8</sup> Greenpoint Sugar Co. v. Whitin, 69 N. Y. 328 (1877); L. 1848, c. 40, as amended L. 1864, c. 517.

realty to secure payment of its debts.<sup>9</sup> A corporation sufficiently "owns" realty as to validate the requisite statutory assent to the mortgage by its stockholders if at the time of their signatures to the assent it occupies the premises under a contract of purchase pursuant to which a deed was taken.<sup>10</sup> The burden is on one claiming that corporate bonds which are valid on their face are invalid to prove his contention.<sup>11</sup> There is no objection to a mortgage of corporate realty to secure payment of debts made pursuant to statute because it authorizes a sale, after certain notices specified, in a city of this State, of real estate situated outside the State, as our statute in reference to the sale of mortgaged premises under a power of sale contained in a mortgage has reference only to real estate and mortgages recorded in this State.<sup>12</sup> A mortgage given by a corporation upon all its property to a trustee to pay its creditors (whom it could not otherwise pay) is invalid if those creditors who do not accept the ten-year bonds, secured thereby, in payment of their claims, are left without any security; because such a scheme is a clear threat to those creditors who will not grant what is virtually a ten-year extension to make doubtful if not worthless their claims.<sup>13</sup> If a resolution of a corporation directing issue and sale of its bonds stipulate that the treasurer and president execute them but do not state who shall sell them and the by-laws do not show what the duties of the corporation's officers are, it is not apparent that this duty falls more directly upon any one than the president, and if he sells some and turns others over to the vice-president to sell, he is not accountable for the latter but only for those he himself sells.<sup>14</sup> A claim that a mortgage given a corporation to secure a loan made by it to an individual is usurious and void because a subscription to its stock was exacted of the borrower as a condition for making the loan cannot be upheld if the condition was imposed by an incorporator before the company was incorporated and was never ratified by it.<sup>15</sup> No objection

<sup>9</sup> *Carpenter v. Black Hawk Gold Mining Co.*, 65 N. Y. 43 (1875); L. 1848, c. 40, as amended L. 1864, c. 517. See now St. Corp. L. § 6.

<sup>10</sup> *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 328 (1877); L. 1848, c. 40, as amended L. 1864, c. 517. See now St. Corp. L. § 6.

<sup>11</sup> *Nichols v. Mase*, 94 N. Y. 160 (1883).

<sup>12</sup> *Carpenter v. Black Hawk Gold B. C. N. Y.*—17

*Mining Co.*, 65 N. Y. 43 (1875); L. 1848, c. 40, as amended L. 1864, c. 577.

<sup>13</sup> *Jenkins v. John Good Cordage & Machine Co.*, 56 A. D. 573, 68 Supp. 239 (1900); aff'd 168 N. Y. 679, 61 N. E. 1130.

<sup>14</sup> *Oswego Gas Light Co. v. Bozer*, 111 A. D. 140, 96 Supp. 486 (1906).

<sup>15</sup> *Central Park Fire Ins. Co. v. Callaghan*, 41 Barb. 448 (1864).

can be made by a corporation holding on to property for which it has issued its bonds that the issue was irregular: "That kind of plunder which holds on to the property but pleads the doctrine of *ultra vires* against the obligation to pay for it, has no recognition or support in the law of this state."<sup>16</sup>

**§ 231. Id.: For What Purposes.**—No corporation can issue bonds except for money, labor done or property actually received for the use and lawful purposes of the corporation.<sup>17</sup> A corporation may issue and dispose of its obligations, and mortgage its property and franchises to secure the payment thereof or of any debt, if such obligations and mortgage are to secure payment of money borrowed by it or debts contracted by it, necessarily, in the transaction of its business or for the exercise of its corporate rights, privileges or franchises or for any other lawful purpose of its incorporation.<sup>18</sup> " . . . it is not foreign to the lawful business and objects of a corporation to secure payment of its debts by way of mortgaging its property."<sup>19</sup> The statutory authority to a corporation to secure payment of any debt which may be contracted by it in its business by mortgaging its property on consent of holders of two-thirds of its capital stock permits the issue of corporate bonds secured by mortgage on its property as security not only for corporate debts contracted simultaneously with the delivery of the bond but as well of past debts; and, possibly, for purposes other than the payment of existing debts.<sup>20</sup> The statute authorizing a mortgage of a corporation's realty to secure payment of its debts permits of a mortgage of such realty by it to secure payment of bonds issued to the creditors or sold to raise money to pay them.<sup>1</sup> The fact that corporate bonds are unauthorizedly issued for the purpose of raising money to carry on the business as well as the authorized and legal purpose of paying debts does not invalidate the mortgage made to secure the bonds insofar

<sup>16</sup> *Seymour v. Spring Forest Cemetery Assn.*, 144 N. Y. 333, 26 L.R.A. 859, 39 N. E. 365 (1895). There was no formal corporate resolution of purchase.

<sup>17</sup> St. Corp. L. § 55 (L. 1909, c. 61).

<sup>18</sup> St. Corp. L. § 6 (L. 1909, c. 61).

<sup>19</sup> *New Britain National Bank v. Cleveland Co.*, 91 Hun, 447, 36 Supp. 387 (1895); *aff'd* 158 N. Y. 722, 53 N. E. 1128.

<sup>20</sup> *Lord v. Yonkers Fuel Gas Co.*, 99 N. Y. 547, 2 N. E. 909 (1885); L. 1864, c. 517, § 2, as amended L. 1871, c. 481, amend'g Gen. Mfg. Act. See now St. Corp. L. § 6.

<sup>1</sup> *Carpenter v. Black Hawk Gold Mining Co.*, 65 N. Y. 43 (1875); L. 1847, c. 40, as amended L. 1864, c. 517. See now St. Corp. L. § 6.

as it is security for the payment of the debts.<sup>2</sup> “Corporations, unless restrained by their charters, have the power to mortgage their property to secure borrowed money, or their debts,” and the statutory permission to corporations to mortgage their property on assent of holders of two-thirds of their capital stock, while it removes the restraint as to mortgaging realty does too as to personalty; so that as to both, therefore, the mortgage could only be to secure the payments of debts and not to raise money merely to carry on the operations of the company.<sup>3</sup> It is not within the province of the Supreme Court to allow the sale of the properties of an insolvent corporation upon a mortgage for the entire consideration with a condition that the amount may be abated from time to time by the mortgagor delivering up stock of the corporation, procured by it in any method at a valuation not then ascertained by any legal proceedings or other method than the statement of its value to be found in the corporation’s books, as this would be “equivalent to the purchase by an insolvent corporation of its own shares from its stockholders, and would seem to be *ultra vires* and beyond the power of the court to authorize.”<sup>4</sup> The courts will enjoin a corporation at the behest of a minority stockholder from issuing corporate bonds entitling the holders, after payment in full of principal and interest, to receive an equal share with the stockholders and the balance remaining until the one-half apportioned to the stockholders shall amount to the sum paid into the company’s treasury by them, whereupon the bondholders are to receive the entire balance; because present stockholders cannot be excluded from sharing in the surplus and profits of the company, if any, after payment of the bonded indebtedness and existing prior obligations.<sup>5</sup> A corporation formed under a statute permitting the borrowing of money for the purpose of carrying on its business or operations and the mortgaging of its property and franchises to secure payment of its debts contracted for the purpose of its business cannot mortgage except to secure a debt which could be enforced against itself nor borrow after it has transferred all its property and

<sup>2</sup> *Carpenter v. Black Hawk Gold Mining Co.*, 65 N. Y. 43 (1875); L. 1848, c. 40, as amended L. 1864, c. 517. See now St. Corp. L. § 6.

<sup>3</sup> *Carpenter v. Black Hawk Gold Mining Co.*, 65 N. Y. 43 (1875); L. 1848, c. 40, as amended L. 1864, c. 517, allowing mortgage of realty only. See now St. Corp. L. § 6, not

so limiting purpose of mortgage on property mortgageable.

<sup>4</sup> *People v. Anglo-American Savings & Loan Assn.*, 60 A. D. 389, 69 Supp. 1054 (1901).

<sup>5</sup> *Smith v. Westchester Bronxville Realty Co.*, 78 Misc. 75, 137 Supp. 690 (1912); *aff’d* 156 A. D. 920, 141 Supp. 1147.

franchises to another corporation for the unexpired term of its charter and for any renewal or extended term it might have, even though such transfer be in the form of a lease.<sup>6</sup> Under a statute permitting a corporation to mortgage its property to secure payment of a debt contracted for the purpose of completing, finishing or operating its road, it may pledge its bonds as security for a precedent debt contracted in the process of borrowing money for the construction and operation of its road.<sup>7</sup>

§ 232. *Id.*: **On What as Security.**—A corporation may mortgage its property and franchises to secure the payment of its obligations and debts, as authorized by statute.<sup>8</sup> A corporate mortgage on realty given pursuant to statute to secure payment of its debts may cover future as well as present real estate of the company.<sup>9</sup> “A corporation, without some statute allowing it, can neither sell nor mortgage its franchises”; but this fact does not invalidate, as security for corporate debts, a mortgage issued by it on its realty pursuant to law to secure payment of such debts, even though it also cover its franchises.<sup>10</sup> Bondholders secured by a mortgage on corporate property described as projected when the mortgage was made but changed before completion are secured by the completed property if the mortgage in terms conveys all property to be acquired.<sup>11</sup> When, after a corporate trust mortgage has been made additions are made to its plant, necessary to the operation thereof, under a contract by which title thereto remains till payment is made therefor in full in the vendor, and the mortgagor becomes insolvent, on foreclosure and sale of such additions together with the mortgaged property the vendor is entitled from the purchase price first to be paid whatever remains due on the purchase price of the additions.<sup>12</sup> It is probable that a trust mortgage by a gas company extends to after-acquired personal property.<sup>13</sup>

<sup>6</sup> *Astor v. Westchester Gas-Light Co.*, 33 Hun, 333 (1884).

<sup>7</sup> *Duncomb v. New York, Housatonic & Northern R. R. Co.*, 84 N. Y. 190 (1881); Gen. R. R. Act, L. 1850, c. 140, § 28, subd. 10.

<sup>8</sup> St. Corp. L. § 6 (L. 1909, c. 61).

<sup>9</sup> *Carpenter v. Black Hawk Gold Mining Co.*, 65 N. Y. 43 (1875); L. 1848, c. 40, as amended L. 1864, c. 517. See now St. Corp. L. § 6.

<sup>10</sup> *Carpenter v. Black Hawk Gold Mining Co.*, 65 N. Y. 43 (1875);

L. 1848, c. 40, as amended L. 1864, c. 517. See now St. Corp. L. § 6, permitting mortgage of franchises.

<sup>11</sup> *Elwell v. Grand St. & Newtown R. R. Co.*, 67 Barb. 83 (1874); aff'd, see foot-note, p. 85.

<sup>12</sup> *Washington Trust Co. v. Morse Iron Works & D. & D. Co.*, 187 N. Y. 307, 79 N. E. 1022 (1907).

<sup>13</sup> *New York Security Co. v. Saratoga Gas Co.*, 88 Hun, 569, 34 Supp. 890; aff'd 157 N. Y. 689, 51 N. E. 1092; L. 1891, c. 171; L. 1871, c. 481.

**§ 233. Id.: No Limit to.**—The statute puts no limitation upon the issue of corporate bonds and obligations or the making of corporate mortgages to secure them.<sup>14</sup>

**§ 234. Id.: At Less Than Par.**—“ . . . A corporation has the power to issue its bonds at less than par.” But “an issue of almost twice the number of bonds, taken at their actual value, necessary to pay the balance due on the property purchased, such issue being made in fact because the stock was really worth not more than forty per cent. of its par value, would be . . . a mere evasion of the statute as to issuing stock at par, and ought not to be tolerated . . .”<sup>15</sup> Issuance of corporate bonds at less than par does not violate the statutory inhibition of the issue of stocks or bonds otherwise than for money, labor done or property received.<sup>16</sup>

**§ 235. Id.: Stockholders' Consent, Governing Statutes.**—In addition to the powers conferred by the General Corporation Law every stock corporation has power to borrow money and contract debts when necessary for the transaction of its business or for the exercise of its corporate rights, privileges or franchises or for any other lawful purpose of its incorporation, and may issue and dispose of its obligations for any amount so borrowed and may mortgage its property and franchises to secure the payment of such obligations or of any debt contracted for such purposes provided that every such mortgage is consented to by the holders of not less than two-thirds of the capital stock of the corporation; except it

<sup>14</sup> St. Corp. L. § 6 (L. 1909, c. 61). The cases decided under the former statute containing such a limitation are given in this note, but are no longer binding. A transfer of about all a corporation's property by mortgage is not illegal as a virtual termination of its business if made with the intent and belief that it would enable the continuance of the business. *New Britain National Bank v. Cleveland Co.*, 91 Hun, 447, 36 Supp. 387 (1895); *aff'd* 158 N. Y. 722, 53 N. E. 1128. “. . . section 2 of the Stock Corporation Law (chap. 564 of 1890, as amended by chap. 688 of 1912) applies to railroad corporations, and that a mortgage must be limited, either by the amount of the paid-up capital stock or by two-thirds of the value of the property of the corporation,

if that be greater than the paid-up capital stock.” *Flynn v. Coney Island & Brooklyn R. R. Co.*, 26 A. D. 416, 50 Supp. 74 (1898). The fact of an issue of bonds by a corporation beyond one-half the value of its property does not make the issue void, but voidable only in the favor of those who can question the act of issuing the bonds. *New Britain National Bank v. Cleveland Co.*, 91 Hun. 447, 36 Supp. 387 (1895); *aff'd* 158 N. Y. 722, 53 N. E. 1128; *L. 1888, c. 394*.

<sup>15</sup> *Gamble v. Queens Co. Water Co.*, 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201 (1890); *Gen. Mfg. Act*, L. 1848, c. 40, § 2.

<sup>16</sup> *MacQuoid v. Queens Estates*, 143 A. D. 134, 127 Supp. 867 (1911); *St. Corp. L. § 55*.

be (a) a purchase-money mortgage or (b) a mortgage authorized by a contract made prior to May first, eighteen hundred and ninety-one.<sup>17</sup> The consent which the holders of not less than two-thirds of the capital stock of a corporation must give to validate any mortgage save a purchase-money one or one authorized by a contract made before May first, eighteen hundred and ninety-one must (1) be either (a) in writing or (b) by vote at a special meeting of the stockholders called for that purpose, and upon the same notice as that required for the annual meetings of the corporation.<sup>18</sup> A certificate (1) under the seal of the corporation (2) that such consent was given by the stockholders (a) in writing or (b) by vote at a special meeting of the stockholders called for that purpose upon the same notice as that required for the annual meetings of the corporation, (3) must be (a) subscribed and (b) acknowledged (c) by the president or a vice-president and (d) by the secretary or an assistant-secretary of the corporation, which (4) must be (a) filed and (b) recorded in the office of the clerk or register of the county wherein the corporation has its principal place of business.<sup>19</sup> The failure of stockholders to give the requisite statutory consent to a corporate mortgage need not necessarily invalidate such mortgage under all circumstances. The statute makes the recital or representation in a mortgage affecting property or franchises in New York, executed by authority of its board of directors in behalf of a foreign or domestic corporation of any description, in substance or effect, that its execution has been duly consented to or authorized by stockholders, presumptive evidence after public record of the mortgage in New York that its execution has been duly and sufficiently consented to and authorized by stockholders as required by any provision of law.<sup>20</sup> The statute further makes a recital or representation in substance or effect, in any mortgage affecting property or franchises in New York executed by authority of the corporation's board of directors in behalf of any domestic or foreign stock corporation of any description, that the execution of such mortgage has been duly consented to or authorized by stockholders, after such mortgage has been publicly recorded for more than one year in one or more of the counties of New York State containing the whole or any part of the mortgaged premises and after the corporation

<sup>17</sup> St. Corp. L. § 6 (L. 1909, c. 61).

<sup>18</sup> St. Corp. L. § 6 (L. 1909, c. 61).

<sup>19</sup> St. Corp. L. § 6 (L. 1909, c. 61).

<sup>20</sup> St. Corp. L. § 7 (L. 1909, c. 61).

has received value for bonds actually issued under and secured by such mortgage and after interest has been paid on any of such bonds according to the terms thereof, conclusive evidence that the execution of such mortgage has been duly and sufficiently consented to and authorized by stockholders as required by any provision of law, and its validity is not impaired by reason of any defect or insufficiency of consent or authority of stockholders or in filing or recording such consent or authority, but the mortgage is valid and binding upon the corporation and those claiming under it as security for all valid bonds issued or to be issued thereunder, unless such mortgage is adjudged invalid because of insufficiency of consent by stockholders in an action begun for such purpose within one year after the earliest record of such mortgage in any county of New York State, provided such action is begun by or in behalf of the corporation by direction of the board of directors acting in their own discretion or upon the written request of the holders of not less than one-third of the capital stock of the corporation.<sup>1</sup> In any such action so begun by or on behalf of the corporation the recitals or representations of the mortgage are presumptive evidence after public record thereof within New York only that the execution of such mortgage has been duly and sufficiently consented to and authorized by stockholders as required by any provision of law.<sup>2</sup> Whenever, in compliance with any law of New York, the officers of any corporation have made and filed and recorded a certificate that the execution of a mortgage made by their corporation has been duly consented to by stockholders, such certificate is conclusive evidence as to the truth thereof in favor of any and all persons who in good faith receive or purchase for value any bond or obligation purporting to be secured by such mortgage, at any time when such certificate remains of record and uncanceled.<sup>3</sup> Nothing in the statute contained affects any right or any remedy in respect of any such right of any creditor accrued before its enactment.<sup>4</sup>

**§ 236. Id.: In General.**—The statutory prohibition against mortgaging corporate property without the consent of a certain percentage of the corporation's stockholders is for the benefit and protection of the stockholders, to protect them from improvident or corrupt acts of the officers of the com-

<sup>1</sup> St. Corp. L. § 7 (L. 1909, c. 61).

<sup>2</sup> St. Corp. L. § 7 (L. 1909, c. 61).

<sup>3</sup> St. Corp. L. § 7 (L. 1909, c. 61).

<sup>4</sup> St. Corp. L. § 57 (L. 1909, c. 61).

pany, and not for the purpose of making corporate mortgages improper *per se*.<sup>5</sup> By the statute requiring the assent of holders of at least two-thirds of a corporation's stock as a condition precedent to a mortgage of its property there is "called into action, the corporation as an artificial entity, the body of the trustees as its agent, and lastly, the constituent members of the corporation or the several individuals composing it. . . . The corporation might become a party to the mortgage, and the trustees direct its officers to execute it; but there must still be the assent of the stockholder. The will of the whole body, expressed by vote or resolution, cannot take its place . . . the corporation cannot assent for the stockholders, neither can one stockholder for another; nor can one who assents on the strength of stock standing in his own name be deemed to represent a proportionate amount of the stock owned by the corporation."<sup>6</sup> It is doubtful if the corporation can raise the point that a mortgage by it lacked the statutory assent of stockholders: certainly it cannot do so while it holds the benefit of any property acquired under the mortgage.<sup>7</sup> The statute requiring assent by stockholders to a mortgage by their corporation does not make a mortgage without such assent improper *per se* or avoid it if the stockholders treat it as valid, as the statute is intended to protect them only from improvidence or corruption of their officers.<sup>8</sup> For the purposes of the act requiring assent by two-thirds of a corporation's stockholders to mortgage of its property, "the amount actually issued and owned should be regarded as the amount of the capital stock. The design was to confer this power of assent upon those who represented two-thirds of the actual stock."<sup>9</sup> A judgment of foreclosure of corporate property presupposes due assent by the stockholders to the mortgage, in the absence of proof.<sup>10</sup>

**§ 237. Id.: What Consent Sufficient.**—The statute requires, as to the consent of stockholders to a mortgage by their cor-

<sup>5</sup> *Greenpoint Sugar Co. v. Whiten*, 69 N. Y. 328 (1877); L. 1848, c. 40, as amend'd L. 1864, c. 517. See now St. Corp. L. § 6.

<sup>6</sup> *Vail v. Hamilton*, 85 N. Y. 453 (1881); Gen. Mfg. Act, L. 1848, c. 40, as amend'd L. 1864, c. 517, § 2, and L. 1871, c. 481. See now St. Corp. L. § 6.

<sup>7</sup> *Atlantic Trust Co. v. Crystal Water Co.*, 72 A. D. 539, 76 Supp. 647 (1902).

<sup>8</sup> *Market & Fulton Nat. B'k v. Jones*, 7 Misc. 207, 27 Supp. 677 (1894); aff'd 90 Hun, 605, 35 Supp. 1109; L. 1878, c. 163. See now St. Corp. L. § 6.

<sup>9</sup> *Greenpoint Sugar Co. v. Whiten*, 69 N. Y. 328 (1877); L. 1848, c. 40, as amend'd L. 1864, c. 517. See now St. Corp. L. § 6.

<sup>10</sup> *Denike v. New York and Rosendale Lime and Cement Co.*, 80 N. Y. 599 (1880).

poration of its property and franchises, that it be given by the holders of not less than two-thirds of the corporation's capital stock, and that it be given either in writing or by vote at a special stockholder's meeting called for the purpose upon the same notice as is required for the stockholders' annual meeting.<sup>11</sup> No particular form of assent by stockholders to a mortgage by their corporation of its property, nor what it shall specify or contain, is prescribed: "the statute only requires an assent in writing to securing a debt by mortgage," and it "should receive a practical and not a technical construction, and especially in the absence of fraud, and in the absence of any objection on the part of those for whose benefit the proviso was inserted, . . . [the court is] not called upon to exercise great astuteness in discovering defects which are not of such a substantial and radical character as to render the assent ineffective for the purpose designed."<sup>12</sup> If the assent by stockholders to a mortgage by their corporation of its property is defective, it is competent by parol evidence to connect the instrument with the subject matter.<sup>13</sup> A mortgage by a corporation of its franchises, etc., as well as of its real and personal property is inoperative as to the franchises, etc., if the required consent of holders of two-thirds of its stock is to the mortgage of its real and personal property only.<sup>14</sup> The statute, "requiring the assent of stockholders to the mortgaging of corporate property, is carried out by a subsequent as well as by a prior assent, and . . . the intent and spirit of the statute permits the validating of a mortgage by an assent subsequent to its execution. Such assent makes the instrument as of the time it is given a valid mortgage."<sup>15</sup> A mortgage by a cor-

<sup>11</sup> St. Corp. L. § 6 (L. 1909, c. 61).

<sup>12</sup> *Greenpoint Sugar Co. v. Whiten*, 69 N. Y. 328 (1877); L. 1848, c. 40, as amend'd by L. 1864, c. 517. "— we, — stockholders of the K. C. M. Co., and owning more than two-thirds of the capital stock of the said company, do hereby severally consent that the said K. C. M. Co. execute to the G. S. Co. a bond conditioned for the payment of —, and a mortgage to secure the same upon the lands and premises by them owned, situate in the city of B., county of K., in the State of N. Y., or any part thereof" — held a sufficient consent. "It is

unnecessary to specify the amount of the debt, or the character of it." See now St. Corp. L. § 6.

<sup>13</sup> *Greenpoint Sugar Co. v. Whiten*, 69 N. Y. 328 (1877); L. 1848, c. 40, as amend'd L. 1864, c. 517. See now St. Corp. L. § 6.

<sup>14</sup> *Lord v. Yonkers Fuel Gas Co.*, 99 N. Y. 547, 2 N. E. 909 (1885); L. 1864, c. 517, § 2 as amend'd L. 1871, c. 481, amend'g Gen. Mfg. Act. See now St. Corp. L. § 6.

<sup>15</sup> *Rochester Savings Bank v. Averell*, 96 N. Y. 467 (1884); Gen. Mfg. Act, L. 1864, c. 517, as amend'd L. 1871, c. 481. See now St. Corp. L. § 6.

poration executed in pursuance of an agreement signed by its trustees who are also all its stockholders is good, even though no previous assent by stockholders to the agreement as required by statute is given; because the assent by the signers binds them in their joint capacities as trustees and stockholders.<sup>16</sup> A corporation owning shares of its own stock, in part transferred to an individual as security for an indebtedness by it to him, cannot by corporate action so give its assent as holder of such shares as to make such assent a part of the assent of holders of two-thirds of its stock to a mortgage by it of its property.<sup>17</sup> It is gravely to be doubted if a motion shown by the minutes of a special meeting of stockholders holding more than two-thirds of the stock that the directors be authorized to borrow a certain sum and secure its payment by the mortgage then before the stockholders, though such minutes be attested by the secretary, is equivalent to the "written assent" of stockholders owning more than two-thirds of the stock of a corporation required by statute to validate such a mortgage; but if it be insufficient neither the individual signing as president of the corporation the mortgage reciting the requisite assent, nor a corporation acquiring the property expressly subject to the mortgage, nor the corporation itself which has absolutely parted with all interest in the mortgaged property, can question its validity for lack of such stockholders' consent.<sup>18</sup> Acquiescence by a stockholder in the issue by his corporation of bonds secured by mortgage (even though not authorized by owners of two-thirds of the corporate capital stock) will be presumed when he has held the stock for twelve years and before then his father held it and refused to buy such bonds when offered to him, and throughout all this time interest has been paid on the bonds and they have appeared on the corporation's annual statements.<sup>19</sup> A mortgage given by a corporation having but two shareholders when an assent thereto, required by statute of stockholders holding at least two-thirds of the stock, is signed, is good.<sup>20</sup>

<sup>16</sup> *Paulding v. The Chrome Steel Co.*, 94 N. Y. 334 (1884); L. 1881, c. 481, § 2; L. 1878, c. 163. See now *St. Corp. L.* § 6.

<sup>17</sup> *Vail v. Hamilton*, 85 N. Y. 453 (1881); *Gen. Mfg. Act*, L. 1848, c. 40, as amend'd L. 1864, c. 517, § 2, and L. 1871, c. 481. See now *St. Corp. L.* § 6.

<sup>18</sup> *Beebe v. Richmond Light &*

*Power Co.*, 3 A. D. 334, 38 *Supp.* 395 (1896); L. 1888, c. 394. See now *St. Corp. L.* § 6.

<sup>19</sup> *Warren v. Bigelow Blue Stone Co.*, 74 *Hun* 304, 26 *Supp.* 649 (1893); *app. dism'd* 142 N. Y. 669, 37 N. E. 571.

<sup>20</sup> *Welch v. Importers & Traders Nat. B'k*, 122 N. Y. 177, 25 N. E. 269 (1890); *Gen. Mfg. Act*, L.

**§ 238. Id.: Filing and Recording of Consent.**—The statute requires that the certificate of stockholders' consent to mortgage must be filed and recorded in the office of the clerk or register of the county wherein the corporation has its principal place of business.<sup>1</sup> The filing of an assent by stockholders to a mortgage by their corporation in a wrong county clerk's office by mistake does not invalidate the mortgage as against a subsequent mortgagee with notice.<sup>2</sup> A corporate mortgage given under authority of a statute requiring the written assent of stockholders owning at least two-thirds of the corporation's capital stock to be first filed in the county clerk's office is good as against the company and stockholders if the requisite assent be given before the execution of the mortgage, no rights of creditors intervening, even though, apparently, the consent be not filed till after the mortgage is executed.<sup>3</sup> Certainly this is true if the written assent is signed by all the stockholders before the execution of the mortgage and is filed simultaneously with the filing of the mortgage for record.<sup>4</sup> An assent by stockholders to a mortgage by their corporation of its property filed the same day that the mortgage is will be inferred to have been filed before the mortgage if necessary to sustain the validity of the transaction, as "the reasonable construction of the statute is, that the mortgage is valid from the filing of the assent."<sup>5</sup>

**§ 239. Id.: To What Mortgages Necessary.**—Purchase-money mortgages and mortgages authorized by a contract made prior to May first, eighteen hundred and ninety-one are excepted by the statute from its requirement that stockholders consent thereto.<sup>6</sup> A purchase money mortgage may be issued by a corporation without the consent of its stockholders.<sup>7</sup> An instrument executed by a corporation assigning

1848, c. 40, § 2, as amend'd L. 1864, c. 517, and L. 1871, c. 481. See now St. Corp. L. § 6.

<sup>1</sup> St. Corp. § 6 (L. 1909, c. 61).

<sup>2</sup> Rochester Savings Bank v. Averell, 96 N. Y. 467 (1884); Gen. Mfg. Act, L. 1864, c. 517, as amend'd L. 1871, c. 481. See now St. Corp. L. § 6.

<sup>3</sup> Martin v. Niagara Falls Paper Mfg. Co., 122 N. Y. 165, 25 N. E. 303 (1890); Gen. Mfg. Act, L. 1848, c. 40, § 2, as amend'd L. 1864, c. 517 and L. 1871, c. 481. See now St. Corp. L. § 6.

<sup>4</sup> Welsh v. Importers' and Trad-

ers' Nat. B'k, 122 N. Y. 177, 25 N. E. 269. " . . . the proviso, in respect to the assent of shareholders, is for their protection."

<sup>5</sup> Greenpoint Sugar Co. v. Whiten, 69 N. Y. 328 (1877).

<sup>6</sup> St. Corp. L. § 6 (L. 1909, c. 61).

<sup>7</sup> Farmers' Loan & Trust Co. v. Equity Gas Light Co., 84 Hun, 373, 32 Supp. 385 (1895). The agreement to mortgage was made before L. 1890, c. 564, requiring assent of stockholders to corporate mortgage, went into effect. See now St. Corp. L. § 6.

to a mortgagee of realty of which it has the equity the rents thereof and authorizing such mortgagee to enter into possession thereof in order to prevent foreclosure is not a mortgage which must be consented to by two-thirds of the corporation's capital stockholders.<sup>8</sup>

**§ 240. Id.: When Effective.**—Bonds of a corporation, though prepared and made complete in form by due execution for the purpose of borrowing money, yet cannot be the subject of attachment nor sale upon execution until delivered by the corporation.<sup>9</sup> “The ordinary mortgage bond of a railroad corporation represents a loan of money from the holder to the borrower. It becomes a valid obligation and must be regarded as having been issued by the corporation when it is actually delivered for a valuable consideration (*citation*). Although completely executed in due form to be used as security for borrowed money, such bonds acquire no validity before delivery. . . .”<sup>10</sup>

**§ 241. Id.: Notice of Irregularity.**—A buyer in good faith, for value, of bonds conditioned on their face so as not to become obligatory until authenticated by a certificate endorsed thereon in the signature of a named trustee which bear a forged signature of such trustee is not permitted to compel delivery thereof to him by the obligor of good bonds if he make no inquiry save from his vendor.<sup>11</sup> “The presence of due and unpaid coupons on the bond [of a corporation] is sufficient to put the purchaser on inquiry, but they do not of themselves make the bond to which they are attached dishonored paper.”<sup>12</sup> A bank paying the indebtedness as an individual of an officer of a corporation who owns all but two of its shares and is its secretary and treasurer, on the collateral security of its bonds, represented by such secretary and treasurer to be good and valid securities, and of any irregularity or illegality in the issue whereof it had no notice, is not put upon further inquiry.<sup>13</sup>

**§ 242. Id.: Conversion into Stock.**—The directors may confer on the holder of any debt or obligation evidenced by bonds of the corporation (whether such debt or obligation be secured or unsecured) the right to convert the principal thereof into

<sup>8</sup> *Hirsch v. Twelfth Ward B'k*, 66 Misc. 290, 122 Supp. 1076 (1910); St. Corp. L. § 2 (see now § 6).

<sup>9</sup> *Sickles v. Richardson*, 23 Hun, 559 (1881).

<sup>10</sup> *Zimmermann v. Timmermann*, 193 N. Y. 486, 86 N. E. 540 (1908).

<sup>11</sup> *Maas v. Missouri, Kansas & Texas Ry. Co.*, 83 N. Y. 223 (1880).

<sup>12</sup> *Buffalo L., T. & S. D. Co. v. Medina Gas Co.*, 162 N. Y. 67, 56 N. E. 505 (1900).

<sup>13</sup> *Buffalo L., T. & S. D. Co. v. Medina Gas Co.*, 162 N. Y. 67, 56 N. E. 505 (1900).

stock of the corporation after two and not more than twelve years from the date of such bonds; provided (1) that the directors are authorized by consent of the holders of not less than two-thirds of the capital stock of the corporation in writing or at a special meeting of the stockholders called for that purpose upon the same notice as that required for the annual meetings of the corporation and a certificate of the giving of such consent in one of such two ways under the seal of the corporation, subscribed and acknowledged by the president or a vice-president and by the secretary or an assistant-secretary, is filed and recorded in the office of the clerk or register of the county wherein the corporation has its principal place of business; and (2) that such right be conferred under such regulations as the directors may adopt.<sup>14</sup> If the capital stock of the corporation is not sufficient to meet the conversion of its bonds into stock pursuant to the statute when made, the directors from time to time must authorize an increase of capital stock sufficient for that purpose by causing a certificate to be filed (a) in the office of the Secretary of State and a duplicate thereof (b) in the office of the clerk of the county where the principal place of business of the corporation is located, which certificate must: (1) be under the seal of the corporation; (2) be subscribed by the president and secretary of the corporation; (3) be acknowledged by the president and secretary of the corporation; (4) set forth either (a) a copy of such mortgage or (b) a resolution of the directors authorizing the issue of such bonds; (5) set forth that the holders of not less than two-thirds of the capital stock of the corporation duly consented to the execution of such mortgage or resolution of directors authorizing the issue of such bonds by such corporation; (6) set forth a copy of the resolution of the directors of the corporation authorizing the increase of the capital stock of the corporation necessary for the purpose of such conversion; (7) set forth the amount of capital theretofore authorized; (8) set forth the proportion of the capital actually issued; and (9) set forth the amount of the increased capital stock.<sup>15</sup> When the certificate provided for by the statute has been filed the capital stock of such corporation is increased to the amount specified in such certificate.<sup>16</sup>

§ 243. *Id.*: **Coupons.**—Detachment from a bond of coupons does not deprive the holders of them of the security of the

<sup>14</sup> St. Corp. L. § 6 (L. 1909, c. 61).

<sup>16</sup> St. Corp. L. § 6 (L. 1909, c. 61).

<sup>15</sup> St. Corp. L. § 6 (L. 1909, c. 61).

mortgage.<sup>17</sup> One who is simply the owner of a coupon severed from a bond having annexed a guaranty "to the holder of the within bond [of] the punctual payment of the principal and interest thereof when and as the same shall become due and payable" cannot recover on the guaranty.<sup>18</sup> A corporation is entitled to show that one suing to recover the amount of a coupon detached from a bond issued by it, though he acquired it before maturity, yet did not obtain it in good faith and for value.<sup>19</sup> In determining whether a corporation is liable for interest on its bonds from their due date to the date of trial "the Court of Appeals lays down, as to interest coupons, the rule that interest follows the principal and cannot be compounded unless there are circumstances which create an exception to the general rule," and such circumstances must be plead and proven.<sup>20</sup> Coupons of corporate bonds which are in distinct terms promises to pay the bearer the amount specified therein at a day and place named are transferable by delivery, promissory notes for the payment of money to the holder, transferable by delivery though detached from their parent bonds; and that they are declared to be for interest upon bonds specified by their numbers and are under seal, does not destroy their negotiability when detached from the bonds.<sup>1</sup> Coupons attached to corporate bonds which are termed upon their face "interest warrants," not on their face negotiable or payable to any person by name or to his order or the order of bearer or of a fictitious person, are not negotiable and do not pass by delivery.<sup>2</sup> One advancing money to another to pay maturing coupons of a corporate bond and mortgage, under an agreement with the corporation, but unknown to the bondholders, that he should hold the coupons as security for his advance, cannot on foreclosure share, as to the coupons paid by such other with his advance and delivered to him, in the funds realized on foreclosure *pro rata* with the other holders of bonds and coupons.<sup>3</sup> Although an action may be maintained upon the coupons to a bond without the production of the bond, a recovery must be based on the obligation contained in the bond and no recovery can be

<sup>17</sup> Union Trust Co. v. Monticello & Port Jervis Ry. Co., 63 N. Y. 311 (1875).

<sup>18</sup> Clokey v. Evansville & Terre Haute R. R. Co., 16 A. D. 304, 44 Supp. 631 (1897).

<sup>19</sup> Wisner v. Osteyee Bros., 23 Misc. 123, 50 Supp. 689 (1898).

<sup>20</sup> Klein v. East River Electric

Light Co., 33 Misc. 596, 67 Supp. 922 (1901).

<sup>1</sup> Evertson v. National B'k of Newport, 66 N. Y. 14 (1876).

<sup>2</sup> Evertson v. National B'k of Newport, 66 N. Y. 14 (1876).

<sup>3</sup> Union Trust Co. v. Monticello & Port Jervis Ry. Co., 63 N. Y. 311 (1875).

had contrary to the agreement therein expressed.<sup>4</sup> The same Statute of Limitations bars an action on coupons attached to a bond as bars an action on the bond itself; so that if it be under seal, an action on the coupons is not barred for twenty years.<sup>5</sup> On judgment had for damages against one sued for conversion of coupons off a corporate bond, and satisfaction thereof, the title to the coupons vests in such one, and he may sue the corporation on such coupons.<sup>6</sup> A corporate bond with coupons attached, or detached if still in the hands of the bondholder, are mere evidences of the indebtedness of the corporation, which may, as a condition of redemption by it pursuant to the bond's conditions, require the surrender of such detached coupons as well as those attached; and if this be not done, interest ceases on the date of such tender.<sup>7</sup>

§ 244. *Id.*: **Chattel Mortgages.**—A corporation may borrow money on a mortgage of its real as well as its personal property.<sup>8</sup> The statutory provision that corporate mortgages other than purchase money mortgages shall be consented to by not less than two-thirds of the stockholders does not apply to a renewal chattel mortgage given by a corporation as transferee of an interest in a lease from an individual containing an obligation, which it assumed, to deliver a new chattel mortgage each year to secure payment of liquidated damages provided for in such lease and of certain personalty as well; because the obligation to renew was part of the purchase price of the chattels.<sup>9</sup> A chattel mortgage assumed by a corporation on buying the chattels covered thereby and which was given by the corporation's vendor as a purchase money mortgage, is not such a mortgage as requires the assent of two-thirds of the corporation's stockholders to validate it.<sup>10</sup> In determining if two-thirds of the stockholders of a corporation give their consent to its chattel mortgage so as to make it valid, "it is the amount of stock actually issued and owned which is taken into account."<sup>11</sup> A corporate mort-

<sup>4</sup> *McClelland v. Norfolk Southern R. R. Co.*, 110 N. Y. 469, 1 L.R.A. 299, 18 N. E. 237 (1888).

<sup>5</sup> *Kelly v. Forty-Second St. R. Co.*, 37 A. D. 500, 55 Supp. 1096 (1899).

<sup>6</sup> *Kelly v. Forty-Second St. R. Co.*, 37 A. D. 500, 55 Supp. 1096 (1899).

<sup>7</sup> *Bailey v. County of Buchanan*, 115 N. Y. 297, 6 L.R.A. 562, 22 N. E. 155 (1889).

<sup>8</sup> *New Britain National Bank v. Cleveland Co.*, 91 Hun, 447, 36

Supp. 387 (1895); *aff'd* 158 N. Y. 722, 53 N. E. 1128; L. 1888, c. 394, limiting mortgage to realty. See now St. Corp. L. § 6.

<sup>9</sup> *Black v. Ellis*, 197 N. Y. 402, 90 N. E. 958 (1910); St. Corp. L. § 2. (See now § 6.)

<sup>10</sup> *Black v. Ellis*, 58 Misc. 391, 111 Supp. 347 (1908); *aff'd* 129 A. D. 140, 113 Supp. 558.

<sup>11</sup> *Swan v. Stiles*, 94 A. D. 117, 87 Supp. 1089 (1904); St. Corp. L. § 48 (L. 1892, c. 688). Now § 6.

gage of realty and personalty as security for bonds which is recorded as a mortgage of realty need not be filed as a chattel mortgage, too.<sup>12</sup> The defense of the invalidity of a corporate chattel mortgage on the ground of failure to comply with the statutory requirements in its execution is available to the corporation as a defense to an action against it.<sup>13</sup> "A [corporate] mortgage may be so drawn as to embrace within its lien property that may be acquired by the mortgagor subsequent to the execution of the mortgage . . . . But such a mortgage, as to chattels not *in esse* when it is executed, is merely an executory contract to give a lien which a court of equity may enforce, as between the parties, when the chattels come into existence, or which the mortgagee may, in some cases, make effective by taking actual possession of the after-acquired property."<sup>14</sup>

**§ 245. *Id.*: Construction of, In General.**—"It is in the highest degree important that there should be a strict adherence to those terms [of bonds] and, if a doubt may arise in construction, it should rather be resolved in favor of the bondholder."<sup>15</sup> When "choses in action" are made the subject of a corporate mortgage, and the phrase is associated with such items as "bills receivable; debts, demands, dues and accounts," those kindred terms define "choses in action" as property *ejusdem generis*; and they do not include causes of action arising out of torts committed after the execution of the mortgage, but rather such choses as might come into existence and be acquired by the mortgagor through its contractual relations with others in the regular course of business.<sup>16</sup> If one contract to deliver to another a portion of the bond issue of a corporation "when, as and if issued," it is not meant that no delivery need be made till the bonds are wholly issued, but that such delivery must be made when the issue of bonds is reasonably large enough to make fulfillment of the contract practicable to the seller at the time when delivery should be

<sup>12</sup> Guaranty Trust Co. v. Troy Steel Co., 33 Misc. 484, 68 Supp. 915 (1900); L. 1895, c. 529, amend'g L. 1868, c. 779, so as to make applicable to mortgages *by any corporation*. See now St. Corp. L. § 6.

<sup>13</sup> London Realty Co. v. Coleman Stable Co., 140 A. D. 495, 125 Supp. 410 (1910); St. Corp. L. § 6.

<sup>14</sup> MacDonnell v. Buffalo L., T. &

S. D. Co., 193 N. Y. 92, 85 N. E. 801 (1908).

<sup>15</sup> St. Louis & San Francisco Railroad Co. v. Guaranty Trust Co. of N. Y., 205 N. Y. 609, 98 N. E. 162 (1912).

<sup>16</sup> MacDonnell v. Buffalo L., T. & S. D. Co., 193 N. Y. 92, 85 N. E. 801 (1908).

called for.<sup>17</sup> When a valid, written agreement has been made by one business corporation to give a first mortgage upon its assets for a certain amount and for a specified consideration to another business corporation which has fully performed on its part, an effort by the former corporation to perform its legal obligation by giving the mortgage is binding in equity as against junior judgment creditors even though certain statutory requirements have not been observed.<sup>18</sup> When a mortgage by a corporation to secure the payment of the principal and interest of its bonds, although in terms purporting to include future earnings and products, stipulates that until default the mortgagor shall have the use of the earnings in the conduct of its business, and that upon default the mortgagee may go into possession, exercise the corporate franchises and appropriate the earnings to the payment of the debt secured by the mortgage, the mortgage does not, as against general creditors, operate as a lien upon such earnings until actual entry and possession under the mortgage by the mortgagee.<sup>19</sup> If a trust mortgage require delivery of "any" of the bonds secured thereby to the mortgagor by the trustee at the indefinite and unlimited choice of the mortgagor, the word "any" must be construed "all."<sup>20</sup> To entitle a holder of corporate bonds to exchange them for stock under a provision in the bonds permitting their conversion into stock "at any time within ten days after any dividend shall have been declared and become payable on said preferred stock, upon the delivery . . . of this bond and the unmatured coupons," the bonds must be presented within ten days after a dividend had been declared and become payable, and there must then be unmatured coupons attached thereto: they could not be presented after the bonds had matured and the coupons all been paid.<sup>1</sup> Under a sinking fund provision in a trust mortgage to secure a bond issue that the grantor pay the trustee annually "an amount which shall equal, in the following years [thereafter specified], the following percentages [thereafter also specified] of the entire amounts of bonds

<sup>17</sup> *Zimmermann v. Timmermann*, 193 N. Y. 486, 86 N. E. 540 (1908).

<sup>18</sup> *Hamilton Trust Co. v. Clemes*, 163 N. Y. 423, 57 N. E. 614 (1900); *Stock Corp. L. §§ 20, 24, 29*. A contract to give a mortgage was caused to be entered into by the corporation by three directors named in the certificate of incorporation.

<sup>19</sup> *N. Y. Security Co. v. Saratoga*

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*G. & El. L. Co.*, 159 N. Y. 137, 45 L.R.A. 132, 53 N. E. 758 (1899).

<sup>20</sup> *Fleisher v. Farmers' Loan & Trust Co.*, 58 A. D. 473, 69 Supp. 437 (1901).

<sup>1</sup> *Carpenter v. Chicago, Milwaukee & St. Paul R. Co.*, 119 A. D. 169, 104 Supp. 152 (1907); *aff'd* 192 N. Y. 586, 85 N. E. 1107.

which shall have been issued and outstanding on said dates " for certain purposes, if some of the bonds have been bought, redeemed and cancelled by funds from other sources than the sinking fund payments, " the estimated annual percentages are to be paid upon the whole amount of bonds issued for the particular purpose mentioned . . . , including all of such bonds as may have been purchased by the trustee with percentages already paid, which, for the purpose alone of calculating the sinking fund payments, are to be deemed outstanding, but not including any bonds issued for that purpose which may have been purchased, redeemed and cancelled with moneys not derived from the payment of percentages specified . . . ."<sup>2</sup> A purchaser from one receiving, as collateral to an indebtedness by a corporation to him, its bonds endorsed as " consolidated first mortgage bonds," in reliance upon there being some of such bonds, cannot hold the corporation and its officers on the ground that they are first mortgage bonds if the mortgage would have shown, had it been inspected, that the design was to substitute such bonds for others previously issued and secured by mortgage and that the prior bondholders would all have to consent to the substitution.<sup>3</sup>

**§ 246. Id.: When Negotiable.**—" It is undoubtedly the general rule that the bonds of railroad, manufacturing, municipal and other like corporations, payable to bearer, issued for the purpose of securing loans of money, are, in this country, deemed negotiable, and coupons thereto attached partake of the same character (*citations*). But when such instruments contain special stipulations and their payment is subject to contingencies not within the control of their holders, they are, by established rules, deprived of the character of negotiable instruments, and become exposed to any defense existing thereto, as between the original parties to the instrument."<sup>4</sup> Corporate bonds, though under seal, when they are " issued to secure the payment of money upon time, and contain on

<sup>2</sup> *Columbia Gas & Electric Co. v. Knickerbocker Trust Co.*, 152 A. D. 5, 136 Supp. 840 (1912).

<sup>3</sup> *Caylus v. New York, Kingston & Syracuse R. R. Co.*, 10 Hun, 295 (1877); *aff'd* 76 N. Y. 609.

<sup>4</sup> *McClelland v. Norfolk Southern R. R. Co.*, 110 N. Y. 469, 1 L.R.A. 299, 18 N. E. 237 (1888). "It is essential . . . that such paper should provide for the unconditional payment to a person, or order, or

bearer, of a certain sum at a time capable of exact ascertainment (*citations*). It would seem, therefore, if these coupons were subject to the condition that the time of their payment could be changed, altered or postponed from time to time at the option of a majority of the holders of the series of bonds simultaneously issued therewith, it would deprive them of one of the essential characteristics of negotiable paper."

their face an expression showing that they are expected to pass from one person to another, and thus to perform the office of bills and notes or of money, as the words 'bearer,' or 'assigns,' or 'the holder,' or the like,' are negotiable; and blank assignments signed by the payees are sufficient to transfer them.<sup>5</sup>

**§ 247. Id.: Principal Due on Default in Interest Payment.**—The reasonable construction of a clause in a railroad bond that "in case of default in the payment of any of the interest coupons . . . in the manner provided in the trust deed and mortgage . . . the principal sum . . . shall become due in the manner and with the effect provided in the said trust deed or mortgage" is that the "principal sum of the mortgage debt, upon the failure to pay interest thereon, was not intended to be made payable except in the manner specifically provided by the terms of the mortgage."<sup>6</sup> Under a guaranty by a corporation of payment of the principal and interest of a bond according to its tenor, to wit, that on default of interest the principle might be collected as stipulated in the mortgage, which provided that on a default continuing six months after demand by the trustees in the deed of trust the principal at their election should become immediately collectible from the mortgaged premises, the corporation becomes liable to a bondholder for interest immediately on default in payment thereof, but for principal only when the principal itself becomes due — whatever may be its obligation to the trustees.<sup>7</sup> A holder of a bond guaranteed by a corporation to the extent of punctual payment of principal and interest so that in case of default in payment of principal or any interest the principal should become due at the trustees' election may hold the guarantor corporation liable for the principal as soon as the trustees have elected.<sup>8</sup> A provision for foreclosure of a trust mortgage at the option of the holders of the bonds it secures on default in payment of principal or interest for a stated period does not require that the option be exercised by all bondholders.<sup>9</sup>

**§ 248. Id.: Mortgage Registrars and Trustees, Registrars and Transferrers.**—"When bonds are registered the company

<sup>5</sup> Brainerd v. New York & Harlem R. R. Co., 25 N. Y. 496 (1862).

<sup>6</sup> Batchelder v. Council Grove Water Co., 131 N. Y. 42, 29 N. E. 801 (1892).

<sup>7</sup> Dougan v. Evansville & Terre Haute R. R. Co., 15 A. D. 483, 44 Supp. 503 (1897).

<sup>8</sup> Dougan v. Evansville & Terre Haute R. R. Co., 15 A. D. 483, 44 Supp. 503 (1897).

<sup>9</sup> Atlantic Trust Co. v. Crystal Water Co., 72 A. D. 539, 76 Supp. 647 (1902).

registering them undertakes to keep a registry of them, not to transfer them except upon the books of the company by direction of the owner or by his duly authorized attorney, and to pay the interest accruing on the bonds and the principal when due to the registered owner."<sup>10</sup> A company registering bonds in the name of their charitable-corporation owner, engaged in no commercial business, is liable for its act in enabling the treasurer of the owner to have the bonds transferred so as to be subject to his individual order and conversion.<sup>11</sup> A corporation transferring its bonds registered in the name of an executor to his individual name upon the strength of his rubber stamp endorsement forged by the thief of the bonds is liable to the registered owner for their value.<sup>12</sup> While to an action to set aside corporate securities a depository thereof and agent for the exchange thereof is a proper party, a registrar is not, if the only ground for joining it is that it countersigns the stock certificates in order that the stock may be listed on the Stock Exchange.<sup>13</sup>

**§ 249. Id.: Mortgage Trustees, In General.**—A mortgage by a corporation, pursuant to statute, of its realty to secure payment of its debts, need not be given to a creditor direct, or a separate mortgage to each creditor, but may be to one person in trust for the benefit of all creditors.<sup>14</sup> If only such bonds are secured by the lien of a trust mortgage as are certified by the trustee, coupons detached therefrom before the bonds are certified, sold or delivered, and before they had any inception as secured obligations, do not come within the protection of the mortgage lien.<sup>15</sup> A mortgagor cannot compel a corporate mortgage trustee to redeem the bonds in any way other than that provided for by agreement so as to accomplish, through a sinking clause provision, a calling in of certain outstanding bonds on a basis less favorable to the holders thereof than if the mortgagor had performed instead of violated his agreement.<sup>16</sup>

<sup>10</sup> *Clarkson Home v. Missouri*, K. & T. R. Co., 182 N. Y. 47, 70 L.R.A. 787, 74 N. E. 571 (1905).

<sup>11</sup> *Clarkson Home v. Missouri*, K. & T. R. Co., 182 N. Y. 47, 70 L.R.A. 787, 74 N. E. 571 (1905).

<sup>12</sup> *Chester County Guarantee Trust & Safe Deposit Co. v. Securities Co.*, 165 A. D. 329, 150 Supp. 1010 (1904).

<sup>13</sup> *Pollitz v. Wabash R. R. Co.*, 142 A. D. 755, 127 Supp. 782 (1911).

<sup>14</sup> *Carpenter v. Black Hawk Gold Mining Co.*, 65 N. Y. 43 (1875); L. 1847, c. 40, as amended L. 1864, c. 517. See now St. Corp. L. § 6.

<sup>15</sup> *Holland Trust Co. v. Thomson-Houston El. Co.*, 170 N. Y. 68, 62 N. E. 1090 (1902).

<sup>16</sup> *Missouri, K. & T. R. Co. v. Union Trust Co.*, 156 N. Y. 592, 51 N. E. 309 (1898).

§ 250. **Id.: Appointment.**—An owner and holder of the bonds of a corporation as to the validity of some of which there is question should not be appointed as trustee, particularly if under the mortgage the trustee has certain discretionary powers.<sup>17</sup> A court of equity will not, at the instance of one who represents neither the mortgagor nor the mortgagee, nor any of the bondholders under a mortgage, interfere because of any alleged irregularity in its appointment of a corporate trustee as successor to an insolvent corporate trustee when the former is acting at the request of and by the consent of all the parties interested.<sup>18</sup> The Supreme Court, as successor to the Court of Chancery, has power to appoint a successor corporate trustee to a predecessor corporate trustee of a trust mortgage which has become insolvent; and if the appointment be irregular it must be negatived by appeal or motion for rehearing.<sup>19</sup>

§ 251. **Id.: Removal.**—A good cause of action for the removal of a mortgage trustee is alleged in a complaint showing a judgment of foreclosure and sale (though containing no direction to convey) and refusal of the trustee to convey, if the judgment was later amended so as to direct conveyance by the trustee without notice to the latter till after the amendment was made, provided the trustee then took no action to annul the amendment.<sup>20</sup> The inability of the court to appoint another trustee under a mortgage giving the bondholders power so to do will not deprive it of power to remove the incumbent trustee.<sup>1</sup> A trustee of a corporate mortgage may be removed for consenting to the subordination of the lien of the mortgage to expenditures on the mortgaged property.<sup>2</sup> Some of the holders of corporate trust bonds may for their own benefit and the benefit of the holders of the rest of the bonds sue to remove the trustee, itself a corporation.<sup>3</sup>

§ 252. **Id.: Powers.**—A corporate trustee may come into court as the representative of its *cestuis que trustent*, residents of different states and many of them unknown, to seek

<sup>17</sup> Matter of Radam Microbe Killer Co., 110 A. D. 329, 97 Supp. 76 (1906).

<sup>18</sup> New York Security Co. v. Saratoga Gas Co., 88 Hun, 569, 34 Supp. 890; *aff'd* 157 N. Y. 689, 51 N. E. 1092.

<sup>19</sup> New York Security Co. v. Saratoga Gas Co., 88 Hun, 569, 34 Supp. 890; *aff'd* 157 N. Y. 689, 51 N. E. 1092.

<sup>20</sup> Harrison v. Union Trust Co., 144 N. Y. 326, 39 N. E. 353 (1895).

<sup>1</sup> Gibson v. American Loan & Trust Co., 58 Hun, 443, 12 Supp. 444 (1890).

<sup>2</sup> Gibson v. American Loan & Trust Co., 58 Hun, 443, 12 Supp. 444 (1890).

<sup>3</sup> Gibson v. American Loan & Trust Co., 58 Hun, 443, 12 Supp. 444 (1890).

the court's direction as to a fund held by it as trustee, and claimed by one person only in hostility to the trust, by making that one only a defendant.<sup>4</sup> A mortgage trustee required by court order to bid on foreclosure "up to" a certain sum may in his discretion bid a larger sum.<sup>5</sup> Although under a trust mortgage the trustee's power to purchase on foreclosure is dependent on the written request of a majority of the bondholders, yet he must be held to have the right to buy, even though no such consent be given, as against a bondholder who intervened in the foreclosure proceedings and secured a court order directing the trustee to bid for the benefit of all bondholders.<sup>6</sup> A mortgage trustee authorized by the mortgage in case of default to form a new corporation for the benefit of the bondholders and reconvey the corporation's property to it, if bought in by him on foreclosure, cannot sell the property bid in by him at all.<sup>7</sup> A trustee may foreclose corporate bonds which are negotiable as though he were the bondholders and has the advantage of the presumption in their favor, from the negotiable character of the bonds, that they were issued for consideration.<sup>8</sup> One of two trustees of a mortgage to secure a series of corporate bonds may sue alone as such to foreclose without asking his co-trustee to join him, and may make the latter a party defendant, if the latter be a director in the company against which it is sought to enforce the mortgage.<sup>9</sup> One claiming to own a temporary receipt exchangeable for a permanent corporate bond cannot enjoin the trustee of the mortgage securing the bonds from delivering any of the permanent bonds to anyone holding a temporary receipt if no one denies that the holders of such receipts are entitled to such bonds.<sup>10</sup>

<sup>4</sup> *Holland Trust Co. v. Sutherland*, 177 N. Y. 327, 69 N. E. 647 (1904). A foreign corporation deposited money with plaintiff to pay its coupons shortly to mature; but before such maturity defendant attached the deposit as the property of a non-resident defendant.

<sup>5</sup> *James v. Cowing*, 82 N. Y. 449 (1880).

<sup>6</sup> *James v. Cowing*, 82 N. Y. 449 (1880).

<sup>7</sup> *James v. Cowing*, 82 N. Y. 449 (1880). This is true though he bought by order of court, and not on consent of a majority of stockholders as provided by the mortgage, if the court order was made in fore-

closure proceedings on the intervention of a bondholder asking court directions to the trustee; or though the new corporation was to be organized in such manner as the majority bondholders directed, and they instead requested a sale.

<sup>8</sup> *Atlantic Trust Co. v. Crystal Water Co.*, 72 A. D. 539, 76 Supp. 647 (1902).

<sup>9</sup> *Cumming v. Middletown, Unionville & Water Gap R. R. Co.*, 147 A. D. 105, 131 Supp. 710 (1911); C. C. P. § 448.

<sup>10</sup> *McCaddon v. Central Trust Co.* of N. Y., 167 A. D. 897, 151 Supp. 646 (1915).

It is doubtful if a resolution by the board of directors of a corporate trustee of a mortgage is necessary to make valid a notice by its secretary of exercise of option to declare the mortgage principal due; but, if such a notice be insufficient, the institution of suit is certainly sufficient notice of intent to exercise such option.<sup>11</sup> There is nothing in the language of a corporate mortgage, that the trustee shall pay out the proceeds of the bonds only on the order of certain committees or officers of the corporation which "shall include a written statement, or memorandum, declaring the purpose, or purposes, for which the proceeds of said bonds so ordered to be paid over are to be appropriated or used," to warrant an express covenant by the trustee to exact from the committees or officers of the corporation such a statement; but an implied covenant to this effect will be found by a court of equity.<sup>12</sup> It is at least doubtful whether a mortgage trustee which has instituted foreclosure proceedings alleging a proper written request from the bondholders to do so under the terms of the bond, can later maintain the action upon the ground that it was voluntarily commenced by it, if the request was invalid.<sup>13</sup> A corporation organized independently and with a larger capital and additional stockholders than one authorized by a mortgage to be organized by the mortgage trustee to take over the mortgaged property on foreclosure cannot be considered to satisfy the requirements of the mortgage.<sup>14</sup> A court of equity will not tolerate an agreement by which a trustee of a trust mortgage on whom rests the duty of protecting the interests of the bondholders for whose benefit the mortgage was executed and a temporary receiver obligated to preserve the property of his *sectui que trust* agree with a third party to sell the last named the property secretly and for an inadequate consideration, thereby securing to themselves the benefit of a sale thus conducted at the expense of the parties towards whom they occupied a fiduciary relation.<sup>15</sup>

<sup>11</sup> New York Security Co. v. Saratoga Gas Co., 88 Hun, 569, 34 Supp. 890; aff'd 157 N. Y. 689, 51 N. E. 1092.

<sup>12</sup> Rhinelander v. Farmers' Loan & Trust Co., 172 N. Y. 519, 65 N. E. 499 (1902). The action on the covenant was held not to come within the twenty but within the six year statute of limitations; and so to be barred.

<sup>13</sup> Farmers' Loan & Trust Co. v. New York & N. R. Co., 150 N. Y. 410, 34 L.R.A. 76, 44 N. E. 1043 (1896).

<sup>14</sup> James v. Cowing, 82 N. Y. 449 (1880).

<sup>15</sup> Atkins v. Judson, 33 A. D. 42, 53 Supp. 504 (1898).

§ 253. **Id.: Liabilities.**—A certificate endorsed by a mortgage trustee of a corporate mortgage upon each bond that "this bond is one of a series of bonds mentioned and described in the mortgage within referred to," when the bonds so certified are each endorsed by the mortgagor as a "First Mortgage Bond," does not make the trustee liable as guarantor for the nature and extent of the security, so as to hold it if the bonds are later cut off by foreclosure of a first mortgage.<sup>15a</sup> In accepting the position of trustee under a trust mortgage the trustee undertakes to discharge the duty and exercise the care and diligence which would naturally be expected of an intelligent person acting in like circumstances to protect his own mortgage.<sup>16</sup> A trustee of a trust corporate mortgage must himself or itself actually and not nominally take what legal proceedings are necessary to protect the bondholders; and if he or it permit certain bondholders in its name to assume complete control of such proceedings he or it is liable for any damages sustained by any other bondholder because of its negligence.<sup>17</sup> If all that is required of a trustee under a trust mortgage as a condition precedent to delivery by it to the mortgagor of the bonds secured by the mortgage be a specified statement, the trustee is not bound, if it receive such a statement, to inquire into application of the proceeds of the bonds or the order in which they are applied by the mortgagor.<sup>18</sup> To hold a mortgage trustee as upon a sealed instrument and so in an action of covenant not limited save by the twenty year Statute of Limitations the covenant may be implied as well as expressed; but the obligation assumed by the trustee under the instrument must be clear.<sup>19</sup>

§ 254. **Id.: Actions, Remedies, and Liabilities, In General.**—When fraud has been committed in the sale of corporate bonds, the right of action is not dependent upon the payment or default of interest.<sup>20</sup>

<sup>15a</sup> *Tschetinian v. City Trust Co.*, 186 N. Y. 432, 79 N. E. 401 (1906).

"The language employed when interpreted in its natural and ordinary meaning simply amounts to a statement identifying the bond whereon it is written as one of those mentioned in the mortgage, and the effect of this is an assurance to the purchaser that his bond is amongst those entitled to the benefits and protection afforded by such mortgage."

<sup>16</sup> *Patterson v. Guardian Trust*

*Co.*, 144 A. D. 863, 129 Supp. 807 (1911).

<sup>17</sup> *Merrill v. Farmers' Loan & Trust Co.*, 24 Hun, 297 (1881).

<sup>18</sup> *Fleisher v. Farmers' Loan & Trust Co.*, 58 A. D. 473, 69 Supp. 437 (1901).

<sup>19</sup> *Fleisher v. Farmers' Loan & Trust Co.*, 58 A. D. 473, 69 Supp. 437 (1901).

<sup>20</sup> *Currier v. Poor*, 155 N. Y. 344, 49 N. E. 937 (1898). Bonds of a corporation held as collateral may be proved in full, but the dividend pay-

§ 255. **Id.: Of Bondholders, In General.**—No action can be maintained on a corporate bond issued to the holder's knowledge for no consideration.<sup>1</sup> A bondholder's complaint is not demurrable because upon the same guaranty by a corporation he seeks to recover both principal and interest.<sup>2</sup> A *bona fide* holder of a negotiable bond issued by a corporation may recover against it thereon although sold at less than par in violation of the corporation's charter; and particularly is this true if, after issuing and selling the bond, the corporation paid interest upon it for several years.<sup>2a</sup> If a majority of corporate bondholders may postpone the time of the payment of the interest coupons of the bonds, this cannot be done before default has occurred in the payment of interest if the reasonable construction of the mortgage is to the contrary.<sup>3</sup> A corporation guaranteeing payment of principal and interest of a bond, the compensation of a trustee and payment of the charges on the property mortgaged as security for the bond, is liable to a bondholder individually for default in its guaranty, and not only to the trustee.<sup>4</sup> When a question arises between a solvent corporation and the holders of its bonds as to the right of the latter to be paid interest under a contract in the bonds that interest was to be paid out of current corporate earnings so far only as the directors certified it had been earned "over and above all expenses, including necessary repairs", the remedy of the bondholders is at law upon contract and not in equity for an accounting based on a trust relationship; because there was no title in the fund in the bondholders.<sup>5</sup> Bondholders entitled to interest from such corporate earnings as are certified by the directors to have been earned above all expenses, and "in default of such certificates" not entitled to interest, are not concluded by the omission of the directors so to certify, but are justified in suing for the interest on the wrongful withholding of the certificate when demanded.<sup>6</sup> Bondholders suing to get inter-

able upon them should be limited to the amount of the debt. *Duncomb v. New York, Housatonic & Northern R. R. Co.*, 84 N. Y. 190 (1881).

<sup>1</sup> *Campbell v. Cypress Hills Cemetery*, 41 N. Y. (2d Hand) 34 (1869).

<sup>2</sup> *Dougan v. Evansville & Terre Haute R. R. Co.*, 15 A. D. 483, 44 Supp. 503 (1897).

<sup>2a</sup> *Elsworth v. St. Louis, Alton & Terre Haute R. R. Co.*, 33 Hun, 7 (1884); *aff'd* 98 N. Y. 553.

<sup>3</sup> *McClelland v. Norfolk Southern R. R. Co.*, 110 N. Y. 469, 1 L.R.A. 299, 18 N. E. 237 (1888).

<sup>4</sup> *Townsend v. Colorado Fuel & Iron Co.*, 16 A. D. 314, 44 Supp. 849 (1897).

<sup>5</sup> *Thomas v. New York & Greenwood Lake Ry. Co.*, 139 N. Y. 163, 34 N. E. 877 (1893).

<sup>6</sup> *Thomas v. New York & Greenwood Lake Ry. Co.*, 139 N. Y. 163, 34 N. E. 877 (1893).

est on their bonds which provide that it shall be paid only from such earnings as are certified by the directors to be in excess of all expenses must show in their complaint that there were earnings applicable to the payment of such interest which had either been retained by the corporation or applied to other purposes.<sup>7</sup> " . . . a party loaning money to an embarrassed corporation, subsequently adjudged to be insolvent, and taking security therefor, is not in a position which entitles him in equity to be adjudged to have a lien on mortgaged property of the corporation or its proceeds in preference to bondholders under a mortgage existing when the loan was made, and . . . it is immaterial for what purpose the loan was made, or how the money received thereon was applied, provided the bondholders were not parties to the transaction."<sup>8</sup> Under an agreement on foreclosure and reorganization of a corporate mortgage whereby one person agrees with another to sell to the latter " the bonds " of the company, and whereby all the holders of its bonds, who have under the foreclosure decree registered them, have the option of accepting the same price, such holders must put their bonds in for sale through such one person who has the right to sell " the bonds " to the purchaser, and the purchaser cannot be held to have bound himself to each separate bondholder.<sup>9</sup> A new corporation accepting a bill of sale from an old corporation containing an assumption by the new of all debts and obligations of the old except its mortgage bonds is not bound to pay a holder of bonds of the old on any contract contained in such bill, whatever may be the terms of the resolution of the board of the new corporation accepting such bill.<sup>10</sup> One who has received without consideration stock and second-mortgage bonds of a corporation is not liable to a judgment-creditor of the corporation whose execution has been unsatisfied for the debt on the theory that he received something for such bonds if it appears that though one of the coupons was paid it was not paid by the corporation and that on foreclosure enough was brought to pay the first-mortgage bonds only.<sup>11</sup> Any person is guilty of a misdemeanor who,

<sup>7</sup> Thomas v. New York & Greenwood Lake Ry. Co., 139 N. Y. 163, 34 N. E. 877 (1893).

<sup>8</sup> Farmers' Loan & Trust Co. v. Bankers' & Merchants' Telegraph Co., 148 N. Y. 315, 31 L.R.A. 403, 42 N. E. 707 (1896).

<sup>9</sup> Johnson v. Morgan, 68 N. Y. 494 (1877).

<sup>10</sup> Fernschild v. Yuengling Brewing Co., 15 A. D. 29, 44 Supp. 106 (1897); aff'd 154 N. Y. 667, 49 N. E. 151.

<sup>11</sup> Christensen v. Illinois & St. Louis Bridge Co., 52 Hun, 478, 5 Supp. 925 (1889).

being entitled to vote at any meeting of the bondholders of a stock corporation, sells his vote, or issues a proxy to vote to any person for any sum of money or thing of value, except as expressly authorized by law.<sup>12</sup>

**§ 256. Id.: Of Bond- and Stock-holders Inter Sese.**—One bond-, or coupon-holder cannot obtain an advantage over others by procuring judgment and levying execution against the mortgagor-corporation's property in the hands of a trustee, "the rule of law being that the holder of unpaid coupons detached from mortgage bonds may sue at law and recover a judgment for his unpaid interest, but he cannot, nevertheless, cause the execution to be levied upon the property covered by the mortgage, because that property has been conveyed to the trustee under the mortgage in trust for all the bondholders, and because the bondholders under the mortgage stand in reference to that security upon an equal right, and are entitled to equality of distribution. . . . if it becomes necessary for him to reach the property held by the trustee he must proceed against the trustee, not for his own separate benefit, but as a bondholder or coupon-holder, and on behalf of the bondholders as a class."<sup>13</sup> It seems that mere naked bondholders of a corporation, as its creditors, cannot attack the right and title of other bondholders, claiming also to be creditors, and have the title adjudicated as an independent cause of action in their own behalf against the corporation, the trustees under the deed of mortgage securing the bonds, and the creditors.<sup>14</sup> Injunction will not be granted a minority bondholder against the acts of the majority bondholders in mortgaging anew to a trust company which was trustee under the old mortgage the same property and additional property as the old mortgage covered and in permitting the trust company to refuse to foreclose, if the bonds originally bought by the minority subjected the holder to the will of the majority and prohibited foreclosure till a majority consented.<sup>15</sup> When bondholders of a corporation execute a reorganization agreement which permits stockholders to participate only if and as the bondholders' committee deem it discreet they should, a stockholder cannot seek to affirm in part and disaffirm in part the contemplated reorganization, as

<sup>12</sup> Penal L., § 668 (L. 1909, c. 88).

<sup>13</sup> *Guaranty Trust Co. v. Troy Steel Co.*, 33 Misc. 484, 68 Supp. 915 (1900).

<sup>14</sup> *Sickles v. Richardson*, 23 Hun, 559 (1881).

<sup>15</sup> *Emery v. New York, Lake Erie & Western R. R. Co.*, 9 Misc. 310, 30 Supp. 306 (1894).

he has no standing.<sup>16</sup> Bondholders of a corporation, the property of which is about to be foreclosed, who permit stockholders to receive stock in a new corporation formed by the bondholders to prevent foreclosure of the old on payment of certain assessments within a specified time, are relieved from their agreement as to all stockholders or their successors in interest who do not pay the assessments within the time limited.<sup>17</sup> When by a foreclosure sale all rights of the mortgaged corporation have been destroyed, one of such stockholders cannot when he claims first to know of the foreclosure, etc., sue a new corporation formed by a committee on the foreclosure of the old for a privilege of taking stock in the new corporation within a stated period extended by such committee to stockholders in the old corporation, as he must either claim under the agreement and is barred after expiration of the time limited therein, or he must proceed to set aside the foreclosure sale.<sup>18</sup> One who is both majority bond and stockholder of a corporation is not precluded from insisting on payment of his bonds or bound individually to pay the mortgage interest because the minority want to compel him to do so, or because he is also a creditor of the company and hopes the corporation will be unable to meet its debts.<sup>19</sup>

§ 257. *Id.*: **On Foreclosure, In General.**—On judgment of foreclosure of a corporate mortgage the court is not bound to set aside the sale because a reorganization agreement, entered into by some of the creditors of the company, had been violated; but may leave the parties thereto who complain of the violation to their remedy by action against the reorganization committee or other persons or bodies.<sup>20</sup> One buying in on foreclosure of a corporate bond and mortgage under terms requiring a certain cash payment and the rest “not required to be paid in cash” by surrender of bonds, must pay in cash, not only such certain account, but also an amount sufficient to pay off accrued interest due holders of coupons.<sup>1</sup> The fact that an order appointing a receiver on foreclosure is so drawn as to make him receiver of all the corporate-mortgagor’s

<sup>16</sup> *Miller v. Dodge*, 28 Misc. 640, 59 Supp. 1070 (1899).

<sup>17</sup> *Dow v. Iowa Central Ry. Co.*, 144 N. Y. 426, 39 N. E. 398 (1895).

<sup>18</sup> *Thornton v. Wabash Ry. Co.*, 81 N. Y. 462 (1880).

<sup>19</sup> *Oelbermann v. New York & Northern R. R. Co.*, 7 Misc. 352, 27 Supp. 945 (1894).

<sup>20</sup> *Farmers' Loan & Trust Co. v. Bankers' and Merchants' Telegraph Co.*, 119 N. Y. 15, 23 N. E. 173 (1890).

<sup>1</sup> *Holland Trust Co. v. Thomson-Houston Co.*, 9 A. D. 473, 41 Supp. 457 (1896); *aff'd* 153 N. Y. 645, 47 N. E. 1108.

property, instead of the mortgaged property only, does not render it void *ab initio*; and if not attacked directly, a further order approving the receiver's accounting not only for funds derived from the mortgaged property but for all the corporation's property protects him, so that a receiver later appointed in sequestration proceedings cannot hold the mortgage receiver liable.<sup>2</sup> On motion to confirm a sale of corporate property by its receiver he must furnish evidence that a mortgage by the corporation on such property was consented to by holders of two-thirds of its stock, if creditors appearing in opposition to the motion complain such consent was not given.<sup>3</sup> A corporation buying in on foreclosure all the assets of another company in the hands of a receiver *pendente lite* subject to all taxes which might be liens thereon takes subject to and is liable for franchise taxes levied during the receivership upon the corporate franchise.<sup>4</sup> When one corporation acquires the majority stock of another, which is hopelessly insolvent, in consideration of guaranteeing payment of the latter's second mortgage bonds, and on the coming due of the interest on such bonds actively instigates the foreclosure of the mortgage securing them with the intent of buying in on the foreclosure and does so buy in the name of a newly-formed corporation, the minority stockholders of the mortgagor company are entitled to have it decreed that that portion of the stock of the newly formed corporation equivalent to their holdings in the old is held in trust for them if they bear their *pro rata* proportion of the just claims of the guarantor corporation against the property of the mortgagor company.<sup>5</sup>

**§ 258. Id.: Of Stockholders.**—When property of a corporation is sold in foreclosure proceedings, all its rights and all the proprietary interests of the stockholders are absolutely barred and cut off.<sup>6</sup> The court will deny the motion of a stockholder to be made party to a foreclosure proceeding in which his corporation is a party when its receiver, as party to the action, was guilty of no fraud and the facts do not show if the receiver's refusal to appeal from the judgment rendered was

<sup>2</sup> Platt v. N. Y. & Sea Beach Ry. Co., 170 N. Y. 451, 63 N. E. 532 (1902).

<sup>3</sup> Matter of Wendler Machine Co., 2 A. D. 16, 37 Supp. 444 (1896).

<sup>4</sup> New York Terminal Co. v. Gaus, 204 N. Y. 512, 98 N. E. 11 (1912); Tax L. § 182.

<sup>5</sup> Cutting v. Baltimore & Ohio R.

Co., 65 A. D. 414, 73 Supp. 21 (1901); *dism'd* 177 N. Y. 552, 69 N. E. 1122.

<sup>6</sup> Vatable v. New York, Lake Erie & Western R. Co., 96 N. Y. 49 (1884); L. 1874, c. 430, § 2, as amended L. 1876, c. 446. See now St. Corp. L. § 9 *et seq.*

justifiable after a litigation fought strenuously by at least one of the moving stockholders.<sup>7</sup>

**§ 259. Id.: Of Creditors.**—Unsecured creditors are not necessary or proper parties to an action to foreclose a mortgage on the property of their corporate debtor, have no right to intervene in such action, and are bound by any adjudication made therein against the corporate mortgagor.<sup>8</sup> A judgment creditor who has levied against mortgaged property of a corporation after default by the corporation but before a receiver thereof has been appointed in proceedings to dissolve it, takes nothing by his action, as the corporation has no interest upon which the execution-lien can attach, in view of the law that after default the mortgagor has no interest in the mortgaged property that can be sold on execution against him.<sup>9</sup>

**§ 260. Id.: Of Bondholders, In General.**—The damages to a bondholder of a corporation from the sale of its property bought in on foreclosure without his assent, if his bonds have no market value, are his aliquot part of what the corporate property would have sold for, after due allowance for the reasonable expenses of making a sale.<sup>10</sup> A mortgagee of a mortgage on which a corporation which has become insolvent is liable and who has not at the time of its insolvency and the appointment of a receiver for it realized anything on his mortgage may thereafter foreclose and demand from the receiver and receive a dividend upon the whole amount of his debt as it existed at the time of the receiver's appointment, without regard to the proceeds of the sale received by him, provided such dividend do not exceed the amount of the deficiency.<sup>11</sup>

**§ 261. Id.: To Sue Direct Instead of Through Trustee.**—One bondholder cannot set aside the action of a committee organized by a majority of the bondholders of a corporation to protect their interests on foreclosure of a mortgage which gives each bondholder equal rights with every other, as bondholders are not trustees for each other.<sup>12</sup> A bondholder who has on behalf of himself and other bondholders similarly situated applied to the mortgage trustee to institute suit against

<sup>7</sup> *Matter of Fontana*, 85 Hun, 219, 32 Supp. 956 (1895); C. C. P. § 452.

<sup>8</sup> *Herring v. N. Y., Lake Erie & Western R. R. Co.*, 105 N. Y. 340, 12 N. E. 763 (1887).

<sup>9</sup> *Leadbetter v. Leadbetter*, 125 N. Y. 290, 26 N. E. 265 (1891).

<sup>10</sup> *Industrial & General Trust,*

*Ltd. v. Tod*, 180 N. Y. 215, 73 N. E. 7 (1904).

<sup>11</sup> *Matter of Simpson*, 36 A. D. 562, 55 Supp. 697 (1899); *aff'd* 158 N. Y. 720, 53 N. E. 1132.

<sup>12</sup> *Moss v. Geddes*, 28 Misc. 291, 59 Supp. 867 (1899).

the mortgagor and whose application has been denied has himself the right to bring the action, as the mortgage securing his bond, though made to the trustee, is really to furnish security for the payment to the bondholder of his money.<sup>13</sup> When a trustee of a trust mortgage is absent from the country or is insane it is not necessary that his refusal to bring action of foreclosure shall be obtained if he is *compos mentis*, or that a new trustee be appointed if he is *non compos mentis*, before a bondholder himself may foreclose; because "the bondholders are the real parties in interest; it is their right which is to be redressed, and their loss which is to be prevented; and any emergency which makes a demand upon the trustee futile or impossible, and leaves the right of the bondholder without other reasonable means of redress should justify his appearance as plaintiff in a court of equity for the purpose of a foreclosure."<sup>14</sup> One cannot invoke the statutory provision, that "where there is no answer the judgment shall not be more favorable to the plaintiff than that demanded in the complaint", if he is one of several bondholders represented on foreclosure by a trustee-plaintiff.<sup>15</sup> One delivered a certificate of indebtedness in lieu of a bond secured by a mortgage by a corporation to a trustee, until the bonds are printed, is not deprived of his action to compel delivery of the bond and to foreclose the mortgage on the theory that he has no interest in the mortgage.<sup>16</sup>

**§ 262. Id.: Of Purchaser to Form New Corporation.**—The subject of reorganization is more fully discussed in the subsequent chapter on "Corporate Existence and Change."<sup>17</sup> When the property and franchises of any domestic stock corporation are sold by virtue of a mortgage or deed of trust, duly executed by it, and the purchaser, his assignee or grantee has acquired title thereto in the manner prescribed by law, he may associate with himself any number of persons (not less than the number required by law for an incorporation for similar purposes, at least two-thirds of whom are citizens of the United States and one a resident of New York State), and they may become a corporation and take and possess the property and franchises thus sold and which were at the time of the sale possessed by the corporation the property of

<sup>13</sup> O'Beirne v. Allegheny & Kinzua R. R. Co., 151 N. Y. 372, 45 N. E. 873 (1897).

<sup>14</sup> Ettlinger v. Persian Rug & Carpet Co., 142 N. Y. 189, 36 N. E. 1055 (1894).

<sup>15</sup> Peek v. New York & New Jer-

sey Ry. Co., 85 N. Y. 246 (1881); C. C. P. § 1207.

<sup>16</sup> Jenkins v. John Good Cordage & Machine Co., 56 A. D. 573, 68 Supp. 239 (1900); aff'd 168 N. Y. 679, 61 N. E. 1130.

<sup>17</sup> See § 507, *infra*.

which has been so sold, upon making and acknowledging and filing in the offices where certificates of incorporation are required by law to be filed, a certificate in which: (a) They shall describe by name and reference to the law under which it was organized, the corporation the property and franchises of which have been acquired, and (b) the court by authority of which the sale has been made, with the date of the judgment or decree authorizing or directing the sale and a brief description of the property sold; and (c) give the name of the new corporation intended to be formed by the filing of such certificate; and (d) the place where its principal office is to be located, and (e) the maximum amount of its capital stock, and (f) the number of shares into which it is to be divided specifying the classes thereof, whether common or preferred, and the amount of and the rights pertaining to each class; and (g) the number of directors (not less nor more than the number required by law for the old corporation) who shall manage the affairs of the new corporation, and (h) the names and postoffice addresses of the directors for the first year, and (i) they may insert in such certificate any provisions relating to the new corporation or its management contained in any plan or agreement which may have been entered into pursuant to statute at or previous to the sale.<sup>18</sup> Such corporation is vested with and entitled to exercise and enjoy all the rights, privileges and franchises which at the time of such sale belonged to or were vested in the corporation last owning the property sold, or its receiver, and is subject to all the provisions, duties and liabilities imposed by law on that corporation.<sup>19</sup> The Secretary of State collects a fee of twenty-five dollars for filing a certificate of reorganization pursuant to section nine of the Stock Corporation Law.<sup>20</sup> The further statutory provisions governing a reorganization of a corporation on foreclosure of its mortgage or deed of trust are identical with the provisions applying on reorganization after other proceedings than foreclosure and are therefore considered in the chapter of this work devoted to "Corporate Existence and Change," to which reference is made—although the decisions dealing peculiarly with points arising on corporate reorganization on foreclosure are treated in the now immediately succeeding text.<sup>1</sup> Upon the filing by a new

<sup>18</sup> St. Corp. L. § 9 (L. 1909, c. 61).

<sup>19</sup> St. Corp. L. § 9 (L. 1909, c. 61).  
"Any proceedings heretofore taken in substantial compliance with this section as hereby amended, and any

and all incorporations based thereon are hereby ratified and confirmed."

<sup>20</sup> Executive L. § 26 (L. 1917, c. 69).

<sup>1</sup> See for reorganization of corpo-

corporation of its certificate of incorporation pursuant to the statute permitting a purchaser on mortgage foreclosure of the property and franchises of an old corporation to associate persons with him who "may become a corporation, and take and possess the property and franchises thus sold," and providing that "such corporation shall be vested with and be entitled to exercise and enjoy all the rights, privileges and franchises" of the old corporation, the new corporation does not *ipso facto* become vested with the property acquired by the purchaser at the sale, but only with the rights, privileges and franchises of the old corporation.<sup>2</sup> Sections 9 to 12 of the Stock Corporation Law and section 55 of the Public Service Commission Law must be construed together; so that corporations sold under foreclosure may still reorganize their property and franchises, while corporations formed on such reorganizations are still liable to compliance with the Public Service Commission Law's provisions.<sup>3</sup> The Public Service Commission is not justified in refusing its assent to the amount of securities to be issued by a new corporation formed on the purchase at foreclosure of the franchises, etc., of an old one, merely because the value of the mortgaged property and the amount of new capital to be invested were less than the amount of securities to be issued; but only, probably, if the corporation formed on the reorganization issues securities in excess of those of the company to the property and franchises of which it has succeeded and the new money put in.<sup>4</sup> A new corporation formed to purchase the property of an old corporation takes subject to such duties and liabilities as the law of the time of its incorporation imposes on similar corporations.<sup>5</sup> The statute vesting a corporate purchaser of assets of another corporation on the latter's reorganization with the latter's rights, etc., and subjecting it to the latter's liabilities, etc., "relates only to obligations imposed by law and is not . . . broad enough to impose upon" the successor-

rations in general, § 507 *et seq.*, *infra*.

<sup>2</sup> *Mayer v. Metropolitan Traction Co.*, 165 A. D. 497, 150 Supp. 1026 (1914); St. Corp. L. § 3 as amended L. 1892, c. 688, § 3. See now § 9.

<sup>3</sup> *People ex rel. T. A. Ry. Co. v. P. S. Comm.*, 203 N. Y. 299, 96 N. E. 1011 (1901); St. Corp. L. §§ 9 to 12; Pub. Serv. Comms. L. § 55.

<sup>4</sup> *People ex rel. T. A. Ry. Co. v. P. S. Comm.*, 203 N. Y. 299, 96 N. E.

1011 (1911); Pub. Serv. Comms. L. § 55.

<sup>5</sup> *Minor v. Erie R. R. Co.*, 171 N. Y. 566, 64 N. E. 454 (1902); St. Corp. L. § 3, subd. 4; Mileage Book Act (L. 1895, c. 1027). This last act was held to apply to a corporation formed after its enactment to purchase the property of another corporation not subject to the Act's operation.

corporation "contractual obligations of its predecessor which it never assumed."<sup>6</sup> When certain stockholders, on foreclosure of the property of their corporation, avail themselves of the statute permitting them to purchase such property and the corporation's franchises, etc., and go on as a new corporation, and accordingly form a plan to accomplish this result, it is optional with any stockholder to come into the new company under the plan; but if he does not exercise his option within the statutory limitation of time so to do, or such extension of that time as the plan may give him, equity will afford him no relief.<sup>7</sup> Trustees acting under a plan to form a new company on behalf of those interested in a corporation being foreclosed cannot give a stockholder seeking to come in under the plan less than the time specified in the statute.<sup>8</sup> A creditor of an old corporation cannot by suing alone a new corporation, formed solely by the bondholders of the old on its reorganization, reach, to apply to his debt, the proceeds received by the new company from the sale at less than par of its stock to stockholders of the old corporation.<sup>9</sup>

**§ 263. Id.: Setting Sale Aside.**—When a complainant has no absolute legal right to have a sale on foreclosure of a corporate mortgage set aside, and it cannot be said that the court below was without discretion to deny the application, or abused its discretion, the Court of Appeals has no jurisdiction to review the order of the court below.<sup>10</sup> An action to set aside as fraudulent a judgment of foreclosure of a corporate mortgage and the consequent sale as fraudulent and collusive cannot be grounded merely on the facts that a director was the one who purchased on foreclosure (because a corporate officer may honestly hold bonds of his corporation and protect his holding by purchase on foreclosure), and that his motives were bad to the knowledge of the mortgage trustee (because what made the foreclosure to result was the default solely).<sup>11</sup>

<sup>6</sup> *Seventy-eighth St. & Broadway Co. v. Purssell Mfg. Co.*, 92 Misc. 178, 155 Supp. 259 (App. T. 1915); St. Corp. L. § 9.

<sup>7</sup> *Vatable v. New York, Lake Erie & Western R. R. Co.*, 96 N. Y. 49 (1884); L. 1874, c. 430, § 2, as amended L. 1876, c. 446. See now St. Corp. L. § 9.

<sup>8</sup> *Vatable v. New York, Lake Erie & Western R. R. Co.*, 96 N. Y. 49 (1884); L. 1874, c. 430, § 2, as

amended L. 1876, c. 446. See now St. Corp. L. § 9.

<sup>9</sup> *Ferguson v. Ann Arbor R. R. Co.*, 17 A. D. 336, 45 Supp. 172 (1897).

<sup>10</sup> *Farmers' Loan & Trust Co. v. Bankers' and Merchants' Telegraph Co.*, 119 N. Y. 15, 23 N. E. 173 (1890).

<sup>11</sup> *Harpending v. Munson*, 91 N. Y. 651 (1883).

§ 264. *Id.*: Practice.— A complaint may properly in one statement combine a cause of action to set aside a mortgage and bill of sale executed by a corporation-defendant to defraud creditors, another cause to set aside a judgment obtained collusively, another cause to enforce the individual liability of the corporation's directors for failure to file an annual report, and a last cause to sequester the corporation's property and divide it among creditors.<sup>12</sup> An injunction against a proposed issue of bonds and reduction of stock cannot be joined with an award for damages for their issue and its reduction.<sup>13</sup> The only proper judgment in an action by one stockholder as representative of all against directors and their corporation to annul as *ultra vires* an arrangement to exchange debenture mortgage bonds for new securities is that the individual defendants account to the corporation for the damages it has sustained through their illegal acts.<sup>14</sup> A cause of action in equity, as distinguished from one at law, lies for a fraudulent inducement to make an agreement to take bonds in a corporation in consideration of the surrender of stock of its predecessor company and for a complete failure of consideration.<sup>15</sup> An action based on the illegality of a plan to exchange new securities for debenture bonds because of the plan being *ultra vires* the corporation and of personal interest of the directors in it does not state two causes of action, but only one with two grounds under it.<sup>16</sup> In an action to adjudge void corporate securities all the holders thereof should be parties, either in person or by representation through a trustee or otherwise.<sup>17</sup>

<sup>12</sup> *Cummings v. American Gear & Spring Co.*, 87 Hun, 598, 34 Supp. 541 (1895); C. C. P. §§ 484, 1790.

<sup>13</sup> *Merz v. Interior Conduit & Insulation Co.*, 20 Misc. 378, 46 Supp. 243 (1897).

<sup>14</sup> *Pollitz v. Wabash R. R. Co.*, 167 A. D. 669, 152 Supp. 803 (1915).

<sup>15</sup> *Williams v. Billington*, 150 A. D. 439, 135 Supp. 32 (1912); app. dism'd 211 N. Y. 527, 105 N. E. N. Y. Supp. 823 (1910).

<sup>16</sup> *Pollitz v. Wabash R. R. Co.*, 142 A. D. 755, 127 Supp. 782 (1911).

<sup>17</sup> *Pollitz v. Wabash R. R. Co.*, 142 A. D. 755, 127 Supp. 782 (1911).

## CHAPTER VII.

### DIRECTORS, OFFICERS AND AGENTS.

#### XII. *Directors, Officers and Agents.*

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Procuring Organization and Increasing Stock of  
Corporation*, § 376.8. *Liabilities Common to Directors, Officers and Agents.*a. *For Political Contributions and Practising Law*,  
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Books*, § 380.bb. *For Refusal or Neglect to Make Entries In, and  
Allow Inspection of, Stock Book*, § 381.e. *With Regard to Reports or Statements.*aa. *For Refusal or Neglect to Make Report or  
Statement*, § 382.bb. *For Falsity of, or Omission in, Statement of  
Corporate Affairs*, § 383.

§ 265. **Directors, Officers and Agents; Directors, De Facto and De Jure.**—"The *de facto* doctrine is one of those legal makeshifts by which unlawful or irregular corporate and public acts are legalized for certain purposes on the score of necessity. It 'was introduced into the law,' said Chief Judge Butler in the leading case of *State v. Carroll* (32 Conn. 449), 'as a matter of policy and necessity, to protect the interests of the public and individuals, where those interests were involved in the official acts of persons exercising the duties of an office, without being lawful officers.' The reason of the rule upon which this policy is founded is stated to be that 'third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and, if they employ him as such, should not be subjected to the danger of having his acts collaterally called in question.' (*Citations.*) And the reason of this rule of necessity would seem to imply that 'if the title of the assumed officer be directly assailed by the State, in a proper proceeding, it will be necessary for him to show himself something more than an officer in fact,' so that when an assumed officer undertakes to enforce in a direct proceeding 'rights which belong only to an officer *de jure*, it may be necessary for him to show himself to be such.'"<sup>1</sup> Directors or trustees of a corporation elected to fill vacancies by the votes of others who assumed to act as such but who were themselves disqualified to hold the office (because they did not *bona fide* hold stock) are directors *de facto* as to the public and third persons dealing with the corporation; but as between themselves and the corporation were never directors or trustees either in fact or in law.<sup>2</sup> A transfer of stock to an individual and his election as director as successor to his transferrer make him a director *de facto* and warrant him as such in joining in a petition for dissolution of the corporation so as to give the court jurisdiction to entertain the proceeding.<sup>3</sup> "The three original directors [named in the certificate of incorporation and not, therefore, stockholders], were directors *de jure*, clothed with all the powers of the corporation and authorized

<sup>1</sup> Matter of Ringler & Co., 204 N. Y. 30, 97 N. E. 593 (1912).

<sup>2</sup> Matter of Ringler & Co., 204 N. Y. 30, 97 N. E. 593 (1912).

<sup>3</sup> MacMahon v. Stepney Spare Wheel Agency, 140 A. D. 554, 125 N. Y. Supp. 823 (1910).

to make any contract in its behalf that it was capable of making.”<sup>4</sup>

**§ 266. Id.: Election, Governing Statutes.**—The statutes governing the election of directors are considered in the immediately following sections, except such as do not fit the particular subject matter of such sections, respectively, and those are considered here. By-laws duly adopted at a meeting of the members of a corporation control the action of its directors; and no by-law adopted by the board of directors regulating the election of directors or officers is valid unless published for at least once a week for two successive weeks in a newspaper in the county where the election is to be held, and at least thirty days before such election.<sup>5</sup> Every corporation has power to make by-laws not inconsistent with any existing law prescribing the manner of the appointment of the inspectors of election.<sup>6</sup>

**§ 267. Id.: In General.**—Surprise and fraud upon the part of the electors at a corporate meeting are sufficient to avoid an election.<sup>7</sup> “The election of an unqualified person to a corporate office is merely voidable and not void.”<sup>8</sup> When the only method of electing an officer to a corporate board is, by its charter, the vote of a majority of his co-officers, and no such majority is present at his election, he has no title to the office, and the fact that the board later recognized him as one of its members and elected him to an office which only a member could hold does not make him any the more an officer.<sup>9</sup> One present at a first election of directors who then voted and was then elected a director cannot later object that no notice was given of the first election of directors.<sup>10</sup> An election taking place under the appointment and authority of but one inspector is void if the statute uses the plural word “inspectors.”<sup>11</sup> A statute exempting manufacturing corporations from the provisions of a law providing for a summary application and order for the establishment of a corporate election, or for a new election, etc., relates simply to

<sup>4</sup> Hamilton Trust Co. v. Clemes, 163 N. Y. 423, 57 N. E. 614 (1900).

The question as to who are directors *de jure*, is discussed in a note in 15 L.R.A. 418.

<sup>5</sup> Gen. Corp. L. § 11 (L. 1909, c. 28).

<sup>6</sup> St. Corp. L. § 31 (L. 1909, c. 61).

<sup>7</sup> People v. Albany & Susquehanna R. R. Co., 55 Barb. 344 (1869).

<sup>8</sup> People v. Albany & Susquehanna R. R. Co., 55 Barb. 344 (1869).

<sup>9</sup> People *ex rel.* Nicholl v. N. Y. Infant Asylum, 122 N. Y. 190, 10 L.R.A. 381, 25 N. E. 241 (1890).

<sup>10</sup> Schenectady & Saratoga Plank Road Co. v. Thatcher, 11 N. Y. 102 (1854).

<sup>11</sup> Matter of Lighthall Mfg. Co., 47 Hun, 258 (1888); 2 R. S. (6th ed.) 399-400, §§ 6, 7.

form and may be retroactive, as the remedy for testing the corporate election still remains, though not in the summary form provided by the law.<sup>12</sup> To an action to restrain a corporation from permitting votes to be cast at a forthcoming election on certain shares of its stock the holders thereof must be made parties; certainly if it be not certain that they will be directors when the injunction is granted as they are when the action is begun.<sup>13</sup>

**§ 268. *Id.*: Time, Place and Notice.**—Directors of every stock corporation are to be chosen at the time and place fixed by the by-laws of the corporation by a plurality of the votes at such election.<sup>14</sup> Notice of the time and place of holding any election of directors must be either published at least once in each week for two successive weeks immediately preceding such election, in a newspaper published in the county where such election is to be held or delivered personally or mailed, not less than ten nor more than twenty days before the election, to each person who appears on the books of the corporation as a stockholder; if mailed, it must be directed to a stockholder at his address as it appears on such books; and the by-laws may require such notice to be published and also mailed or delivered as above provided.<sup>15</sup> No by-law adopted by the board of directors regulating the election of directors is valid unless published for at least once a week for two successive weeks in a newspaper in the county where the election is to be held, and at least thirty days before such election.<sup>16</sup> If the election has not been held on the day designated in the by-laws or by law the directors must forthwith call a meeting of the members of the corporation for the purpose of electing directors, giving notice thereof in the same manner as notice is given of the annual meeting for the election of directors; and if such meeting is not so called within one month or if, though held, it results in a failure to elect directors, any member of the corporation may call a meeting for the purpose of electing directors by publishing a notice of the time and place of holding such meeting at least once in each week for two successive weeks immediately preceding the election in a newspaper published in the county where

<sup>12</sup> *Matter of New York Express Co.*, 23 Hun, 615 (1881); L. 1880, c. 254, exempted corporation formed under L. 1848 from 1 R. S. 603, § 5. See now Gen. Corp. L. § 32.

<sup>13</sup> *Jones v. Nassau Suburban Home Co.*, 53 Misc. 63, 103 N. Y. Supp. 1089 (1907).

<sup>14</sup> St. Corp. L. § 25 (L. 1909, c. 61).

<sup>15</sup> St. Corp. L. § 25 (L. 1918, c. 267).

<sup>16</sup> Gen. Corp. L. § 11 (L. 1909, c. 281).

the election is to be held and in such other manner as may be prescribed in the by-laws for the publication of notice of the annual meeting, and by serving upon each member either personally or by mail directed to him at his last known post-office address a copy of such notice at least two weeks before the meeting.<sup>17</sup> Such meeting (for the special election of directors) must be held at the office of the corporation, or if it has none, at the place in New York State where its principal business has been transacted, or if access to such office or place is denied or can not be had, at some other place in the city, village or town where such office or place is or was located; and at such meeting the members attending constitute a quorum and may elect inspectors of election and directors and adopt by-laws providing for future annual meetings and election of directors (if the corporation has no such by-laws), and transact any other business which may be transacted at an annual meeting of the members of the corporation.<sup>18</sup> "Provisions in statutes and by-laws requiring the election of directors to be had on a specified day are regarded as directory, and the election, if not held on the regular day, may be held at a later day, and the directors then chosen, if there be no other irregularity or informity in their title, will be directors *de jure*."<sup>19</sup> A statutory requirement of the time after an annual election within which an election of corporate directors shall be held is directory merely; so that if such election be not held within the stipulated number of days immediately after the failure to hold an annual election it can lawfully be held at a later period.<sup>20</sup> While the requirement of a thirty-day notice of a meeting to elect directors pursuant to by-laws adopted by the corporation may be waived by a stockholder, *e. g.*, by attendance and participation at a meeting held on less notice, yet if a less notice be given any stockholder may have the courts summarily order a new election.<sup>1</sup> A statutory provision that elections for directors of corporations be held annually is equivalent to an express requirement, in the absence of any by-law fixing a date within the year, that the election be held upon the recurrence in the

<sup>17</sup> Gen. Corp. L. § 29 (L. 1909, c. 61).

<sup>18</sup> Gen. Corp. L. § 30 (L. 1909, c. 28).

<sup>19</sup> *Beardsley v. Johnson*, 121 N. Y. 224, 24 N. E. 380 (1890).

<sup>20</sup> *Vandenburgh v. Broadway Railway Co.*, 29 Hun, 348 (1883); L. 1854, c. 282, § 5.

<sup>1</sup> *Matter of Keller*, 116 A. D. 58, 101 N. Y. Supp. 133 (1906); Gen. Corp. L. § 24 (L. 1892, c. 687); St. Corp. L. § 20 (L. 1901, c. 354); Gen. Corp. L. § 27. See now Gen. Corp. L. § 11.

following year of the day on which the first election was held, if that be a legal day.<sup>2</sup> A statute requiring annual elections of directors is not inoperative because no by-law has been adopted regulating the manner of holding such elections, pursuant to a statute requiring such a by-law to be passed.<sup>3</sup> The statutory provision that if an election of directors is not held on the day designated, the president must notify and cause an election of directors to be held within sixty days thereafter is imperative, and on failure so to do, mandamus may properly be resorted to; and that a corporation is incorporated under a general law, which provides that in such event it shall be lawful to hold such an election in such manner as shall be provided for by the corporate by-laws, does not make it the less subject to the general statutory provision in question.<sup>4</sup>

**§ 269. Id.: Method of.**—Directors of every stock corporation are to be chosen at the time and place fixed by the by-laws of the corporation by a plurality of the votes at such election; and vacancies in the board of directors are to be filled in the manner prescribed in the by-laws; and at least one-fourth in number of the directors of every stock corporation must be elected annually.<sup>5</sup> If the number of directors of a stock corporation is increased pursuant to law the additional directors authorized by such increase must be elected by the votes of a majority of the directors in office at the time of the increase.<sup>6</sup> The statute provides for (1) the appointment, (2) the compensation and (3) the oath of inspectors of the election of directors. (1) Inspectors of election of every stock corporation must be appointed in the manner prescribed in the by-laws, except that the inspectors of the *first* election of directors (and of all previous meetings of the stockholders) must be appointed by the board of directors named in the certificate of incorporation, and except, further, that if any inspector refuses to serve or neglects to attend at the election or his office becomes vacant, the meeting may appoint an inspector in his place unless the by-laws otherwise provide.<sup>7</sup> (2) Each inspector is entitled to a reasonable compensation

<sup>2</sup> *Vandenburgh v. Broadway Railway Co.*, 29 Hun, 348 (1883); L. 1854, c. 282, § 5.

<sup>3</sup> *Vandenburgh v. Broadway Railway Co.*, 29 Hun, 348 (1883); L. 1854, c. 282, § 5.

<sup>4</sup> *People ex rel. Miller v. Cummings*, 72 N. Y. 433 (1878); 1 R. S. 604, § 8; L. 1848, c. 40, § 4. See

now Gen. Corp. L. § 29, changing old statute somewhat.

<sup>5</sup> St. Corp. L. § 25 (L. 1909, c. 61).

<sup>6</sup> St. Corp. L. § 26 (L. 1909, c. 421).

<sup>7</sup> St. Corp. L. § 31 (L. 1909, c. 61).

for his services, to be paid by the corporation. (3) The inspectors appointed to act at any meeting of the stockholders must, before entering upon the discharge of their duties, be sworn faithfully to execute the duties of inspector at such meeting with strict impartiality, and according to the best of their ability, and the oath so taken must be subscribed by them and immediately filed in the office of the clerk of the county in which such election or meeting is held, with a certificate of the result of the vote taken thereat.<sup>8</sup> No by-law may require that more than a plurality of the votes of the stockholders voting at an election of directors shall be essential to a choice.<sup>9</sup> A corporation may hold an election for directors though there be no by-law regulating such election, and a statute requiring any by-law regulating elections to be published before the elections if the latter were to be valid.<sup>10</sup> After an election has begun it is not improper for the inspectors to keep it open as long, within a reasonable discretion, as is necessary to receive the votes of all the stockholders present, ready and offering to vote.<sup>11</sup> "The statute requiring the oath of inspectors to be filed in the office of the clerk of the county in which the election is held is directory only, and the failure to file it does not invalidate the election."<sup>12</sup>

**§ 270. Id.: Who May Vote, and How.**—The certificate of incorporation of any stock corporation may provide that at elections of directors of such corporation each stockholder shall be entitled to as many votes as shall equal the number of his shares of stock multiplied by the number of directors to be elected, and that he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them as he may see fit, which right, when exercised, is termed cumulative voting.<sup>13</sup> When any foreign or domestic stock corporation, except a moneyed corporation, becomes a stockholder in another domestic or foreign corporation, pursuant to charter author-

<sup>8</sup> St. Corp. L. § 31 (L. 1909, c. 61).

<sup>9</sup> Matter of Rapid Transit Ferry Co., 15 A. D. 530, 44 N. Y. Supp. 539 (1897); St. Corp. L. § 20 (L. 1892, c. 688). See now § 25.

<sup>10</sup> Matter of David Jones Co., 67 Hun, 360, 22 N. Y. Supp. 318 (1893); L. 1892, c. 687, § 11, subd. 5.

<sup>11</sup> People v. Albany & Susquehanna R. R. Co., 55 Barb. 344 (1869).

<sup>12</sup> Union National Bank v. Scott,

53 A. D. 65, 66 N. Y. Supp. 145 (1900); St. Corp. L. § 28. Now § 31.

<sup>13</sup> Gen. Corp. L. § 24 (L. 1909, c. 28). "The stockholders of a corporation heretofore formed, who, by the provisions of laws existing on April thirtieth, eighteen hundred and ninety-one, were entitled to the exercise of such right, may hereafter exercise such right according to the provision of this section."

ity or because the corporation the stock of which is acquired is engaged in a similar business or in the construction or operation of works necessary or useful in the business of the first corporation or in which or in connection with which the manufactured articles, product or property of such first corporation are or may be used, or because the corporation the stock of which is acquired is one with which such first corporation is or may be authorized to consolidate, the corporation holding such stock possesses and exercises in respect thereof all the rights, powers and privileges of individual owners or holders of such stock.<sup>14</sup> In the absence at a meeting for the special election of directors of the books of the corporation showing who are members thereof, each person before voting must present his sworn statement setting forth that he is a member of the corporation and the number of shares of stock owned by him and standing in his name on the books of the corporation and, if known to him, the whole number of shares of stock of the corporation outstanding; and on filing such statement he may vote as a member of the corporation on the shares of stock appearing in such statement to be owned by him and standing in his name on the books of the corporation; and the inspectors must return and file such statements, with a certificate of the result of the election, verified by them, in the office of the clerk of the county in which such election is held; and the persons so elected are the directors of the corporation.<sup>15</sup> Only stockholders of record are entitled to vote at corporate elections; and that no stock is kept precisely as prescribed by law is no objection to those persons voting who are shown to be stockholders by a stock certificate book containing the necessary information.<sup>16</sup> If a statute providing that, when an election for directors is not held on the day set by charter, notice must be given of an election for directors to be held within sixty days immediately thereafter, and that no share shall be voted upon except by such as appear on the books to have the right to vote on the day set in the charter for the election, only those can vote at the election when it is held who were stockholders at the time when the election should have been held; and persons becoming stockholders in the interim cannot vote.<sup>17</sup>

<sup>14</sup> St. Corp. L. § 52 (L. 1909, c. 61).

<sup>15</sup> Gen. Corp. L. § 31 (L. 1909, c. 28).

<sup>16</sup> Matter of Utica Fire Alarm Telegraph Co., 115 A. D. 821, 101

N. Y. Supp. 109 (1906); St. Corp. L. § 20 (L. 1901, c. 355). Now § 25.

<sup>17</sup> *Vandenburgh v. Broadway Railway Co.*, 29 Hun, 348 (1883); 1 R. S. 604, § 8.

The subject of voting by stockholders at all meetings has already been discussed and reference is made to such discussion for fuller treatment of the statutes and decisions.<sup>17a</sup>

§ 271. **Id.: Who May Be Elected.**—At least one of the directors of the corporation must be a citizen of the United States and a resident of New York State.<sup>18</sup> Each director shall be a stockholder unless otherwise provided in the certificate of incorporation, or in a by-law adopted at a stockholders' meeting.<sup>19</sup> When any domestic or foreign stock corporation, except a moneyed corporation, becomes a stockholder in another domestic or foreign corporation, pursuant to charter authority or because the corporation the stock of which is acquired is engaged in a similar business or in the construction or operation of works necessary or useful in the business of the first corporation or in which or in connection with which the manufactured articles, product or property of such corporation are or may be used, or because the corporation the stock of which is acquired is one with which such first corporation is or may be authorized to consolidate, then its president or other officers are eligible to the office of director of such corporation the same as if they were individually stockholders therein.<sup>20</sup> “ . . . a corporation may have as its directors persons who are not stockholders, if provision to that effect be made by its charter or by-laws.”<sup>1</sup> “ In the nature of things there can be no stockholders at the date of incorporation, and hence the provision that the directors shall be chosen ‘ from the stockholders . . . by a majority of the votes of the stockholders voting ’ has no application to ‘ the directors for the first year ’ named in the certificate pursuant to law.”<sup>2</sup> Possession of the bare legal title to stock, taken for the purpose of qualifying one to be a director, does not constitute him a stockholder within the intent of the statute prescribing that condition of eligibility to corporate office.<sup>3</sup> When a transfer of stock is made in good faith for the purpose of qualifying a person to act as director, and the transferee actually holds the stock during his incumbency of

<sup>17a</sup> See § 169, *supra*.

On the right of a director of a corporation to vote by proxy, see note in 29 L.R.A. 848.

<sup>18</sup> Gen. Corp. L. § 34 (L. 1917, c. 538).

<sup>19</sup> St. Corp. L. § 25 (L. 1909, c. 61).

<sup>20</sup> St. Corp. L. § 52 (L. 1909, c. 61).

<sup>1</sup> Buffalo Electro-Plating Co. v. Day, 151 A. D. 237, 135 N. Y. Supp. 1054 (1912); St. Corp. L. § 25.

<sup>2</sup> Hamilton Trust Co. v. Clemes, 163 N. Y. 423, 57 N. E. 614 (1900); St. Corp. L. § 20, now § 25. Bus. Corp. L. § 2, par. 8.

<sup>3</sup> Matter of Elias, 17 Misc. 718, 40 N. Y. Supp. 910 (1896); St. Corp. L. § 20, now § 25.

office, he is a stockholder within the purview of the law; but when a transfer is made for that purpose to one who at once retransfers it to the owner, before even he is elected director, though his name appears on the books as a stockholder and so concludes the inspectors of election, it does not conclude the court inquiring into the validity of his tenure as director, and such a one is not, therefore, a stockholder when elected director, and is ineligible for that office.<sup>4</sup> Stock held by a member of a reorganization committee in trust as such is a sufficient holding to satisfy a requirement that a director be a stockholder.<sup>5</sup> A stockholder in a corporation organized under a statute decreeing that no person shall be a director of it unless a stockholder, after sale and transfer of his stock ceases to be a director *de jure*, although he may be treated as a director *de facto* if he continues and is allowed to act as such; but he cannot thereafter be legally chosen a director.<sup>6</sup> One who is director and stockholder in a corporation organized under a law requiring each director to hold at least five shares of its stock is entitled to the benefit of the rule that "as soon as a director parts with all the beneficial interest in, and control over, the stock which he is required to hold, and causes the officers of the corporation to have knowledge of such fact by a request that a proper transfer be made on the books of the company, he no longer possesses the qualifications which the statute declares to be essential."<sup>7</sup>

**§ 272. Id.: New Election.**—The topic of a new election of directors is discussed in the section which shortly follows anent "Trying out and Proving Title."<sup>8</sup>

**§ 273. Id.: Acceptance.**—In addition to election by stockholders, express or implied acceptance of the office is essential to constitute one a director.<sup>9</sup> " . . . in the absence of an express declaration or any statute or controlling usage to the

<sup>4</sup> Matter of Ringler & Co., 204 N. Y. 30, 97 N. E. 593 (1912); Gen. Corp. L. § 32.

<sup>5</sup> Haines v. Kinderhook & Hudson Ry., 33 A. D. 154, 53 N. Y. Supp. 368 (1898).

<sup>6</sup> Beardsley v. Johnson, 121 N. Y. 224, 24 N. E. 380 (1890); L. 1850, c. 149, § 5.

<sup>7</sup> Chemical Nat. Bank v. Colwell, 132 N. Y. 250, 30 N. E. 644 (1892); L. 1875, c. 611, § 10. The director assigned all his stock to the corporation's secretary as an individual,

who accepted it and the statement that the director's connection with the company was severed, but did not transfer it on the books as requested, because there were no books. He then issued a new certificate to the director without his knowledge for five shares and another to himself for the balance; and later induced the director to accept the five-share certificate.

<sup>8</sup> See § 276, *infra*.

<sup>9</sup> United Growers Co. v. Eisner, 22 A. D. 1; 47 N. Y. Supp. 906 (1896)

contrary, one elected a director is presumed to accept.”<sup>10</sup> “The facts that a person, as a stockholder, is eligible for election as trustee, and is elected, do not alone invest him with the character of trustee so as to charge him with the duties and responsibilities of the office. There must in addition have been an acceptance on his part of the office to which he was elected. . . . His acceptance could be shown by conduct on his part indicating an intention to accept the office, and might be implied from circumstances.”<sup>11</sup>

§ 274. **Id.: Tenure of Office, Holding Over.**—If the directors are not elected on the day designated in the by-laws, or by law, the corporation is not for that reason dissolved; but every director continues to hold his office and discharge his duties until his successor has been elected.<sup>12</sup> “At common law, a director holding over after the end of his term became an officer *de facto*, and as such he could do acts binding the corporation (*citation*). The only change effected as to that by . . . [the statute permitting them to continue to act until their successors were elected] is to make directors holding over and acting, *de jure* directors until their successors shall be elected.”<sup>13</sup> The omission to reelect directors or to elect others in their place has the legal effect of continuing them in office.<sup>14</sup> Directors of a corporation formed under a statute providing that directors elected should continue such until others are elected in their places continue on after the time set for another election of directors if no such election is then held.<sup>15</sup> A trustee of a manufacturing corporation is not bound to hold over after the expiration of the term for which he was elected, and is not bound to act after that time, but he may, with the consent of the stockholders do so; and if his sworn statements show that he did, the fact that for five years he had no notice of and did not attend any meetings will not

<sup>10</sup> *Halpin v. Mutual Brewing Co.*, 20 A. D. 583, 47 N. Y. Supp. 412 (1897).

<sup>11</sup> *Cameron v. Seaman*, 69 N. Y. 396 (1877). The stockholder was sought to be held liable as trustee for the corporate failure to file its annual report, under L. 1848, c. 40, § 12. He was not present at his election; was told of it verbally by the president whom he told he would not serve; never received a written notice of election said to have been sent him; before his election the cor-

porate property had been foreclosed leaving \$5,000 unpaid and no assets to pay it.

<sup>12</sup> Gen. Corp. L. § 28 (L. 1909, c. 28).

<sup>13</sup> *Van Amburgh v. Baker*, 81 N. Y. 46 (1880); Gen. Mfg. Act, L. 1848, c. 40, § 4. See now Gen. Corp. L. § 28 (L. 1909, c. 28).

<sup>14</sup> *Matter of Dolgeville El. L. & P. Co.*, 160 N. Y. 500, 55 N. E. 287 (1899); Gen. Corp. L. now § 28.

<sup>15</sup> *Vandenburgh v. Broadway Railway Co.*, 29 Hun 348 (1883).

relieve him from personal liability under a then-existing statute for failure of the corporation to file its annual report.<sup>16</sup>

§ 275. **Id.: Termination of Directorship.**—The law permits the division in a certificate of incorporation of the directors of the corporation into two or more classes whose terms of office shall respectively expire at different times.<sup>17</sup> In the absence of the election of his successor by the stockholders, a director of a corporation has two methods by which he may cease to be such: “*First*, by resigning the office, which he could at any time do, and, *second*, by an absolute sale of all of his stock.”<sup>18</sup> A corporate trustee need give no public notice, or notice to anyone save his associates, of intent to resign, or actual resignation.<sup>19</sup> No acceptance or entry in the minutes of a director’s resignation is needed to make it effective.<sup>20</sup> Although by the general rule of law directors elected annually for the term of one year under the corporate charter, which does not, however, contain any provision as to their holding over until their successors are elected, may so hold over; “yet there is no rule which compels them to do so, and where . . . a director sells out all of his stock in a corporation and ceases to take any part in the management of its affairs or the meetings of its directors, he is not bound to see that a successor is elected in his place or to tender any formal resignation.”<sup>1</sup> A director of a corporation the by-laws of which provide that its directors shall serve for one year and until such time as their successors are chosen continues such after his resignation has been received if no successor has been chosen, so that service upon him of process is good service on the corporation.<sup>2</sup> “. . . in the absence of any specific statutory authority and in the absence of provisions in the articles of incorporation or in by-laws duly adopted by the stockholders of the corporation providing therefor, the board of directors of a business corporation . . . has no power to expel from the board of directors a fellow-director, and hence, no power to

<sup>16</sup> *First National Bank of Jersey City v. Lamon*, 130 N. Y. 366, 29 N. E. 321 (1891).

<sup>17</sup> *St. Corp. L. § 26* (L. 1909, c. 421).

<sup>18</sup> *Sinclair v. Fuller*, 158 N. Y. 607, 53 N. E. 510 (1899); *St. Corp. L. § 20*, now § 25. This decision assumes no provision in the certificate of incorporation pursuant to a statute authorizing it that directors need not be stockholders.

<sup>19</sup> *Bruce v. Platt*, 80 N. Y. 379 (1880); *Gen. Mfg. Act*, L. 1848, c. 40, § 12.

<sup>20</sup> *Chandler v. Hoag*, 2 Hun, 613 (1874); *aff’d* 63 N. Y. 624; L. 1848, c. — (Feb. 17), § 4.

<sup>1</sup> *Sturges v. Vanderbilt*, 73 N. Y. 384 (1878).

<sup>2</sup> *Timolat v. The S. J. Held Co.*, 17 Misc. 556, 40 N. Y. Supp. 692 (1896); C. C. P. § 431.

pass a valid amendment to the by-laws, under and by virtue of which the directors may assume to exercise that power.”<sup>3</sup>

**§ 276. *Id.*: Trying Out and Proving Title to Directorship.**—Upon the application of any person or corporation aggrieved by or complaining of any election of any corporation or any proceeding, act or matter touching the same, the Supreme Court must (1) upon notice thereof to the adverse party or to those to be affected thereby, (2) forthwith and in a summary way hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matters or causes of complaint, and (3) establish the election or order a new election or make such order and give such relief as right and justice may require.<sup>4</sup> “The statute providing for a summary inquiry by the Supreme Court into a corporate election authorizes a judicial investigation into elections made by a board of directors or trustees to fill vacancies, as distinguished from elections for full terms by the stockholders.”<sup>5</sup> It is not necessary to annul the election of directors of a corporation that the attorney-general proceed under nineteen hundred and forty-eighth section of the Code of Civil Procedure; as the court has such power of annulment under the thirty-second section of the General Corporation Law.<sup>6</sup> A General Rule of Practice that “contested motions shall not be noticed or brought to a hearing at any special term held at the same time and place with a circuit” does not exclude a judge at special term, engaged at the same time in holding a circuit, from entertaining a motion noticed for such term, such as an order to show cause why a petition for inquiry into a corporate election should not be had pursuant to statute.<sup>7</sup> Although by statute a petition by one aggrieved to have inquiry made into a corporate election is to be heard and decided by a judge in court, yet an order to show cause thereon may be granted by a judge out of court as well as by a court.<sup>8</sup> A proceeding by a party

<sup>3</sup> *Raub v. Gerken*, 127 A. D. 42, 111 N. Y. Supp. 319 (1908); Gen. Corp. L. § 11, subd. 5 (L. 1895, c. 672), giving every corporation power to make by-laws not inconsistent with any existing law means not inconsistent with statutes and decisions of the courts as well.

<sup>4</sup> Gen. Corp. L. § 32 (L. 1909, c. 28).

<sup>5</sup> *Matter of Rangler & Co.*, 204 N. Y. 30, 97 N. E. 593 (1912); Gen. Corp. L. § 32.

<sup>6</sup> *Matter of Empire State Supreme Lodge*, 53 Misc. 344, 103 N. Y. Supp. 465 (1907); Gen. Corp. L. § 27, now § 532.

<sup>7</sup> *Matter of Petition of Argus Co.*, 138 N. Y. 557, 34 N. E. 388 (1893); General Rule of Practice No. 38; Gen. Corp. L. § 27, now § 32 (1 R. S. 603, § 5).

<sup>8</sup> *Matter of Petition of Argus Co.*, 138 N. Y. 557, 34 N. E. 388 (1893); Gen. Corp. L. § 27, now § 32 (1 R. S. 603, § 5); C. C. P. § 780.

aggrieved to have the Supreme Court inquire into a corporate election under the statutory authority vested in the court to make such inquiry is not made invalid by the joining of another party in the petition without authority.<sup>9</sup> A statute authorizing a proceeding to compel a new election of directors of a corporation by any person that may "be aggrieved by, or complain of" any election, "does not mean that any person whomsoever who chooses to make a complaint may institute the proceeding, but it must be some person whose rights have been infringed, and who is justly entitled to complain." The statute permitting the Supreme Court to give relief against an improper corporate election on the petition of a person aggrieved does not authorize one not showing that he or his assignor was a stockholder at the time of the election complained of to seek relief under it.<sup>10</sup> The necessity which exists in a proceeding to set aside an election of a corporate director, on the ground that he did not receive the necessary number of votes, of showing that the one seeking to annul the election has been injured by the result, does not exist when the ground of the application is that no director at all could be elected because the corporation had no proper constitution and by-laws providing for directors.<sup>11</sup> The statute requiring notice of a proceeding to review the election of corporate directors to be given "to the adverse party, or to those to be affected thereby" is satisfied by notice to the corporation itself and the directors whose election is challenged.<sup>12</sup> A statute intended to give relief to establish an election already had or to set aside such an election and order a new one does not permit mandamus to compel inspectors of election to count votes they have refused to count.<sup>13</sup> A summary inquiry by the Supreme Court, pursuant to statute, into the validity of corporate elections is not an action and is inappropriate for determining equitable claims or questions not necessarily involved in deciding the primary question.<sup>14</sup> A stockholder

<sup>9</sup> Matter of Petition of Argus Co., 138 N. Y. 557, 34 N. E. 388 (1893); Gen. Corp. L. § 27, now § 32 (1 R. S. 603, § 5).

<sup>10</sup> Matter of Scheel, 134 A. D. 442, 119 N. Y. Supp. 295 (1909); Gen. Corp. L. § 27, now § 32.

<sup>11</sup> Matter of Empire State Supreme Lodge, 53 Misc. 344, 103 N. Y. Supp. 465 (1907).

<sup>12</sup> Matter of Empire State Supreme Lodge, 53 Misc. 344, 103 N.

Y. Supp. 465 (1907); Gen. Corp. L. § 27, now § 32.

<sup>13</sup> People *ex rel.* Putzel v. Simonson, 61 Hun, 338, 16 N. Y. Supp. 118 (1891); L. 1890, c. 563, § 15. See now Gen. Corp. L. § 32.

<sup>14</sup> Matter of Utica Fire Alarm Telegraph Co., 115 A. D. 821, 101 N. Y. Supp. 109 (1906); St. Corp. L. § 20 (L. 1901, c. 355). See now Gen. Corp. L. § 32.

has no standing in court when seeking to enjoin a person, a *de facto* director, under color of an election, from acting as such, and to command the recognition of another person whose resignation, under color of the action of the board, has been accepted; for a court of equity will not determine the title to office of a director of a corporation.<sup>15</sup> A determination by the court in a proceeding under the statute to determine the right of individuals to act as directors of a corporation which depended on their ownership of its stock is not conclusive as an adjudication of their right to the shares of stock in another action involving title to such stock.<sup>16</sup> The court adjudicating upon a special proceeding to review the validity of an election of directors cannot in such proceeding decide that proceedings to revoke an attempted settlement with a subscriber to the corporation's stock was in violation of its previous order.<sup>17</sup> Although it seems proper for the court to appoint a referee to take testimony and report with his opinion in a proceeding to inquire summarily into the validity of a corporate election, yet the order of appointment is not appealable.<sup>18</sup>

An action may be maintained against one or more trustees, directors, managers or other officers of a corporation to procure a judgment for the purpose of suspending a defendant from exercising his office where it appears that he has abused his trust; or of removing a defendant from his office upon proof or conviction of misconduct and directing a new election to be held by the body or board duly authorized to hold the same, in order to supply the vacancy created by the removal; or, where there is no such body or board, or where all the members thereof are removed, directing the removal to be reported to the Governor who may, with the advice and consent of the senate, fill the vacancies.<sup>19</sup> The court must, upon the application of either party, make an order directing the trial by jury of the issue of neglect or failure of defendants to perform their duties; and for that purpose the questions to be tried must be prepared and settled as prescribed in section nine hundred and twenty of the Code of Civil Procedure.<sup>20</sup>

<sup>15</sup> *Moir v. Provident Savings Life Assurance Society*, 127 A. D. 591, 112 N. Y. Supp. 57 (1908).

<sup>16</sup> *Farmer v. Farmer & Son Type Founding Co.*, 83 A. D. 218, 82 N. Y. Supp. 228 (1903); *Gen. Corp. L. § 27*, now § 32.

<sup>17</sup> *Matter of New York & Westchester Town Site Co.*, No. 2, 145

A. D. 630, 130 N. Y. Supp. 419 (1911).

<sup>18</sup> *Matter of Silaski*, 175 A. D. 199, 161 N. Y. Supp. 513 (1916); *Gen. Corp. L. § 32* (L. 1909, c. 28).

<sup>19</sup> *Gen. Corp. L. § 90* (L. 1909, c. 28).

<sup>20</sup> *Gen. Corp. L. § 90* (L. 1909, c. 28). "As to any litigation pend-

Such an action may be brought by the Attorney-General in behalf of the People of the State.<sup>1</sup> The statutory action by the Attorney-General does not divest or impair any visitorial power over a corporation which is vested by statute in a corporate body or a public officer.<sup>2</sup> An injunction order suspending from office or restraining from the performance of his duties a trustee, director or other officer of a corporation can be granted only by the court upon notice of the application therefor to the trustee, director or other officer enjoined; and if such an injunction is made otherwise it is void.<sup>3</sup> A trustee, director or other officer of a corporation cannot be suspended or removed from office by a court or judge otherwise than by the final judgment of a competent court, in an action brought by the Attorney-General as prescribed by statute.<sup>4</sup> An action by the Attorney-General in the name of the People to try the rights of two bodies each claiming to be directors of a corporation may be brought.<sup>5</sup> A temporary injunction against certain defendants interfering with certain plaintiffs' acting as officers of a corporation, granted on the ground that such defendants had usurped the functions of such plaintiffs who were *de facto* officers, will be vacated when it appears that, just before bringing the action and securing the injunction, plaintiffs had forcibly evicted defendants, who were properly acting as the corporation's officers, and usurped the corporate power themselves, but had concealed this fact from the court granting the temporary injunction.<sup>6</sup> The doctrine of corpo-

ing prior to September one, nineteen hundred and seven, the provisions of this section as they existed prior to that date shall apply."

<sup>1</sup> Gen. Corp. L. § 91 (L. 1909, c. 28).

<sup>2</sup> Gen. Corp. L. § 92 (L. 1909, c. 28).

<sup>3</sup> Gen. Corp. L. § 305 (L. 1909, c. 28). This statute applies not only to a domestic corporation, but to a foreign corporation which does business within the state or has within the state an agency, business, fiscal or for the transfer of its stock; see Gen. Corp. L. § 308.

<sup>4</sup> Gen. Corp. L. § 307 (L. 1909 c. 28). The statute referred to is § 90, Gen. Corp. L. The statute referred to in the text applies not only to a domestic corporation but to a foreign corporation which does

business within New York, or has within New York an agency, business, fiscal or for the transfer of its stock; see Gen. Corp. L. § 308.

<sup>5</sup> *People v. Albany & Susquehanna R. R. Co.*, 55 Barb. 344 (1869); Code, §§ 428, 432.

<sup>6</sup> *Ciancimino v. Man*, 1 Misc. 121, 20 N. Y. Supp. 702 (1892). "A court of equity has no inherent power to try the disputed title to corporate office, and to enjoin one in possession from the exercise of its functions at the suit of a rival claimant. . . . Such may be done and judgment of ouster rendered only in an action in the nature of *quo warranto*, instituted by the attorney-general on behalf of, and in the name of, the people. . . . Where, however, the particular case presents other features calling for

rate officers *de facto* applies only in favor of third persons and to protect innocent parties who have trusted to the apparent title of an officer; and not, as against the people, in an action to try the title to the office.<sup>7</sup>

The Attorney-General may maintain an action upon either his own information or the complaint of a private person against a person who usurps, intrudes into or unlawfully holds or exercises within the State an office in a domestic corporation.<sup>8</sup> In such action the Attorney-General, besides stating the cause of action in the complaint, may in his discretion set forth therein the name of the person rightfully entitled to the office and the facts showing his right thereto, and obtain an order from the court or judge to arrest the defendant upon proof by affidavit that the defendant by means of his usurpation or intrusion has received fees or emoluments belonging to the office.<sup>9</sup> The statute, hereinafter quoted, provides that the portion of the Code of Civil Procedure governing arrest applies in general to the order of arrest and the proceedings thereon; that judgment in the action may determine the right of the defendant and relator or the defendant only; that the action is triable as of right by a jury; that on rendition of judgment for the relator he may execute his office after taking oath and giving bond, and receive the books and papers from the defendant; that relator may recover his damages from defendant for the latter's usurpation of office; that any number of persons claiming title to the same office may be sued in one action by the Attorney-General; that a temporary injunction against defendant may be had in certain cases and a final one in others; that the plea of incrimination will not avail a witness; and that final judgment may oust the defendant, subject him to costs, and a fine.<sup>10</sup> The remedy of one alleging that he has been ousted from his office as director of a corporation and that another in possession of that office as his successor holds it unlawfully is not by *mandamus* but by action by the Attorney-General either upon his own information or the complaint of a private person under the nineteen hundred and forty-eighth section of the Code, in the nature of a *quo*

relief, which are of equitable cognizance, and the trial of a disputed title to corporate office is only incidental thereto, the court may inquire into the legality of the election, and grant such relief as the special exigencies require . . . ; but its judgment cannot go to the extent of ousting a *de facto* officer,

nor will it be permitted to have that effect."

<sup>7</sup> *People v. Albany & Susquehanna R. R. Co.*, 55 Barb. 344 (1869).

<sup>8</sup> C. C. P. § 1948.

<sup>9</sup> C. C. P. § 1949.

<sup>10</sup> C. C. P. §§ 1949-1956, both inclusive.

*warranto*.<sup>11</sup> “ . . . when a person is already an officer [of a corporation] by color of right, the court will not grant a mandamus to admit another person who claims to have been duly elected, and . . . the proper remedy is by an information in the nature of a *quo warranto*.”<sup>12</sup> The writ of mandamus will not issue to accomplish the restoration of one to a corporate office in case of doubtful right, and, if it is a question of serious doubt whether such one have title to the office, the Court of Appeals will not review the discretion exercised by the court below it in refusing mandamus.<sup>13</sup>

Who were elected directors of a corporation at a meeting may be proven not only by the corporation's books but by the testimony of witnesses who were present.<sup>14</sup> To prove one a trustee or director of a corporation more is necessary than proof of his election as such.<sup>15</sup> A man is not proven to be a director of a corporation at a particular time when he denies as a witness that he was and the only contradiction of his testimony is its certificate of incorporation executed over a year before that time in which he was named as an original director.<sup>16</sup> It is not sufficient to prove that one is a director of a corporation organized prior to 1892 under the Manufacturing Act of 1848 to show that an answer to a complaint against him and others, alleging he was such director, did not deny such allegation; that the certificate of incorporation filed years ago was signed and acknowledged by him, giving his name as one of its directors for the first year; and that annual reports stated he was a director, if not signed by him.<sup>17</sup> “ The receipt of illegal votes in favor of a candidate who also has received a majority of the legal votes, does not defeat his election. It is

<sup>11</sup> *People ex rel. Manice v. Powell*, 201 N. Y. 194, 94 N. E. 634 (1911); *Gen. Corp. L. §§ 90, 91*, 307; *C. C. P. § 1948*.

<sup>12</sup> *People v. Stevens*, 5 Hill, 616, as quoted with approval in *People ex rel. Nicholl v. N. Y. Infant Asylum*, 122 N. Y. 190, 10 L.R.A. 381, 25 N. E. 241 (1890).

<sup>13</sup> *People ex rel. Nicholl v. N. Y. Infant Asylum*, 122 N. Y. 190, 10 L.R.A. 381, 25 N. E. 241 (1890).

<sup>14</sup> *Partridge v. Badger*, 25 Barb. 146 (1857).

<sup>15</sup> *Osborne and Cheesman v. Croome*, 14 Hun, 164, aff'd 77 N. Y.

629 (1878). Each year from 1866 to 1870 he was elected trustee. In 1871 there was no election but he acted with the other trustees who held over. In 1872 there was an election and he was elected with others but neither was present nor had notice of it. He never acted as trustee after 1871. Held, not a trustee.

<sup>16</sup> *Hanauer v. Bradstreet's Collection Bureau*, 95 Misc. 211, 158 N. Y. Supp. 918 (1916).

<sup>17</sup> *Bank of the Metropolis v. Faber*, 38 A. D. 159, 56 N. Y. Supp. 542 (1899).

the rule of corporate elections in stock corporations that the majority of legal votes determine the election.”<sup>18</sup>

§ 277. **Id.: Change in Number.**—An increase or reduction, but not below the minimum number prescribed by law, in the number of directors of any stock corporation may be effected by unanimous consent without a meeting, in which case the unanimous consent of the stockholders in writing, signed by them or their duly authorized proxies, must be filed in the offices where the original certificates of incorporation were filed; but no such consent is valid unless there is annexed thereto an affidavit of the custodian of the stock book of such corporation stating that the persons who have signed such consent, either in person or by proxy, are the holders of record of the entire capital stock of such corporation issued and outstanding.<sup>19</sup> The number of directors of any stock corporation may be increased or reduced, but not below the minimum number prescribed by law, when the stockholders owning a majority of the stock shall so determine as follows: (1) A meeting must be held on two weeks' notice in writing to each stockholder of record served personally or by mail directed to each stockholder at his last known postoffice address; (2) proof of the service of such notice must be filed in the office of the corporation at or before the time of such meeting; (3) the meeting must be held; (4) the proceedings of such meeting must be entered in the minutes of the corporation; (5) a transcript of the proceedings, verified by the president and secretary of the meeting, must be filed in the offices where the original certificates of incorporation were filed.<sup>20</sup> If the number of directors of a stock corporation be increased pursuant to law the additional directors authorized by such increase must be elected by the votes of a majority of the directors in office at the time of the increase.<sup>1</sup> If the original or an amended certificate of incorporation of a stock corporation provides that its directors shall be divided into

<sup>18</sup> Matter of Petition of Argus Co., 138 N. Y. 557, 34 N. E. 388 (1893).

<sup>19</sup> St. Corp. L. § 26 (L. 1909, c. 421). “This section shall apply to any stock corporation whether organized under a general or special law, and the number of directors may be increased as hereby provided notwithstanding the maximum number of directors now prescribed by law.”

<sup>20</sup> St. Corp. L. § 26 (L. 1909, c. 421). “This section shall apply to any stock corporation whether organized under a general or special law, and the number of directors may be increased as hereby provided notwithstanding the maximum number of directors now prescribed by law.”

<sup>1</sup> St. Corp. L. § 26 (L. 1909, c. 421).

two or more classes whose terms of office shall respectively expire at different times, and the number thereof is increased pursuant to law, the additional directors must be divided among such classes as nearly as practicable in proportion to the respective numbers of directors constituting each class prior to such increase.<sup>2</sup> The Secretary of State collects a fee of ten dollars for filing a certificate of change of number of directors pursuant to section twenty-six of the Stock Corporation Law.<sup>3</sup> Directors may be increased or decreased by statutory means in two ways: (1) By action of the stockholders owning a majority of the stock at a meeting held on two weeks' notice to the stockholders of record; and (2) by unanimous consent of the owners of all the stock issued and outstanding, without any meeting.<sup>4</sup> It is not competent for stockholders to prescribe by by-law or otherwise that an increase or decrease in the number of its directors can be made only by a vote representing a larger per cent of the stock than the statute requires for such purpose, any more than it is competent for them to permit such change by a less vote than the statute contemplates.<sup>5</sup> The statutory provision permitting majority stockholders to increase or reduce the number of the corporation's directors, if not above the legal maximum or below the minimum number, does not permit an increase of directors of a trading corporation by such majority against the protest of a minority when the certificate of incorporation provides that the number of directors shall not be changed except by the unanimous consent of all the stockholders.<sup>6</sup> No by-laws passed by a corporate executive committee concerning the number of directors to manage the corporation or fixing their term of office bind the members unless statutory publication thereof be made.<sup>7</sup> " . . . a resolution to reduce the number of directors of a stock corporation under section 21 of the Stock Corporation Law does not take effect unless a transcript of the proceedings of the

<sup>2</sup> St. Corp. L. § 26 (L. 1909, c. 421).

<sup>3</sup> Executive L. § 26 (L. 1917, c. 69).

<sup>4</sup> *Bond v. Atlantic Terra Cotta Co.*, 137 A. D. 671, 122 N. Y. Supp. 425 (1910); St. Corp. L. § 26.

<sup>5</sup> *Katz v. H. & H. Manufacturing Co.*, 109 A. D. 49, 95 N. Y. Supp. 663, *aff'd* 183 N. Y. 578, 76 N. E. 1098 (1905); St. Corp. L. § 49 (L.

1892, c. 688, *amend.* L. 1903, c. 320, L. 1904, c. 307, and L. 1905, c. 750). See now St. Corp. L. § 26.

<sup>6</sup> *Ripin v. U. S. Woven Label Co.*, 205 N. Y. 442, 98 N. E. 855 (1912); St. Corp. L. § 26; Gen. Corp. L. § 10.

<sup>7</sup> *Matter of Empire State Supreme Lodge*, 53 Misc. 344, 103 N. Y. Supp. 465 (1907); Gen. Corp. L. § 11, *subd.* 5.

meeting at which the resolution was adopted shall subsequently be filed in the proper offices. If the transcript is never filed the resolution never becomes operative. . . . such a resolution does not go into effect *until* the filing of the transcripts. . . . the number of directors cannot be deemed to be reduced until the date of the filing of the transcripts.”<sup>8</sup> A reduction or increase in the number of the directors of a corporation does not take legal effect until after the filing of the transcript of the minutes of the corporation, recording the stockholders’ vote to such effect, with the Secretary of State and the county clerk.<sup>9</sup> If first stockholders in meeting assembled increase the number of the corporation’s directors, and secondly at the same meeting elect the increased number, and thirdly the certificate of increase is filed in the offices of the Secretary of State and county clerk, the occurrence of the second act before the third does not invalidate the election of the increased number of directors and a majority of them composed of half of the increase and half of the old number may validly fix salaries for the corporate officers.<sup>10</sup> A proposed decrease of the number of directors in a corporation formed from several other corporations under an agreement that the number of directors of the new company should be a number which will be lessened by the proposed decrease does not impair any vested property right of a stockholder of one of the old companies becoming a stockholder in the new under such agreement, although the decrease will make it necessary for him to combine with the owners of one-third instead of one-fifth of the stockholders in order to insure the election of a director of their choice.<sup>11</sup>

**§ 278. *Id.*: Meetings.**—As to resolutions of directors in every respect, see the sixtieth section of this work. If meetings of the board of directors are to be held only within the State of New York the certificate or by-laws must so provide.<sup>12</sup> Every corporation has power to make by-laws not inconsistent with any existing law fixing the number of directors necessary to constitute a quorum at a number less than a majority of the board, but at least equal to one-third of its number.<sup>13</sup>

<sup>8</sup> *Matter of Westchester Trust Co.*, 186 N. Y. 215, 78 N. E. 875 (1906); *St. Corp. L.* § 21, now § 26.

<sup>9</sup> *Matter of Dolgeville El. L. & P. Co.*, 160 N. Y. 500, 55 N. E. 287 (1899); *Stock Corp. L.* § 21, now § 26.

<sup>10</sup> *Lewis v. Matthews*, 161 A. D. 107, 146 N. Y. Supp. 424 (1914).

<sup>11</sup> *Bond v. Atlantic Terra Cotta Co.*, 137 A. D. 671, 122 N. Y. Supp. 425 (1910).

<sup>12</sup> *Bus. Corp. L.* § 2 (L. 1909, c. 484).

<sup>13</sup> *Gen. Corp. L.* § 11 (L. 1909, c. 28).

Unless otherwise provided a majority of the board of directors of a corporation at a meeting duly assembled is necessary to constitute a quorum for the transaction of business and the act of a majority of the directors present at a meeting at which a quorum is present is the act of the board of directors.<sup>14</sup> Whenever under the provisions of any of the corporate laws a corporation is authorized to take any action by the agreement or action of its directors, managers or trustees, such agreement or action may be taken by such directors, regularly convened as a board, and acting by a majority of a quorum, except when otherwise expressly required by law or the by-laws of the corporation; and any such agreement shall be executed in behalf of the corporation by such officers as shall be designated by the board of directors, managers or trustees.<sup>15</sup> At any meeting at which every member of the board of directors is present, though held without notice, any business may be transacted which might have been transacted if the meeting had been duly called.<sup>16</sup> Except when otherwise required by law or the by-laws of the corporation, special meetings of the members of the corporation may be called in the same manner as the annual meeting thereof.<sup>17</sup> "It is not absolutely essential to the validity of a corporate act that the trustees of a corporation should proceed according to any particular form. If all are present, or have received due notice of the proposed meeting, action taken by them, intended to be a corporate act, although informally expressed, is as valid as if it had been surrounded by all the formalities usual and, it may be said, desirable in such cases. The law looks to the substance rather than to the form of things."<sup>18</sup> Directors or trustees of a corporation cannot vote at a meeting of the board by proxy.<sup>19</sup> The statutory mandate that the action of a majority of a board of directors at a lawful meeting shall be the act of the board, unless otherwise provided, permits a by-law demanding unanimity by the directors to do certain things.<sup>20</sup> The action of a quorum of a corporation's board of directors in which several directors participated who were disqualified, either because they were but *de facto* directors

<sup>14</sup> Gen. Corp. L. § 34 (L. 1917, c. 538).

<sup>15</sup> Gen. Corp. L. § 43 (L. 1909, c. 28).

<sup>16</sup> Gen. Corp. L. § 43 (L. 1909, c. 28).

<sup>17</sup> Gen. Corp. L. § 43 (L. 1909, c. 28).

<sup>18</sup> *Whitehead v. O'Sullivan*, 12

Misc. 577, 33 N. Y. Supp. 1098 (1895).

<sup>19</sup> *Craig Medicine Co. v. Merchants' Bank*, 59 Hun, 561, 14 N. Y. Supp. 16 (1891).

<sup>20</sup> *Levin v. Mager*, 86 Misc. 116, 149 N. Y. Supp. 112 (1914); Gen. Corp. L. art. XI, § 34.

through prior sale of their holdings of stock or because the action involved purchase of their individual property by the corporation, is nevertheless binding as to a third person affected thereby, though the corporation itself might set it aside.<sup>1</sup> If corporate by-laws provide "that whenever, at a regular meeting of the board, there shall be less than a quorum attend, and three or more directors [of the nine provided for] are present, those present shall have power to adjourn to such time and place as they may deem proper, not passing over the next regular meeting," and at a meeting so adjourned five directors are present, the meeting is legal and "they had the right to pass any resolution, and take any action which did not violate the law of their organization, or exceed the powers with which, as a corporate body, they were invested."<sup>2</sup> It is not necessary that a corporation's by-laws should provide for the calling of a special meeting of its directors to enable such a meeting to be legally held, as, if they actually meet in special meeting in a proper place and have all been notified or are all present and do not object, a legal meeting may be held, and any action of the corporation at such meeting is valid, if there be no regulation forbidding the holding of such meeting.<sup>3</sup> An action by an individual as such who is president and holder of the certificates of indebtedness of a corporation to restrain the holding of a special meeting of its directors on the ground that the call was not issued as prescribed in the by-laws and with the ultimate purpose of preventing the adoption of certain amendments to the by-laws cannot be maintained unless it be shown that some of the things proposed to be done at the meeting will injure the interests of the corporation or its certificate holders.<sup>4</sup> There is no general principle in the law or statutory regulation requiring that the object of a directors' meeting be specified in the notice thereof in order to validate corporate action; and "when a meeting of directors is notified without specification of the particular purpose, it would naturally be understood that it was called to consider any matters pertaining to the conduct of the affairs of the corporation which might come before it. . . . a general notice is all that is required to a valid meeting of directors for the determination of matters pertaining to the

<sup>1</sup> *Wile & Brickner Co. v. Rochester & Kettle Falls Land Co.*, 4 Misc. 570, 25 N. Y. Supp. 794 (1893).

<sup>2</sup> *Smith v. Law*, 21 N. Y. 296 (1860).

<sup>3</sup> *United Growers Co. v. Eisner*,

22 A. D. 1, 47 N. Y. Supp. 906 (1897).

<sup>4</sup> *Gilleran v. Springfield, L. I., Cemetery Society*, 161 A. D. 597, 146 N. Y. Supp. 828 (1914).

ordinary business affairs of the corporation.”<sup>5</sup> No formal or regular meeting of the board of trustees of a corporation is needed to make valid a certificate of the number of trustees filed under a statute requiring “the existing trustees of any such corporation [as that in question] . . . [to] make and sign a certificate, declaring how many trustees the corporation shall have in the future management of its business . . . , which certificate shall be acknowledged . . . and shall be filed in the office of the clerk of the county,” etc.<sup>6</sup> A director — meaning by the word any of the persons having by law the direction or management of the affairs of a corporation by whatever name described — of a corporation is deemed to have such a knowledge of the affairs of the corporation as to enable him to determine whether any act, proceeding or omission of its directors is a violation of the article of the Penal Law relating to corporations, which covers fraud in their organization, fraud in procuring their organization, fraudulent issue of stocks and bonds, acting for foreign corporations not authorized to do business in this State; misconduct of officers, directors, agents and employees; unlawful use of certain titles in connection with a corporate name; presumption of knowledge of corporate condition and business and of assent thereto by directors; and misconduct at corporate elections.<sup>7</sup> If present at a meeting of the directors at which any act, proceeding or omission of such directors in violation of such provisions of the Penal Law occurs, he must be deemed to have concurred therein unless he at the time causes or in writing requires his dissent therefrom to be entered on the minutes of the directors; and if absent from such meeting he must be deemed to have concurred in any such violation if the facts constituting such violation appear on the record or minutes of the proceedings of the board of directors and he remains a director of the corporation for six months thereafter without causing or in writing requiring his

<sup>5</sup> Matter of Petition of Argus Co., 138 N. Y. 557, 34 N. E. 388 (1893). “We need not determine whether a meeting of directors called to take action upon an extraordinary emergency involving the exercise of unusual power, might require a departure from the ordinary rule. It is sufficient to say that the adoption of a new stock book was not an occasion of this character . . . ”.

<sup>6</sup> Burden v. Burden, 159 N. Y. 287, 54 N. E. 17 (1899); L. 1878, c. 316, § 2.

<sup>7</sup> Penal L. § 667 (L. 1909). The sections of the Penal Law in the article (64) relating to corporations are numbered 660 to 670, both inclusive.

dissent from such violation to be entered on such record of minutes.<sup>8</sup>

§ 279. **Id.: Salaries.**—"It is the general rule that a director, assuming office as such without any agreement as to compensation, is presumed to render his official services gratuitously; for he assumes thereby, in a sense, a trust relation towards the company, and it would be against sound policy to permit him to assert claims for services which were within the line of his duties. But, when he is employed to perform services for the benefit of the corporation which are not within that line, there is not the same reason for denying him the right to be compensated. So far from there being any objection to the employment by a board of directors of one of their number, as their agent to do something in the interest and for the benefit of the corporation which, collectively, it would be impossible, or inconvenient, for them to do, it may often happen, from the nature of the business to be done, or in the situation of affairs, that it is, essentially, preferable and advantageous to do so."<sup>9</sup> A corporate director is not entitled to compensation for services performed by him as such unless he has a pre-existing provision expressly giving him the right thereto; and if rendered without any intent of compensation he cannot get payment therefor on the theory of an implied promise to pay therefor.<sup>10</sup> No presumption of a promise by a corporation to pay a director for his services arises from the mere fact of their rendition, or to pay an officer beyond the salary provided him by the corporate by-laws.<sup>11</sup> Directors certainly have no power to vote increases of salary (whether disguised as extra dividends or not) to themselves for services already performed under a stipulated salary: whether they have authority, in the absence of some provision of statute, by-law or charter, to vote salaries to each other as mere incidents of their office is extremely doubtful; and a resolution by them voting themselves salaries both for services already performed and services to be performed, resting in each case on the same basis, will be held tainted with fraud and wholly void.<sup>12</sup> An increase in the salaries of officers of a corporation brought about by the necessary vote of the officers

<sup>8</sup> Penal L. § 667 (L. 1909, c. 88).

<sup>9</sup> *Bagley v. Carthage, W. & S. R. R. Co.*, 165 N. Y. 179, 58 N. E. 895 (1900).

<sup>10</sup> *Stout v. Security Trust & Life Ins. Co.*, 82 A. D. 129, 81 N. Y. Supp. 708 (1903).

<sup>11</sup> *Gill v. New York Cab Co.*, 48 Hun. 524, 1 N. Y. Supp. 202 (1888).

<sup>12</sup> *Godley v. Crandell & Godley Co.*, 212 N. Y. 121, L.R.A.1915D, 632, 105 N. E. 818 (1914).

themselves as directors and stockholders is voidable, not void; and a stockholder and director who knew thereof and voted against the increases but in no other way ever objected for a number of years cannot complain of the salaries if they are not improper.<sup>13</sup> A stockholder in his individual and representative capacity may make majority directors account for salaries voted themselves in excess of the amount stipulated in contracts for their services to the corporation.<sup>14</sup> Directors of a corporation cannot bind its stockholders to salaries voted to their own number when those directors getting the salaries participate in the board meeting at which they are voted.<sup>15</sup> An agreement to pay a director a salary as president, voted at a board meeting in which he participated and at which he presided, is voidable only, and the corporation must set up in its answer to his complaint for such salary the facts showing bad faith, if it claims it exists, and cannot have a dismissal of the complaint upon the sole ground of such participation and presiding.<sup>16</sup> Corporate officers or directors cannot vote themselves salaries for services of which there is no proof but which are accepted by themselves for their corporation.<sup>17</sup> Salaries paid officers of a corporation must ordinarily be corrected within itself and may be ratified by a majority of the stockholders; but not salaries paid directors as such by their own action.<sup>18</sup> " . . . where the by-laws of a business corporation provide that the salary or compensation of its officers may be fixed by the board of directors an adoption of such by-law does not deprive the court of its equitable jurisdiction to inquire into the reasonableness of the salaries voted by the directors, and . . . a minority stockholder in a representative action is entitled to a decree requiring the directors to return to the treasury all sums received by them in excess of reasonable compensation for the services they rendered."<sup>19</sup> A resolution by a board of directors authorizing a committee "to employ counsel to assist them in whatever action they may decide necessary" is broad enough to authorize an action by the corporation against some of its directors for wasting its assets; and, if it be not, the action is

<sup>13</sup> *Murray v. Smith*, 166 A. D. 528, 152 N. Y. Supp. 102 (1915).

<sup>14</sup> *Kreitner v. Burgweger*, 174 A. D. 48, 160 N. Y. Supp. 256 (1916).

<sup>15</sup> *Kelsey v. Sargent*, 40 Hun, 150 (1886).

<sup>16</sup> *Kearns v. New York & College Point Ferry Co.*, 19 Misc. 19, 42 N. Y. Supp. 771 (1896).

<sup>17</sup> *Haas v. Universal Phonograph & Record Co.*, 75 Misc. 119, 132 N. Y. Supp. 767 (1912).

<sup>18</sup> *Tilton v. Gans*, 90 Misc. 84, 152 N. Y. Supp. 981 (1915); *aff'd* 168 A. D. 910, 152 N. Y. Supp. 1146.

<sup>19</sup> *Tilton v. Gans*, 90 Misc. 84, 152 N. Y. Supp. 981 (1915); *aff'd* 168 A. D. 910, 152 N. Y. Supp. 1146.

warranted without resolution if a majority of the directors sanctioned the bringing of the action.<sup>20</sup>

§ 280. **Personal Profit and Advantage, In General.**—A corporate director should not be permitted to use his trust position to his personal advantage.<sup>1</sup> “. . . directors and trustees of a corporation act for the corporation and all its stockholders; they cannot deal with themselves for their own benefit to the detriment of the corporation or the minority of the stockholders.”<sup>2</sup> The rule forbidding those in a fiduciary capacity from using it for their personal benefit works independently of any question of fraud, but does not make void *ab initio* all the fiduciary's transactions, rather rendering them voidable at the injured party's election; so that though a transaction is consummated through the fraud of the fiduciary, that will not permit the one obligated by it to escape performance on his part while retaining the benefit to him.<sup>3</sup> The right of a beneficiary or one claiming under him to avoid a deal between a director of a corporation and the corporation itself, as a breach of trust, “does not depend upon the question whether the trustee in fact has acted fraudulently, or in good faith and honestly, but is founded upon the known weakness of human nature, and the peril of permitting any sort of collision between the personal interests of the individual and his duties as trustee, in his fiduciary character . . . where the trustee's act consists, not in possessing himself of the property of the beneficiary as owner, but in taking collateral security for a debt honestly due him, or a liability justly incurred, the rule can have no application, since the payment of the debt or the discharge of the liability is an essential prerequisite of the avoidance. And this is true whether the pledge be taken for a present or precedent debt.”<sup>4</sup> “The illegality of a profit made by a director arises almost wholly by reason of some undisclosed and secret bias on his part

<sup>20</sup> *Pyro-Gravure Co. v. Steber*, 30 Misc. 658, 64 N. Y. Supp. 520 (1900).

<sup>1</sup> *Blake v. Buffalo Creek R. R. Co.*, 56 N. Y. 485 (1874).

<sup>2</sup> *Robbins, Inc. v. Hill*, 81 Misc. 441, 142 N. Y. Supp. 637 (1913), *aff'd* 166 A. D. 899, 150 N. Y. Supp. 1074.

<sup>3</sup> *Barr v. New York, Lake Erie & Western R. R. Co.*, 125 N. Y. 263, 26 N. E. 145 (1891). Directors on the board of two railroads

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got one to lease the other to their personal profit and in fraud of the stockholders of the lessor-company. The lessee-company enjoyed the benefits of the lease for years and then, when sued by the lessor's stockholders for rent, sought to escape liability on the ground of the fraud.

<sup>4</sup> *Duncomb v. New York, Housatonic & Northern R. R. Co.*, 84 N. Y. 190 (1881).

against the interest of the corporation of which he is a director. If a profit is made in a transaction that is honest in itself, and is open and fully disclosed, and the transaction is consummated after an honest statement of the facts to the board of directors at a meeting, and to the stockholders at a stockholders' meeting, there is no reason for criticism or for charging such director with any profits that he may make."<sup>5</sup> The invalidity of dealings by corporate officers and directors with corporate property "is founded upon the unwillingness of the law to uphold contracts which bring into collision the trust duty and the personal interest, and it is because of that collision, and the temptations which surround it, that it declares the contract voidable at the election of the beneficiary without investigating the good or bad faith of the trustee. The entire basis of the rule consists in this collision between trust duty and personal interest, and the equitable prohibition has no application where there is no such possible inconsistency. There is no such conflict in the ordinary case of the purchase by a director in a going corporation of its outstanding obligations. . . . Unless some special fund has been provided, or some special liquidation has been ordered, the director owes no duty to his company to discharge or buy in the outstanding bonds, and may purchase for himself because no inconsistent trust duty has arisen. . . . we are asked to crowd the rule almost to the verge of an absurdity . . . by tainting with invalidity the holding by a director of the unmatured obligations of the corporation bought by him in the open market and not put in liquidation or sought to be extinguished."<sup>6</sup> "A contract entered into by a corporation by the authority or direction of its trustees, with themselves, and for their benefit, or a transfer of its property by the authority of the trustees to themselves, may be set aside, in case it injures any public interest, or the private interest of any shareholder or creditor, even though the contract or transfer was executed in good faith by the trustees (*cita-*

<sup>5</sup> *Billings v. Shaw*, 209 N. Y. 265, 103 N. E. 142 (1913). The executor of a deceased holder of two-thirds of a corporation's stock, while acting as president and a director, gave an option to two other directors to buy the estate's and his rights and properties in the corporation which was exercised with the result that the obligations of the corporation were transferred to

such two directors of the corporation in consideration of a sum paid not by them but by the corporation, and the corporation or other stockholders never had a chance to buy out the rights and properties sold and the other stockholders never knew of the deal.

<sup>6</sup> *Seymour v. Spring Forest Cemetery Assn.*, 144 N. Y. 333, 26 L.R.A. 859, 39 N. E. 365 (1895).

tions). But this rule is not broad enough to condemn as void on the ground of public policy all contracts and transfers executed by a purely private business corporation, with or to its trustees in good faith, in case no public or private interest is harmed thereby. Such contracts are not void but voidable at the election of those who are affected by the fraud.”<sup>7</sup> There is “no rule which prohibits a director of a corporation engaging in a business similar to that carried on by the corporation, either in his own behalf or for another corporation of which he is likewise a director.”<sup>8</sup> Wrongful taking and division *inter sese* by directors of the paid up capital of their corporation gives a common law cause of action to the corporation against them which passes to its trustee in bankruptcy.<sup>9</sup>

§ 281. **Id.: Contracts with Corporation.**—“It is a general rule that a director, trustee or an executive officer of a corporation is without power to bind it or its shareholders by a contract authorized by or entered into with himself and for his individual benefit. But if the contract so entered into is in all respects just as between the parties, and all of the shareholders and directors or trustees are competent to assent, and with full knowledge of the terms of the contract, do assent and direct that it be made, it is binding on the corporation and cannot be avoided by its shareholders or by persons who subsequently become its creditors.”<sup>10</sup> The rule avoiding any contract made with a corporation insofar as a director therein profits thereby personally does not hold if it be made openly and to the stockholders’ knowledge.<sup>11</sup> “. . . while a contract entered into by a corporation by the authority or direction of its trustees with themselves, and for their benefit, or a transfer of its property by the authority of the trustees to themselves, may be set aside in case it injures any public interest or the private interest of any shareholder or creditor, even though the contract or transfer was executed in good faith by the trustees, yet this rule is not broad enough to condemn as void, on the ground

<sup>7</sup> Skinner v. Smith, 134 N. Y. 240, 31 N. E. 911 (1892).

<sup>8</sup> New York Automobile Company v. Franklin, 49 Misc. 8, 97 N. Y. Supp. 781 (1905).

<sup>9</sup> Rathbone v. Ayer, No. 1, 84 A. D. 184, 82 N. Y. Supp. 239 (1903).

<sup>10</sup> Welch v. Importers’ & Traders’ Nat. Bk., 122 N. Y. 177, 25 N. E. 269 (1890).

<sup>11</sup> Goldshear v. Barron, 42 Misc. 198, 85 N. Y. Supp. 395 (1903).

The director introduced one (whom he had told he intended to get a commission from any sale resulting from the introduction) to another upon the latter’s promise that if a sale resulted from the introduction he would get a commission. The person introduced later formed a “one-man” corporation which bought the property and from which the commission was held recoverable.

of public policy, all contracts and transfers executed by a purely private business corporation with or to its trustees in good faith, in case no public or private interest is harmed thereby, such contracts not being void but voidable at the election of those who are affected thereby."<sup>12</sup> The mere fact that one party to a contract with a corporation was a director in it when the contract was made does not make the agreement void.<sup>13</sup> A contract made by a corporation through the vote of a majority of its directors in which the vote of that one of their number was necessary to pass the resolution who was the other party to the contract is void; because he cannot bind the corporation to an agreement securing beneficial results to himself.<sup>14</sup> While a contract between a corporation and one of its directors or between the directors of one corporation with another corporation of which they are also directors is voidable by the corporation, it is not voidable by a stockholder for that reason alone.<sup>15</sup> The courts will not decree specific performance of an executory contract between individuals and a corporation for the sale of the property of the former when one of the former at the time the contract was made was a director of the purchasing corporation and took part in making the contract upon which the action is brought.<sup>16</sup> In determining the propriety of a price paid by a corporation for works built by a person who is a stockholder and director in it, a charge for his personal service may legitimately be considered as well as an amount paid by him to another, interested too in the company, for services rendered; and an amount charged for interest and profit are likewise allowable.<sup>17</sup> A director of a corporation cannot recover any sum agreed to be paid him by a contractor for securing a job from the corporation for it.<sup>18</sup> " . . . a corporation in order to defeat a contract entered into by directors, in which one or more of them had a private interest, is not bound to show that the influence of the director or directors having the private interest, determined the action of the board."<sup>19</sup>

<sup>12</sup> *Marbury v. Stone*, 17 A. D. 352, 45 N. Y. Supp. 184 (1897), *aff'd* 160 N. Y. 701, 57 N. E. 1116.

<sup>13</sup> *Vounoh v. Sixty-Seventh St. Atelier Bldg.*, 55 Misc. 222, 105 N. Y. Supp. 155 (1907).

<sup>14</sup> *Copeland v. Johnson Manufacturing Co.*, 47 Hun, 235 (1888).

<sup>15</sup> *Hart v. Ogdensburg & Lake Champlain R. R. Co.*, 89 Hun, 316, 35 N. Y. Supp. 566 (1895).

<sup>16</sup> *Munson v. Syracuse, Geneva & Corning R. R. Co.*, 103 N. Y. 58, 8 N. E. 355 (1886).

<sup>17</sup> *Gamble v. Queens Co. Water Co.*, 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201 (1890).

<sup>18</sup> *Landes v. Hart*, 131 A. D. 6, 115 N. Y. Supp. 337 (1909).

<sup>19</sup> *Munson v. Syracuse, Geneva & Corning R. R. Co.*, 103 N. Y. 58, 8 N. E. 355 (1886).

That a voidable contract with a firm of which three members are directors in the corporation which is the other party thereto is amended by a meeting of five directors, of whom three were those members of such firm, so as to be more favorable to that company, is no reason for avoiding it after the contract has been fully performed by the firm.<sup>20</sup> A director employed by his corporation under a contract for a term of years prepared by himself, approved by the executive committee, signed by the officers at such committee's direction, and approved at a board meeting at which the director employed was present, is liable to have his employment under the contract terminated at any time by the board, and has the burden of showing that the employment under the contract was necessary, was for duties distinct from his duties as director and that his services were worth the amount paid therefor.<sup>1</sup> A contract by a director with his corporation will not be set aside at the instance of its stockholders if to do work already agreed to be done by another at but a slightly greater cost and if otherwise no one could in all probability have been secured to do the work.<sup>2</sup> An agent, director or officer of a corporation who is secretly a partner with another to whom he has work of the corporation sent to do must account to the corporation for any profits he made in such partnership.<sup>3</sup> Directors of a corporation cannot pay one of their number a sum agreed upon as to be paid him on cancellation of a contract made by it with him because of consolidation by it with another corporation until the stockholders shall have voted in favor of the consolidation.<sup>4</sup> A contract by which one is induced to invest money in another's business for the considerations that it be incorporated, that the investor receive stock in the corporation and that the inducer agree to buy the investor's stock at its book value if the corporation did not employ the investor at a stated salary for a specified time, is not void as against public policy because the inducer becomes a director of the corporation and it may, therefore, obligate him as director to act against the corporation's best interests if they require a termination of the contract.<sup>5</sup> A contract of indemnity by a corporation with its

<sup>20</sup> *People v. Republic Savings & Loan Assn.*, 97 A. D. 31, 89 N. Y. Supp. 582 (1904).

<sup>1</sup> *Merrill v. United Box Board & Paper Co.*, 143 A. D. 833, 128 N. Y. Supp. 959 (1911).

<sup>2</sup> *Strobel v. Brownell*, 16 Misc. 657, 40 N. Y. Supp. 702 (1895).

<sup>3</sup> *The Lozier Motor Co. v. Ball*, 53 Misc. 375, 104 N. Y. Supp. 771 (1907).

<sup>4</sup> *Kelsey v. Sargent*, 40 Hun, 150 (1886).

<sup>5</sup> *Drucklieb v. Harris*, 209 N. Y. 211, 102 N. E. 599 (1913).

director against loss to him from his guaranty in its behalf is not void but voidable, and in the absence of fraud the right of avoidance is in the holders of a majority of its stock — so that the courts will not exercise their equitable powers on motion of minority stockholders.<sup>6</sup> “It is neither void nor voidable for the directors of a corporation to rent property from an officer of the company, although the transaction, of course, is subject to inquiry . . . .”<sup>7</sup>

§ 282. *Id.*: **As Creditor, Stockholder or Purchaser.**—The directors of a corporation cannot legally enable one of their number, and a *bona fide* creditor of the company, to obtain judgment by confession against it on its claim, on which execution is returned unsatisfied though it is amply able to satisfy it, and whereupon its property is sequestered and a receiver appointed, with the result that a levy on a judgment recovered by another creditor against it a few days after the confession of the director's debt is prevented; and the good motive of the directors in seeking to preserve the corporate property for all creditors is immaterial.<sup>8</sup> “The disability to seize upon the assets of a corporation attaches upon the office of trustee or officer of the corporation, and while an officer may bring his action against the corporation for the purpose of securing an equal division of the assets amongst the creditors of the corporation, he cannot use any judgment obtained by him in such an action for the purpose of obtaining a preference in the payment of his own debt,” *e. g.*, by attachment.<sup>9</sup> One who is a director in and officer of a corporation and in control as proxy or trustee of a majority of its stock will be compelled to return to it notes and stock bonus resolved to be used to pay an indebtedness by it which he took over as if in discharge of another resolution for the issue of its notes for an indebtedness by it to him.<sup>10</sup> There is no breach in the fiduciary obligation of a director in a corporation by his securing security for a personal debt due him from one who also has an account with or is indebted to the corporation.<sup>11</sup> The relation between director and corpora-

<sup>6</sup> *Hyde v. Equitable Life Assurance Soc.*, 61 Misc. 518, 116 N. Y. Supp. 219 (1908).

<sup>7</sup> *Metzger v. Knox*, 77 Misc. 271, 136 N. Y. Supp. 681 (1912); *aff'd* 153 A. D. 911, 137 N. Y. Supp. 1129, and 154 A. D. 953, 139 N. Y. Supp. 1133.

<sup>8</sup> *National Broadway Bank v. Wessell Metal Co.*, 59 Hun, 470, 13 N. Y. Supp. 744 (1891).

<sup>9</sup> *Throop v. Hatch Lithographic Co.*, 58 Hun, 149, 11 N. Y. Supp. 532 (1890); *aff'd* 125 N. Y. 530, 26 N. E. 742.

<sup>10</sup> *United Gold & Platinum Mines Co. v. Smith*, 44 Misc. 567, 90 N. Y. Supp. 199 (1904).

<sup>11</sup> *Murray v. Smith*, 166 A. D. 528, 152 N. Y. Supp. 102 (1915).

tion is that of trustee and *cestui que trust*, and under "the rule that one holding a position of trust cannot use it to promote his individual interests by buying, selling, or in any way disposing of the trust property," the action of three of a board of five directors in ordering paid the bill of one of such three, greater in amount than was due, will be held void.<sup>12</sup> An arrangement by which persons who are directors of a corporation loan money to it upon the pledge of securities in order to preserve its credit and to tide it over its difficulties is not against public policy, but will be supported between the directors and the company if fair and made in good faith.<sup>13</sup> "Directors cannot, with secret knowledge of the existence of a contract which they claim to be of great value, issue treasury stock of the corporation and buy it in themselves, particularly when the transaction converts them from minority to majority stockholders. . . . All stockholders should be given knowledge of contracts affecting the value of the stock and should be allowed to subscribe for their proportional share of the new issue."<sup>14</sup> One controlling by proxies and as trustee the stock of a corporation and a director and officer therein will be compelled at the instance of a stockholder to return to the corporation a large block of its stock voted to him at a special meeting of stockholders held pursuant to a notice not intimating the passage of a resolution giving him such stock.<sup>15</sup> Stockholders seeking to hold a director, who purchases on foreclosure the corporate property, as trustee for their benefit, must first pay and discharge his debt.<sup>16</sup> One of several trustees appointed by creditors to hold corporate stock for their benefit as security for an indebtedness by the owner thereof to them cannot resign after acting and personally buy in the stock on its sale by the trustees pursuant to the trust agreement for the benefit of himself and the remaining trustees.<sup>17</sup>

<sup>12</sup> Butts v. Wood, 37 N. Y. 317 (1867).

<sup>13</sup> Converse v. Sharpe, 161 N. Y. 571, 56 N. E. 69 (1900). The loan was made in the honest belief that the company would pull through its difficulties, after a conference of persons interested in it; and to secure present loans agreed to be made on the faith of the pledge and not to secure payment of some pre-contracted debt.

<sup>14</sup> Whitaker v. Kilby, 55 Misc. 337, 106 N. Y. Supp. 511 (1907).

<sup>15</sup> United Gold & Platinum Mines Co. v. Smith, 44 Misc. 567, 90 N. Y. Supp. 199 (1904). The notice said the meeting was to consider a plan to amalgamate two companies "and for such other business in relation thereto, as well as the general business of the company, as may be presented to the meeting."

<sup>16</sup> Harpending v. Munson, 91 N. Y. 651 (1883).

<sup>17</sup> Jenkins v. Hammerschleg, 38 A. D. 209, 56 N. Y. Supp. 534 (1899).

§ 283. **Id.: Executive Committee.**— “ The board of directors of a corporation do not stand in the same relation to the corporate body which a private agent holds toward his principal. In the strict relation of principal and agent, all the authority of the latter is derived by delegation from the former, and if the power of substitution is not conferred in the appointment, it cannot exist at all. But in corporate bodies the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke those powers. They are derivative only in the sense of being received from the State in the act of incorporation. The directors convened as a board are the primary possessors of all the powers which the charter confers, and like private principals they may delegate to agents of their own appointment the performance of any acts which they themselves can perform. . . . the by-law in question . . . was, in substance and effect, a regulation which constituted a subordinate agency to conduct the ordinary business of the corporation. The persons composing the agency would change according as the quorum of five or more directors attending the meeting might be constituted of different individuals. But if the board could delegate the power of transacting business to five or more individuals named, no doubt exists that the same authority might be imparted to a shifting quorum, composed of the same number.”<sup>18</sup> The managers or directors of a corporation may, “ undoubtedly, clothe a committee, in the intervals between the sittings of the board, with all their own authority to conduct the ordinary business of the company (*citation*); but it does not follow that the committee could delegate that power to one of their number.”<sup>19</sup> The board of directors of a business corporation has power to appoint an executive committee of its own number to transact the corporation’s business during the interval between board meetings, including the giving of negotiable notes for legitimate indebtedness incurred, even though the indebtedness and note be to the corporation’s president.<sup>20</sup> Under a statute requiring a manufacturing corporation’s business to be carried on by a board of trustees, but empowering that board to appoint such subordinate officers and agents as the corporation’s business may require, it may appoint an executive committee of its own members

<sup>18</sup> Hoyt v. Thompson’s Ex’t’r, 19 N. Y. 207 (1859).

<sup>19</sup> Olecott v. Tioga R. R. Co., 27 N. Y. 546 (1863).

<sup>20</sup> First National Bank v. Commercial Travelers’ Assn., 108 A. D. 78, 95 N. Y. Supp. 454 (1905), aff’d 185 N. Y. 575, 78 N. E. 1103.

and give it power to transact the company's business during the interval between meetings of the board; and a power delegated by such committee to another to endorse checks and receive money thereon, being purely ministerial, may be legally exercised by the delegate.<sup>1</sup> An executive committee of a corporate board of directors authorized by its by-laws pursuant to statute to exercise the board's powers when it was not in session cannot bind the corporation after a session of the board has been so far moved by the calling of a meeting; and one dealing with such a committee is chargeable with a knowledge of the law and the extent of the authority conferred upon it.<sup>2</sup> In the absence of sacrifice of a corporation's interests or intent to defraud, its executive committee of three may lawfully pass, to one of their number not a stockholder who has advanced money to the corporation for work it is doing, the title to its bonds as security for the loan, even though the other two of the committee were liable individually as guarantors of the debt by the corporation to the third one of their number.<sup>3</sup> A corporate executive committee of a board of directors empowered to conduct the "ordinary business" of the corporation may conduct any business without any limit save business in which the corporation is not by its charter authorized to engage.<sup>4</sup>

**§ 284. Id.: Powers, In General.**—The affairs of every corporation must be managed by its board of directors.<sup>5</sup> The certificate of incorporation of any corporation may contain any limitation upon the powers of its directors which does not exempt them from the performance of any obligation or the performance of any duty imposed by law.<sup>6</sup> By-laws duly adopted at a meeting of the members of the corporation control the action of its directors.<sup>7</sup> Subject to the by-laws, if any, adopted by members of a corporation, the directors may make necessary by-laws of the corporation.<sup>8</sup> When the directors of

<sup>1</sup> *Sheridan Electric Light Co. of N. Y. v. Chatham Nat. B'k*, 127 N. Y. 517, 28 N. E. 467 (1891); 1 R. S. 600, § 1, subd. 5; 2 id. (7th ed.) 1531, § 5.

<sup>2</sup> *Commercial Wood & C. Co. v. Northampton Portland C. Co.*, 190 N. Y. 1, 82 N. E. 730 (1907); *Gen. Corp. L. of Del.* § 9. Executive committee made contract with plaintiff earlier in the same day for which a board of directors' meeting was called, and this board at such meeting advised plaintiff "pro-

posed contract" was under advisement, and later disapproved it.

<sup>3</sup> *Duncomb v. New York, Housatonic & Northern R. R. Co.*, 88 N. Y. 1 (1882).

<sup>4</sup> *Hoyt v. Thompson's Ex't'r*, 19 N. Y. 207 (1859).

<sup>5</sup> *Gen. Corp. L.* § 34 (L. 1917, c. 538).

<sup>6</sup> *Gen. Corp. L.* § 10 (L. 1909, c. 28).

<sup>7</sup> *Gen. Corp. L.* § 11 (L. 1909, c. 281).

<sup>8</sup> *Gen. Corp. L.* § 34 (L. 1917, c. 538).

any corporation for the first year of its corporate existence hold over and continue to be directors after the first year, because of their neglect or refusal to adopt the by-laws required to enable the stockholders to hold the annual election for directors, all their acts and proceedings while so holding over, done for and in the name of the corporation, designed to charge upon it any liability or obligation for the services of any such director, or any officer, or attorney or counsel appointed by them, and every such liability or obligation, must be held fraudulent and void.<sup>9</sup> Whenever, under the provisions of any of the corporate laws, a corporation is authorized to take any action by the agreement or action of its directors, such agreement or action may be taken by such directors, regularly convened as a board and acting by a majority of a quorum, except when otherwise expressly required by law or the by-laws of the corporation; and any such agreement must be executed in behalf of the corporation by such officers as are designated by the board of directors.<sup>9a</sup> At any meeting at which every member of the board of directors is present, though held without notice, any business may be transacted which might have been transacted if the meeting had been duly called.<sup>9b</sup> During the continuance of the war any corporation organized under the laws of New York State may co-operate with other corporations and with natural persons in the creation and maintenance of instrumentalities conducive to the winning of the war, and its directors may appropriate and expend for such purposes such sum or sums as they may deem expedient and as, in their judgment, will contribute to the protection of the corporate interests, provided that whenever the expenditures for such purposes in any calendar year in the aggregate amount to one per centum on the capital stock outstanding, then, before any further expenditure is made during such year for such purposes by the corporation, ten days' notice must be given to the stockholders in such manner as the directors may direct of the intention to make such further expenditures specifying the amount thereof; and if written objection be made by stockholders holding twenty-five per centum or more of the stock of the corporation, such further expenditure cannot be made until it has been authorized at a stockholders' meeting.<sup>9c</sup> Upon the dissolution of any corporation its directors unless other persons are appointed by the Legislature or by some court of

<sup>9</sup> St. Corp. L. 527 (L. 1909, c. 61).

<sup>9b</sup> Gen. Corp. L. § 43 (L. 1909,

<sup>9a</sup> Gen. Corp. L. § 43 (L. 1909, c. 28).

<sup>9c</sup> L. 1918, c. 240.

competent jurisdiction are trustees of its creditors, stockholders or members, and have full power to settle its affairs, collect and pay outstanding debts and divide among the persons entitled thereto the money and other property remaining after payment of debts and necessary expenses; and such trustees have authority to sue for and recover the debts and property of the corporation and are jointly and severally personally liable to its creditors, stockholders or members to the extent of its property and effects coming into their hands.<sup>10</sup> "Where the exercise of corporate acts is vested in a select body, an act done by the persons composing that body, in a meeting of all the corporators, is not a valid corporate act."<sup>11</sup> The relationship between a director and his corporation is that of *quasi* trustee but between him and third parties it is that of agent merely for the corporation.<sup>12</sup> The relation between directors and their corporation is not that of agents to principal but is fiduciary in character, though not strictly that of trustee and *cestui que trust*.<sup>13</sup> The judgment of the board of directors of a corporation controls its business irrespective of the views of the majority stockholders to the contrary.<sup>14</sup> "While the ordinary rules of law relating to an agent are applicable in considering the acts of a board of directors in behalf of a corporation when dealing with third persons, the individual directors making up the board are not mere employees, but a part of an elected body of officers constituting the executive agents of the corporation. They hold such office charged with the duty to act for the corporation according to their best judgment, and in so doing they cannot be controlled in the reasonable exercise and performance of such duty. As a general rule the stockholders cannot act in relation to the ordinary business of the corporation, nor can

<sup>10</sup> Gen. Corp. L. § 35 (L. 1909, c. 28).

<sup>11</sup> *Landers v. Frank St. M. E. Church*, 114 N. Y. 626, 21 N. E. 420 (1889).

<sup>12</sup> *Moran v. Vreeland*, 81 Misc. 664, 143 N. Y. Supp. 522 (1913); *aff'd* 162 A. D. 907, 146 N. Y. Supp. 1101.

<sup>13</sup> *Mabon v. Miller*, 81 A. D. 10, 80 N. Y. Supp. 979 (1903). "The agency of the directors rests solely in their dealings with third persons, when they represent the corporation as its agents; but in dealings with the corporation, they act in a fidu-

ciary capacity for the shareholders as it is to their care that the shareholders, acting through the corporate entity, intrust the control of its property and the management of its business."

<sup>14</sup> *Whitaker v. Kilby*, 55 Misc. 337, *aff'd* 106 N. Y. Supp. 511 (1907). The powers of directors exist independent of any action by the stockholders; and the directors are the exclusive executive representatives of the corporation. *Manson v. Curtis*, — N. Y. — (1918) N. Y. L. J. May 14, p. 533.

they control the directors in the exercise of the judgment vested in them by virtue of their office. The relation of the directors to the stockholders is essentially that of trustee and *cestui que trust*. The peculiar relation that they bear to the corporation and the owners of its stock grows out of the inability of the corporation to act except through such managing officers and agents. The corporation is the owner of the property, but the directors in the performance of their duty possess it, and act in every way as if they owned it. . . . Without some statute or provision of the charter authorizing his removal or suspension, a director cannot be removed or suspended from office until the end of his term, at least without cause."<sup>15</sup> "The board of directors represents the corporate body. It is provided by statute in this State that the affairs of every corporation shall be managed by its board of directors (General Corporation Law, section 34). The directors are not ordinary agents in the immediate control of the stockholders. The directors hold their office charged with the duty to act for the corporation according to their best judgment, and in so doing they cannot be controlled in the reasonable exercise and performance of such duty. The corporation is the owner of the property, but the directors in the performance of their duty possess it and act in every way as if they owned it (*citation*). They are trustees clothed with the power of controlling the property and managing the affairs of a corporation without let or hindrance. As to third persons they are its agents, but as to the corporation itself, equity holds them liable as trustees."<sup>16</sup> " . . . a corporation may be bound by the acts of its duly authorized agents in the same way that a natural person may be bound, and . . . a formal resolution is not necessary to establish an act which can only be performed by a board or committee acting as a body."<sup>17</sup> The execution by a corporation of a judgment note, *i. e.*, a note empowering the holder or his trustee to confess judgment upon default, does

<sup>15</sup> People *ex rel.* Manice v. Powell, 201 N. Y. 194, 94 N. E. 634 (1911); Gen. Corp. L. §§ 90, 91, 307; C. C. P. § 1948.

<sup>16</sup> Continental Securities Co. v. Belmont, 206 N. Y. 7, 51 L.R.A. (N.S.) 112, 99 N. E. 138 (1912).

<sup>17</sup> Young v. U. S. Mortgage & Trust Co., 214 N. Y. 279, 108 N. E. 418 (1915), holding that: "If an officer or employee of a corporation

is called before its board of directors or a duly authorized committee and informed by one of their number that they have decided to make a stated increase in his salary to induce him to continue in the service of the corporation and he assents to the proposition and acts upon it, it is not essential that the agreement be reduced to writing or embodied in a formal resolution."

not involve a delegation of the discretion of the directors.<sup>17</sup> Although a settlement of points of difference between two corporations pursuant to an agreement between their respective boards of directors is voidable at the election of the stockholders of one of such corporations on the ground that the majority of its directors were also directors in the other corporation, yet such right to avoid a contract made by common directors is in the corporation and not in minority stockholders; so that if it be ratified by the majority of the stockholders, without fraud or the like, the minority has no complaint to make.<sup>18</sup> The statutory commission to directors of the management of a corporation cannot be controlled by an agreement between the officers while acting as such that each shall have a salary for a term of years and that the profits shall be distributed in a certain way, irrespective of the stock held by them.<sup>20</sup> Directors cannot, against the protest of minority stockholders, do an act which changes the nature of the corporation's business so as effectually to destroy it for all the purposes for which it was formed, particularly if they ultimately personally benefit by this exercise of their trust powers.<sup>1</sup> Directors seeking by majority vote to settle a dispute as to ownership of stock which exists between two stockholders will be enjoined from carrying their plan into execution.<sup>2</sup> A director of one corporation cannot cancel a debt owing to it by another corporation though the latter be composed of three officers of the former in their individual capacity.<sup>3</sup> When neither statute nor by-law regulating the subject is shown, the power of a corporation to make a general assignment resides in its directors; but a resolution by the latter "that the company execute a general assignment" gives the president, as executive officer, power to carry the resolution into effect.<sup>4</sup> It is not within the apparent scope of trustees of a corporation organized for manufacturing pur-

<sup>18</sup> *Holmes v. St. Joseph Lead Co.*, 84 Misc. 278, 147 N. Y. Supp. 104 (1914); *aff'd* 163 A. D. 885, 147 N. Y. Supp. 1117.

<sup>19</sup> *Continental Insurance Co. v. New York & Hudson River R. R. Co.*, 187 N. Y. 225, 79 N. E. 1026 (1907).

<sup>20</sup> *Abbott v. Harbeson Textile Co.*, 162 A. D. 405, 147 N. Y. Supp. 103 (1914); *Gen. Corp. L.* § 34. An agreement between two stockholders, neither controlling the stock, of a corporation, to divorce the manage-

ment of the corporate affairs from the board of directors and secure it to one of themselves is void and unenforceable. *Manson v. Curtis*, — N. Y. — (1918); *N. Y. L. J.* May 14, p. 533.

<sup>1</sup> *Abbott v. American Hard Rubber Co.*, 33 Barb. 578 (1861).

<sup>2</sup> *Hall v. Lay*, 27 Misc. 602, 59 N. Y. Supp. 638 (1899).

<sup>3</sup> *McCloskey v. Goldman*, 62 Misc. 462, 115 N. Y. Supp. 189 (1909).

<sup>4</sup> *Rogers v. Pell*, 154 N. Y. 518, 49 N. E. 75 (1898).

poses to make and sell its promissory notes in the market.<sup>5</sup> The reason of the rule that one taking the negotiable paper of a corporation in payment of an individual obligation of its officer is chargeable with notice as to the authorized character of the paper does not exist in the case of corporate paper payable to its director; and, therefore, the rule is not applicable to a director.<sup>6</sup> A board of directors of a corporation invested by its charter with all corporate powers not specifically excepted may retire preferred stock, issued by the corporation upon condition that the company have the option to retire it at par; and may determine the time of exercise of the option.<sup>7</sup> Directors of a corporation selling all its assets to another without giving any notice to creditors of such corporation of the proposed transfer, even though upon an agreement by the latter to assume all the then existing debts and liabilities of the former, make themselves liable for a judgment recovered against their corporation upon a claim of which they were ignorant at the time of the transfer.<sup>8</sup> Directors need no special authority to enable them to transfer to new subscribers stock of the company surrendered to it by those to whom it has originally been issued.<sup>9</sup>

§ 285. *Id.*: **Contracts.**—The liability of a corporation for its directors' contracts in its behalf is later discussed.<sup>10</sup> Directors may make a contract, which the law expressly permits their corporation to make, without the authorization of the stockholders.<sup>11</sup> Directors of a corporation may make a contract pertaining to its ordinary business relations with another corporation without fear of interference by the stockholders of the former, even though such directors be also interested in the other corporation, unless fraud or bad faith be charged.<sup>12</sup>

<sup>5</sup> *Close v. Potter*, 5 Misc. 543, 25 N. Y. Supp. 972 (1893).

<sup>6</sup> *Orr v. South Amboy Terra Cotta Co.*, 113 A. D. 103, 98 N. Y. Supp. 1026 (1906).

<sup>7</sup> *Hackett v. Northern Pacific Ry. Co.*, 36 Misc. 583, 73 N. Y. Supp. 1087 (1901).

<sup>8</sup> *Darey v. Brooklyn & N. Y. Ferry Co.*, 196 N. Y. 99, 26 L.R.A.(N.S.) 267, 89 N. E. 461 (1909); C. C. P. §§ 1781, 1782, substantially re-enacted in 1909 as §§ 90, 91, Gen. Corp. L.

<sup>9</sup> *City Bank of Columbus v. Bruce & Fox*, 17 N. Y. 507 (1858).

<sup>10</sup> See §§ 434, 436 and 438, *infra*.

<sup>11</sup> *Beveridge v. New York Elevated R. R. Co.*, 112 N. Y. 1, 2 L.R.A. 648, 19 N. E. 489 (1889).

<sup>12</sup> *Genesee Valley Ry. Co. v. Retsof Mining Co.*, 15 Misc. 187, 36 N. Y. Supp. 896 (1895).

Time for which contracts of employment may be made on behalf of corporation by its officers, directors, and agents, see notes in 49 L.R.A. 471; 17 L.R.A.(N.S.) 177.

On implied authority of superintendent of department to contract as to matters relating to his department, see note in 38 L.R.A.(N.S.) 1135.

Secret bonus of officer or director

§ 286. **Id.: Real Estate.**—It is within the power of a board to give the corporation's president the power to purchase property as part of its legitimate business and to give the company's obligation in payment for it.<sup>13</sup> The directors of a corporation organized to acquire and hold by purchase, lease or otherwise, mineral land and other real property, and to mine, transport and dispose of the mineral and other products of such lands, may lease its property at a fixed rent, in order to develop the property, instead of operating it directly; and in the absence of fraud the stockholders cannot insist that their consent be obtained to such lease.<sup>14</sup>

§ 287. **Id.: Actions, Service of Process, Counsel Fees.**—The service of process in actions against corporations is generally discussed in the four hundred and forty-third section of this book. The verification of pleadings in corporate actions is generally discussed in the four hundred and forty-first section of this book. Although an attorney retained by a director to bring an action for him against an agent or officer of the corporation who has misappropriated its money has no statutory lien on the cause of action and recovery, yet, if the director agree that the attorney have a lien on the cause of action and recovery, the courts will enforce this contractual lien; because the director, as trustee, had a lien on the recovery which he could transfer to the attorney.<sup>15</sup> "As a general principle, trustees of a corporation whose corporate existence is attacked, should be afforded the means of resisting such attack, so far as the facts justify and their duty demands. . . . But the claim of the trustees to be protected in the defense of the corporation they represent, or that of their counsel to be paid out of the fund for opposing the appointment of a receiver, however just it may be, is not an absolute right which can be enforced by an action in their behalf against the receiver, but is a matter to be addressed to the sound discretion of the court in which the proceeding is pending, and such discretion should be exercised in that proceeding, and as part thereof, and upon a consideration of all the

of corporation as affecting right to enforce contract against corporation, see note in 7 L.R.A.(N.S.) 467.

<sup>13</sup> *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546 (1863).

<sup>14</sup> *Hennessy v. Muhleman*, 40 A. D. 175, 57 N. Y. Supp. 854 (1899). "The doctrine of *ultra vires* originated at a time when nearly all cor-

porations were created for public purposes, and there is no reason why it should ever have been applied to private corporations any more than to the powers of individuals in a partnership."

<sup>15</sup> *Schoenherr v. Van Meter*, 215 N. Y. 548, 109 N. E. 625 (1915); *Judiciary L.* § 475.

circumstances.”<sup>16</sup> A demand made of a corporation’s director at its office who is acting as the recognized agent of the company in the matter is sufficient to authorize the maintenance against the corporation of an action for detainue.<sup>17</sup> Discussion will be found later in this work of service of process on directors so as to bind their corporations and verification by them of their corporations’ pleadings.<sup>18</sup>

§ 288. **Id.: Liabilities, In General.**—The legality of the acts of directors of a corporation are to be determined by the laws of the state of its incorporation.<sup>19</sup> The acts of a board of directors must be judged in the light of appearances existing when they acted.<sup>20</sup> Directors are not liable for mere errors of judgment, whether as to law or facts, if they act without corrupt intent.<sup>1</sup> Directors of a corporation are not liable for errors of judgment.<sup>2</sup> The mere fact that one is a trustee of a corporation does not make him chargeable with actual knowledge of its business transactions and of the entries made on its books.<sup>3</sup> “. . . each director is only liable for his own acts or omissions, and that one is not liable for the acts or omissions of another unless he participated therein to the injury of the corporation, or had some knowledge by which in the exercise of reasonable care he could have prevented the loss or connived at it, or failed to perform his duty of exercising the authority he possessed to prevent losses which should, in the exercise of reasonable care and skill, have been foreseen and guarded against (*citations*). Nor are directors liable for mere errors of judgment where they act without corrupt intent and in good faith and are fairly competent to discharge the duties of the position, at least not unless the

<sup>16</sup> *Barnes v. Newcomb*, 89 N. Y. 108 (1882).

<sup>17</sup> *Dunham v. Troy Union R. R. Co.*, 42 N. Y. (3 Keyes) 543 (1867).

<sup>18</sup> See § 441, *infra*, as to verification of pleadings, and § 443, *infra*, as to service of process.

<sup>19</sup> *Ottinger v. Bennett*, 144 A. D. 525, 129 N. Y. Supp. 819 (1911); *rev'd* on two certified questions only, 203 N. Y. 554, 96 N. E. 1123.

<sup>20</sup> *Dwight v. Williams*, 25 Misc. 667, 55 N. Y. Supp. 201 (1898).

<sup>1</sup> *Cass v. Realty Securities Co.*, 148 A. D. 96, 132 N. Y. Supp. 1074 (1911); *aff'd* 206 N. Y. 649. The action was by a junior lienor to hold the directors of the senior lienor for paying general creditors from the

net proceeds of sale of the mortgaged property after satisfying the senior lien before the junior lienor.

<sup>2</sup> *Holmes v. St. Joseph Lead Co.*, No. 1, 168 A. D. 685, 154 N. Y. Supp. 517 (1915); *aff'd* without opinion, 217 N. Y. 618, 111 N. E. 1088; and same against same, No. 2, 168 A. D. 688, 154 N. Y. Supp. 513 (1915); *aff'd* 217 N. Y. 619, 111 N. E. 1088, without opinion. The directors of one corporation controlling another began an investigation into a loan by the latter to one of its directors and his son, but refused to continue it or sue as asked by its stockholders.

<sup>3</sup> *Powell v. Conover*, 75 Hun, 11, 26 N. Y. Supp. 1028 (1894).

acts are unlawful or *ultra vires*.”<sup>4</sup> “Directors of corporations act in a fiduciary capacity. In every action where the interest of the corporation is involved, particularly where the same is in conflict with the individual interest of the directors, they act as trustees and are strictly accountable to the creditors or stockholders of the corporation for their action.”<sup>5</sup> “The directors of corporations are trustees of the stockholders, and in a certain sense of its creditors. Any agreement to influence their action for the benefit of others and to the prejudice of the company is fraudulent and void.”<sup>6</sup> “The directors of a corporation who willfully abuse their trust or misapply the funds of the company, by which a loss is sustained, are personally liable as trustees to make good the loss, and they are also liable if they suffer the corporate funds to be lost or wasted by gross negligence and inattention to the duties of their trust.”<sup>7</sup> “A director is not liable in damages for preventing the consummation of a contract by his corporation when its abandonment was due to no act of his as the proximate cause but to the report by an expert made as the result of honest advice by him to friends that material facts as to the company’s condition had been concealed from them.”<sup>8</sup> When directors relinquish to a corporation’s president for a period of years the exclusive management of its business, allowing him to give notes, etc., they cannot, on resuming control, repudiate their agent’s acts.<sup>9</sup> “If the directors of a company, no matter whether through inattention or otherwise, suffer its subordinate officers to pursue a particular line of conduct for a considerable period, without objection, they are as much bound to those who are not aware of any want of authority, as if the requisite power had been directly conferred.”<sup>10</sup> One who has accepted the office and exercised the duties of a director of a corporation cannot escape a statutory liability which attaches to that office on

<sup>4</sup> *People v. Equitable Life Assurance Society*, 124 A. D. 714, 109 N. Y. Supp. 453 (1908); C. C. P. §§ 1781, 1782; now Gen. Corp. L. §§ 90, 91.

<sup>5</sup> *Billings v. Shaw*, 209 N. Y. 265, 103 N. E. 142 (1913).

<sup>6</sup> *Bliss v. Matteson*, 45 N. Y. 22 (1871). The agreement was by defendants to have directors of a company to be bought and run by them prefer payment of plaintiff’s coupons on bonds. The fact that they might control the new company on

its formation was held immaterial as the presumption was that the stock would become distributed after organization to others than themselves.

<sup>7</sup> *Brinckerhoff v. Bostwick*, 88 N. Y. 52 (1882), quoting with approval from *Robinson v. Smith*, 3 Paige, 222.

<sup>8</sup> *Hale v. Mason*, 160 N. Y. 561, 55 N. E. 202 (1899).

<sup>9</sup> *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546 (1863).

<sup>10</sup> *Beers v. Phoenix Glass Co.*, 14 Barb. 358 (1852). Secretary.

the ground of irregularities in his election.<sup>11</sup> A judgment for damages for fraud against corporate directors for buying with corporate funds valueless property from majority stockholders cannot be upheld by proof of negligence, such as the recklessness of the directors in shutting their eyes when making the purchase.<sup>12</sup> Allegations that the vote of a director to abandon an enterprise was negligent, fraudulent and in furtherance of a conspiracy to deprive an individual of a subsidy which he would have secured had the enterprise gone through are not allegations of facts tending to show a violation by the director of his duty sufficient to make him liable to account to the corporation for a breach of his duty as director.<sup>13</sup> Directors of a corporation who vote in favor of a resolution to pay its president a salary, without specifying how it shall be paid, though committing a wrongful act, are not liable to suit by the corporation for recovery of the amount of notes issued and negotiated to pay such salary by another resolution to which they were not assenters, but those directors who did vote for the latter resolution are liable to the corporation "upon the principle that a person who fraudulently places in circulation the negotiable instrument of another, whether made by him or by his apparent authority, and thereby renders him liable to pay the same to a *bona fide* purchaser, is guilty of a tort, and, in the absence of special circumstances diminishing its value, is presumptively liable to the injured party for the face value thereof."<sup>14</sup> A suit based upon the mis- or mal-feasance of directors of a corporation in letting go from their hands money of the corporation which they have received or interfered with or acted upon is in equity; but an action based upon their negligence in appointing incompetent officers or permitting the latter to deal improperly with the corporate funds is at law.<sup>15</sup>

When an action is brought by a creditor of a corporation and the law makes its stockholders, directors, trustees or other officers, or any of them, liable in any event or contingency for the payment of his debt, they may be made parties defendant by the original or by a supplemental complaint and their liability may be declared and enforced by the judgment

<sup>11</sup> *Union National Bank v. Scott*, 53 A. D. 65, 66 N. Y. Supp. 145 (1900).

<sup>12</sup> *Polhemus v. Polhemus*, 114 A. D. 781, 100 N. Y. Supp. 263 (1906).

<sup>13</sup> *Occidental Construction Co. v.*

*Miller*, 154 A. D. 437, 139 Supp. 166 (1913).

<sup>14</sup> *Metropolitan Elevated Ry. Co. v. Kneeland*, 120 N. Y. 134, 8 L.R.A. 253, 24 N. E. 381 (1890).

<sup>15</sup> *Higgins v. Tefft*, 4 A. D. 62, 38 N. Y. Supp. 716 (1896).

in the action; or the plaintiff in the action may, instead of making them parties, maintain a separate action against them to procure a judgment declaring, apportioning and enforcing their liability; and in either kind of action the court must when it is necessary cause an account to be taken of the property and of the debts of the corporation and thereupon the defendants' liability must be apportioned accordingly, though if it affirmatively appears that the corporation is insolvent and has no property to satisfy its creditors the court may, without taking such an account, ascertain and determine the amount of each defendant's liability, and enforce the same accordingly.<sup>16</sup> If it appears that the property of the corporation and the sums collected or collectible from the stockholders upon their stock subscriptions are or will be insufficient to pay the debts of the corporation the court must ascertain the several sums for which the directors, trustees or other officers, or the stockholders of the corporation, being parties to the action, are liable; and must adjudge that the same be paid into court, to be applied, in such proportions and in such order as justice requires, to the payment of the debts of the corporation.<sup>17</sup> A suit in equity may be brought by one creditor of a corporation against its directors to enforce their individual liability under its charter for its debts incurred during their administrations up to a designated amount without making the corporation itself or all creditors parties, if it appears that there are other creditors about to start like suits.<sup>18</sup> In an action against trustees for a debt owing by their corporation, "when it is proved that the corporation has received property from others under a promise to pay, under circumstances which the law would adjudge sufficient to charge the corporation with the purchase-price, a debt is established which the trustees cannot dispute, although perchance the corporation might, for any reason, have refused to accept the property; and had it done so no legal liability would have resulted."<sup>19</sup> There can be no better evidence of the fraud of trustees toward their corporation and its creditors in the sale of its assets than that they delivered to the attorney of one suing them the process against the company, to protect its interests.<sup>20</sup> One who is director of a banking

<sup>16</sup> Gen. Corp. L. §§ 109, 110, 111 (L. 1909, c. 28).

<sup>17</sup> Gen. Corp. L. § 114 (L. 1909, c. 28).

<sup>18</sup> *Bauer v. Platt*, 72 Hun, 326, 25 N. Y. Supp. 426 (1893).

<sup>19</sup> *Whitney Arms Co. v. Barlow*, 63 N. Y. 62 (1875); Gen. Mfg. Act, L. 1848, c. 40, § 12, as amended L. 1853, c. 333.

<sup>20</sup> *Whittlesey v. Delaney*, 73 N. Y. 571 (1878).

corporation cannot, in a suit to rescind an agreement to buy its stock from its cashier on the ground of fraudulent representations, be held to the rule that one holding himself out as manager and director of an institution cannot avail himself of the plea of ignorance, because this claim is between officers *inter sese*.<sup>1</sup>

**§ 289. Id. For Unauthorized Dividends.**—The directors of a stock corporation must not make dividends except from the surplus profits arising from the business of such corporation; and in case of any violation of this provision the directors under whose administration dividends may have been so made, except those who may have caused their dissent therefrom to be entered at large upon the minutes of such directors at the time or who were not present when the dividends were made, are jointly and severally liable to such corporation and its creditors to the full amount of any loss sustained by such corporation or its creditors by reason of such making of dividends.<sup>2</sup> But the statutory prohibition against making dividends except from surplus profits does not prevent a division and distribution of the assets of the corporation remaining after the payment of all its debts and liabilities upon the dissolution of such corporation or the expiration of its charter; nor does it prevent a corporation from accepting shares of its capital stock in complete or partial settlement of a debt owing to the corporation which by its board of directors is deemed bad or doubtful.<sup>3</sup> A director of a stock corporation is guilty of a misdemeanor who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended to make a dividend, except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law.<sup>4</sup> A director of a corporation, *i. e.*, any person having by law the direction or management of the affairs of a corporation by whatever name described, is deemed to have such a knowledge of the affairs of the corporation as to enable him to determine whether any act, proceeding or omission of its directors is a violation of the provision of law just stated.<sup>5</sup> A director is deemed to have concurred in the violation of such provision of law either if present at a meeting of the directors at which

<sup>1</sup> Lefever v. Lefever, 30 N. Y. 27 (1864).

Generally on the question of liability of the directors of a corporation to the corporation, see notes in 55 L.R.A. 751 and 39 L.R.A. (N.S.) 173.

<sup>2</sup> St. Corp. L. § 28 (L. 1909, c. 61).

<sup>3</sup> St. Corp. L. § 28 (L. 1909, c. 61).

<sup>4</sup> Penal L. § 664 (L. 1909, c. 88).

<sup>5</sup> Penal L. § 667 (L. 1909, c. 88).

any act, proceeding or omission of such directors constituting such violation occurs without at the time causing or in writing requiring his dissent therefrom to be entered on the minutes of the directors, or if absent from such meeting and the facts constituting such violation appear on the record or minutes of the proceedings of the board of directors and he remains a director of the corporation for six months thereafter without causing or in writing requiring his dissent from such violation to be entered on such record of minutes.<sup>6</sup> The statutory provisions for making stockholders, directors and officers parties defendant in an action by a corporate creditor, or bringing separate actions against them, and the judgment to be thereupon rendered are noted in the last paragraph of the two hundred and eighty-eighth section of this book. The statute precluding dividends save from surplus profits and reduction of capital stock makes directors violating it liable only for the loss sustained by the corporation or its creditors from the declaration and payment of dividends and not for the full amount of such dividends should they exceed such loss.<sup>7</sup> Directors owning all the stock of the corporation may distribute its surplus profits as salaries to themselves if they be guilty of no fraud.<sup>8</sup> Ignorance of the financial condition of his corporation is no protection to a director from liability for declaring dividends when its net earnings do not justify them; and the account books of the corporation, particularly its ledger, are admissible evidence of such financial condition.<sup>9</sup> Trustees are liable for a debt of the company under a statute making them so on declaration of dividends from capital if they transfer all its stock, practically, to an individual while a debt of the company is still outstanding.<sup>10</sup> Trustees liable for corporate debts by reason of decreasing the capital stock by dividends are not responsible for the costs of a judgment for the debt had by the creditor against the company.<sup>11</sup> "The object of the statute [making trustees individually liable for a debt due by their corporation if they declare and pay to its stockholders a dividend diminishing

<sup>6</sup> Penal L. § 667 (L. 1909, c. 88).

<sup>7</sup> *Shaw v. Ansaldi Co., Inc.*, 178 A. D. 589, 165 N. Y. Supp. 872 (1917); St. Corp. L. § 28.

<sup>8</sup> *Shaw v. Ansaldi Co., Inc.*, 178 A. D. 589, 165 N. Y. Supp. 872 (1917).

<sup>9</sup> *Wesp v. Muckle*, 136 A. D. 241, 120 N. Y. Supp. 976 (1910); *aff'd*

201 N. Y. 527, 94 N. E. 1100; St. Corp. L. § 28.

<sup>10</sup> *Rorke v. Thomes*, 56 N. Y. 559 (1874); Gen. Mfg. Act, L. 1848 c. 40, § 13.

<sup>11</sup> *Rorke v. Thomes*, 56 N. Y. 559 (1874); Gen. Mfg. Act, L. 1848 c. 40, § 13.

the amount of its capital stock] is to prevent the dissipation of the fund designed for the security of creditors, and all who have occasion to deal with these corporations; and, although the statute is highly penal, and a clear case must be established, yet the substance of the act, and not the mere form, must be the test of liability."<sup>12</sup> An action to recover damages for alleged illegal declaration of dividends by a director of a corporation survives the defendant's death and may be continued against his personal representatives; but they cannot, if there is no property of the non-resident, deceased defendant in this State, be served by publication or personally outside the State.<sup>13</sup>

**§ 290. Id.: For Dividing, Withdrawing, Paying or Reducing Capital Stock.**—The directors of a stock corporation must not divide, withdraw or in any way pay to the stockholders or any of them any part of the capital of such corporation, or reduce its capital stock, except as authorized by law.<sup>14</sup> In case of any violation of the prohibition, against dividing, withdrawing, in any way paying to stockholders any of a corporation's capital stock or reducing it except as authorized by law, the directors under whose administration it may have happened, except those who may have caused their dissent therefrom to be entered at large upon the minutes of such directors at the time or were not present when it happened, are jointly and severally liable to the corporation and its creditors to the full amount of any loss sustained by it or them respectively by reason of such withdrawal, division or reduction.<sup>15</sup> But such prohibition does not prevent a division and distribution of the assets of any such corporation remaining after the payment of all its debts and liabilities upon the dissolution of such corporation or the expiration of its charter; nor prevent a corporation from accepting shares of its capital stock in complete or partial settlement of a debt owing to the corporation which is deemed bad or doubtful by its board of directors.<sup>16</sup> A director of a stock corporation is guilty of a misdemeanor who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended to divide, withdraw, or in any manner pay to the

<sup>12</sup> *Rorke v. Thomes*, 56 N. Y. 559 (1876); *Gen. Mfg. Act*, L. 1848, c. 40, § 13.

<sup>13</sup> *German-American Coffee Co. v. Johnston*, No. 1, 168 A. D. 31, 153 N. Y. Supp. 866 (1915); *Deced. Est. L. § 120*; *C. C. P. §§ 757, 1836a, 707, 1217*.

<sup>14</sup> *St. Corp. L. § 28* (L. 1909, c. 61).

<sup>15</sup> *St. Corp. L. § 28* (L. 1909, c. 61).

<sup>16</sup> *St. Corp. L. § 28* (L. 1909, c. 61).

stockholders, or any of them, any part of the capital stock of the corporation; or to reduce such capital stock without the consent of the legislature.<sup>17</sup> A director of a corporation, *i. e.*, any person having by law the direction or management of the affairs of a corporation by whatever name described, is deemed to have such a knowledge of the affairs of the corporation as to enable him to determine whether any act, proceeding or omission of its directors is a violation of the provision of law just stated.<sup>18</sup> A director is deemed to have concurred in the violation of such provision either if present at a meeting of the directors at which any act, proceeding or omission of such directors constituting such violation occurs without at the time causing or in writing requiring his dissent therefrom to be entered on the minutes of the directors, or if absent from such meeting and the facts constituting such violation appear on the record or minutes of the proceedings of the board of directors and he remains a director of the corporation for six months thereafter without causing or requiring in writing his dissent from such violation to be entered on such record of minutes.<sup>19</sup> The statutory provisions for making stockholders, directors and officers parties defendant in an action by a corporate creditor, or bringing separate actions against them, and the judgment to be thereupon rendered, are noted in the last paragraph of the two hundred and eighty-eighth section of this book.

**§ 291. Id.: For Assenting to Indebtedness Beyond Capital.**—There used to be a liability imposed by statute on directors for consenting to an indebtedness by their corporation in an amount exceeding its capital; but this liability no longer exists. The cases collected in the note were decided under the repealed statute.<sup>20</sup> The statutes do, however, provide that no corporation formed pursuant to the statute, permitting a

<sup>17</sup> Penal L. § 664 (L. 1909, c. 88).

<sup>18</sup> Penal L. § 664 (L. 1909, c. 88).

<sup>19</sup> Penal L. § 667 (L. 1909, c. 88).

On right to injunction against reduction of capital stock of corporation, see note in 1 L.R.A. (N.S.) 571.

<sup>20</sup> The statutory provision making corporate directors personally liable for a corporate debt in excess of its paid up capital stock "imposes a liability upon the trustees, creating or assenting to debts in excess of the capital, to the extent of such excess, not for the benefit of any particular creditor, but for the benefit

of all, and their liability is in equity a fund to which all the creditors may resort for the satisfaction of such debts as the corporation itself fails to pay, to be shared in by all in proportion to the debt remaining unpaid. It follows that it must be enforced in equity in a suit where all the creditors and the corporation itself are parties, or represented, where an accounting can be had, all the facts ascertained and the equities adjusted. The liability is secondary, to be resorted to only after the usual remedies against the cor-

corporation upon its formation or reorganization to make provision in its certificate of incorporation for the issuance of shares of stock (other than preferred stock having a preference as to principal) without any nominal or par value, can incur any debts until the amount of capital stated in such certificate has been fully paid in money or in property taken at

poration itself have been exhausted;" it is not primary and contractual as is the liability of a stockholder for debts created before the capital stock is paid in. *National Bank v. Dillingham*, 147 N. Y. 603, 42 N. E. 338 (1895); St. Corp. L. § 24. A creditor bringing a representative action against directors of his corporate debtor to enforce their personal liability because of increase in their régime of the corporate debts above its paid-up capital need not be a judgment-creditor if he was enjoined by an injunction operative when his action was brought from obtaining a judgment against the corporation. *Whitney v. Pugh*, 58 A. D. 316, 68 N. Y. Supp. 992 (1901); St. Corp. L. § 24 (L. 1892, c. 688). An action against directors consenting to the creation of an indebtedness by their corporation which brings its total indebtedness not secured by mortgage to a sum in excess of the amount of its paid-up capital stock to enforce their personal liability for such indebtedness to the corporation's creditors may and should be brought by one creditor as representative of himself and all other creditors against all the directors liable to contribute to the creditor's fund. *Whitney v. Pugh*, 58 A. D. 316, 68 N. Y. Supp. 992 (1901); St. Corp. L. § 24 (L. 1892, c. 688): ". . . otherwise that fund cannot be properly constituted, unless indeed it be held that a multiplicity of suits will lie to establish one fund, and that in a case where the personnel of the directorship has changed from year to year, a creditor suing for himself and all other creditors can only bring his action to realize a part of the fund, viz., that to be drawn from the liability of one set of di-

rectors who were such when the indebtedness to the particular creditor instituting the action arose." In seeking to hold a director personally liable for consenting to the creation of any debt of his corporation whereby its total indebtedness not secured by mortgage shall exceed the amount of its paid-up capital stock, it must be remembered that "it is the creation of a debt *not secured by mortgage* in excess of the paid-up capital stock which makes the directors liable, but not a debt which is secured by mortgage." *Irving National Bank v. Moynihan*, 84 A. D. 301, 82 N. Y. Supp. 705 (1903); St. Corp. L. § 24 (L. 1892, c. 688). "The liability imposed by statute upon directors for such indebtedness of their corporation not secured by mortgage as exceeds its paid-up capital stock must be enforced in a suit in equity for the benefit of all creditors to which they and the corporation are parties, and if several actions have been brought by different plaintiffs against the same directors and all the plaintiffs are represented by the same attorney, the plaintiffs should be compelled to elect in which of the actions they shall proceed, and proceedings in all the other actions should be stayed until the further order of the court, to the end that when judgment has been recovered in the action in which the election has been made, the plaintiffs in those actions, as well as the other creditors, may come in and prove their claims in that action, and the rights and liabilities of all parties be determined therein." *American Grocery Co. v. Flint*, 5 A. D. 263, 39 N. Y. Supp. 1 (1896). A statute making trustees of a corporation who assent

its actual value, and that, if the amount of capital stated in such certificate is increased, the corporation cannot increase the amount of its indebtedness then existing until it has received in money or property the amount of such increase of its stated capital; and that the directors of the corporation assenting to the creation of any debt in violation of such statutory prohibition are liable jointly and severally for such debt, though no action can be brought on such liability unless within one year after the debt has been incurred the creditor has served upon the director written notice of intention to hold him personally liable for such debt; but any director who because of such liability pays any debt of the corporation is subrogated to all rights of the creditor in respect thereof against the corporation and its property and is also entitled to contribution from all other directors of the corporation similarly liable for the same debt, and the personal representative of any such director who has died before making such contribution.<sup>20a</sup> The statute further provides that a corporation organized under any general law which is reorganized so as to permit of its issuing non-par value stock cannot incur any debts subsequent to the filing of the certificate of reorganization until it has assets of an actual value at least equal to the amount of capital stated in such certificate of reorganization as that with which it will carry on business; and that the directors of a corporation assenting to the creation of a debt in violation of such statutory provision are jointly and severally liable for such debt in like manner as directors of a corporation obtaining non-par value stock as prescribed in the last sentence.<sup>20b</sup>

**§ 292. Id.: For Permitting Payment for Corporation's Stock by Unauthorized Means.**—A director of a stock corporation is guilty of a misdemeanor who concurs in any vote or act of

to an increase of its indebtedness over the amount of its capital stock personally liable for such excess to the creditors of the company makes them liable only to such creditors to whom the company owes such excess, and not to creditors to whom it does not owe it. *Patterson v. Robinson*, 37 Hun, 341 (1885); L. 1848, c. 40, § 23. In determining whether the indebtedness of a corporation exceeds the amount of its capital stock so as to make its directors creating the indebtedness individually liable to creditors for the excess, under the

statute, bonds of the corporation not shown to have been issued or to have reached the hands of creditors cannot be included, nor can a judgment against the corporation predicated on advances made by a director; and, in any event, all the directors at fault must be joined as defendants. *McClave v. Thompson*, 36 Hun, 365 (1885); L. 1875, c. 611, § 22.

<sup>20a</sup> St. Corp. L. § 19 (L. 1917, c. 500), and § 20 (L. 1912, c. 351).

<sup>20b</sup> St. Corp. L. § 24 (L. 1917, c. 484), and § 24-b (L. 1917, c. 484).

the directors of such corporation, or any of them, by which it is intended to discount or receive any note or other evidence of debt in payment of an instalment of capital stock actually called in, and required to be paid, or with intent to provide the means of making such payment; or to receive or discount any note or other evidence of debt with intent to enable any stockholder to withdraw any part of the money paid in by him on his stock; or to apply any portion of the funds of such corporation, except surplus profits, directly or indirectly to the purchase of shares of its own stock.<sup>1</sup> A director of a corporation, *i. e.*, any person having by law the direction or management of any of the affairs of a corporation by whatever name described, is deemed to have such a knowledge of the affairs of the corporation as to enable him to determine whether any act, proceeding or omission of its directors is a violation of the provision of law just stated.<sup>2</sup> A director is deemed to have concurred in the violation of such provision of law either if present at a meeting of the directors at which any act, proceeding or omission of such directors constituting such violation occurs without at the time causing or in writing requiring his dissent therefrom to be entered on the minutes of the directors, or if absent from such meeting and the facts constituting such violation appear on the record or minutes of the proceedings of the board of directors and he remains a director of the corporation for six months thereafter without causing or in writing requiring his dissent from such violation to be entered on such record of minutes.<sup>3</sup>

**§ 293. *Id.*: On Corporate Dissolution.**—Upon the dissolution of any corporation its directors are trustees for its creditors, stockholders or members, unless others be appointed by legislature or court; and are jointly and severally personally liable to its creditors, stockholders or members to the extent of the corporate property and effects which came into their hands.<sup>4</sup> Upon the expiration of the term of a corporation's life pursuant to a limitation thereof in its charter its property vests in its directors as trustees for the owners of its stock, subject only to the payment of the claims of creditors.<sup>5</sup> The statutory provision making directors of a corporation its trustees on dissolution for creditors means "that the corporate property should be held and administered upon

<sup>1</sup> Penal L. § 664 (L. 1909, c. 88)

<sup>2</sup> Penal L. § 667 (L. 1909, c. 88).

<sup>3</sup> Penal L. § 667 (L. 1909, c. 88).

<sup>4</sup> Gen. Corp. L. § 35 (L. 1909, c. 28).

<sup>5</sup> *Matter of Friedman*, 177 A. D. 755, 164 N. Y. Supp. 892 (1917).

by the directors, where other persons were not appointed, for the purpose of its distribution in the settlement of all existing claims upon it; whether the claimant was a creditor in the legal sense, or not. The term 'creditor' is broad enough, in view of the evident purpose of this act and of the other provision we have mentioned [Business Corporation Law, § 5], to include those persons to whom the corporation was under any enforceable obligation, as well as those to whom it was indebted."<sup>6</sup> "The statute declaring that the directors and managers of any corporation shall, upon its dissolution, be the trustees of the creditors and stockholders . . . expressly limits the liability to the extent of the property and effects that shall come into their hands."<sup>7</sup> It seems that a way in which directors of a corporation virtually dissolving it by transfer of all its assets may protect themselves from claims of unknown creditors is to apply to the court for leave to distribute and upon giving such notice as the court prescribed to be relieved from personal liability for the distribution.<sup>8</sup> The directors of a corporation who voluntarily dissolve it are liable to one to whom the corporation was contingently liable at the time of the dissolution and who later makes the liability absolute and may be compelled to account for their management and disposition of the corporate assets, although it is improper to appoint a receiver *pendente lite* if the corporation has no property left and direct the directors to pay over to him all property held by them.<sup>9</sup> In order to hold individually an officer of a dissolved corporation responsible to creditors of the corporation to whom he had stated he would undertake payment of its merchandise debts with the intent of inducing such creditors to refrain from making themselves parties to the dissolution proceeding and from organizing to protect their interests or from bidding for the property and by reason of which statements such creditors let the property go to such officer at unreasonable prices at the sale on dissolution, no statutory provisions are needed, and a judgement in equity that such officer holds the property thus acquired impressed with a trust for the pay-

<sup>6</sup> *Marsteller v. Mills*, 143 N. Y. 398, 38 N. E. 370 (1894). The trustees on dissolution were held proper defendants in a suit based on the corporation's negligence resulting in plaintiff's personal injury.

<sup>7</sup> *Hoffman v. Van Nostrand*, 42 Barb. 174 (1864).

<sup>8</sup> *Darcy v. Brooklyn & New York*

*Ferry Co.*, 127 A. D. 167, 111 N. Y. Supp. 514 (1908); *aff'd* 196 N. Y. 99, 26 L.R.A.(N.S.) 267, 89 N. E. 461; C. C. P. § 1781 *et seq.* Now Gen. Corp. L. § 90 *et seq.*

<sup>9</sup> *Tapley Co. v. Keller*, 133 A. D. 54, 117 N. Y. Supp. 817 (1909); St. Corp. L. § 28.

ment of such creditors' just claims against the corporation is proper. "It is not necessary to such a cause of action that the plaintiff should allege the sale by the receiver to have been fraudulent or that they should seek to have it set aside."<sup>10</sup> The real as well as the personal property of a dissolved corporation is a fund for the benefit of creditors in the hands of its directors as trustees.<sup>11</sup> Stockholders of a corporation which has become dissolved by expiration of the time limit of its life set forth in its charter cannot make one not a director of the corporation but whom they allege to have received its property from its directors, since deceased, who had possession thereof at the time of the dissolution, account, as such a step can be taken only through a receiver.<sup>12</sup> Directors voting for voluntary dissolution of their corporation and the employment of an attorney to conduct the necessary proceedings are not personally liable to him for his services unless by special promise they undertake to pay him.<sup>13</sup>

**§ 294. Id.: For Sale of Stock Which Does Not Own.**—This liability of a director is likewise a liability of an officer and is considered under the same subheading as that given this section but under the heading below of "Liabilities Common to Directors and Officers."<sup>14</sup>

**§ 295. Id.: For Increasing Capital Stock Beyond Amount Authorized.**—As this liability also pertains to officers it is considered under the subsequent heading of "Liabilities Common to Directors and Officers."<sup>15</sup>

**§ 296. Id.: For Loans to Stockholders.**—As this liability exists also on the part of corporate officers it is considered in the section shortly following under the heading "Liabilities Common to Directors and Officers."<sup>16</sup>

**§ 297. Id.: For Transfer to Officers, Directors or Stockholders of Property of Corporation Not Paying Due Obligations.**—As this liability rests also upon officers of a corporation it is discussed under the heading which later follows of "Liabilities Common to Directors and Officers."<sup>17</sup>

**§ 298. Id.: For Omitting to Disclose Service on Himself of Injunction Against Corporation.**—As this liability is enjoyed

<sup>10</sup> *Lilienthal v. Betz*, 185 N. Y. 153, 77 N. E. 1002 (1906). Action held not justified by C. C. P. §§ 1781, 1782, but irrespective thereof (see now Gen. Corp. L. §§ 90, 91).

<sup>11</sup> *Owen v. Smith*, 31 Barb. 641 (1860); 1 R. L. 248; 1 R. S. 600, §§ 9, 10.

<sup>12</sup> *DeMartini v. McCaldin*, 101 Misc. 304, 167 N. Y. Supp. 596 (1917).

<sup>13</sup> *Drew v. Longwell*, 81 Hun, 144, 30 N. Y. Supp. 733 (1894).

<sup>14</sup> § 347, *infra*.

<sup>15</sup> § 348, *infra*.

<sup>16</sup> § 349, *infra*.

<sup>17</sup> § 350, *infra*.

equally by directors, officers and agents it is appropriately discussed under the later heading of "Liabilities Common to Directors, Officers and Agents."<sup>18</sup>

**§ 299. Id.: For Fraudulent Issue of Stocks and Bonds.**—As the liability for fraudulent issue of stocks and bonds is suffered alike by directors, officers and agents, it is considered in a later heading of "Liabilities Common to Directors, Officers and Agents."<sup>19</sup>

**§ 300. Id.: For Political Contributions.**—As this liability is also placed upon officers and agents it is considered in a subsequent section under the heading "Liabilities Common to Directors, Officers and Agents."<sup>19a</sup>

**§ 301. Id.: With Regard to Corporate Books; For Omission of, or Making False Entry In.**—As this liability is put equally upon directors, officers and agents, it is discussed under a later heading of "Liabilities Common to Directors, Officers and Agents."<sup>20</sup>

**§ 302. Id.: For Refusal or Neglect to Make Entries in and Allow Inspection of Stock Books.**—As this liability is put equally upon directors, officers and agents, it is considered under a later heading of "Liabilities Common to Directors, Officers and Agents."<sup>1</sup>

**§ 303. Id.: With Regard to Making Certificates, Reports, Statements and Notices; For Refusal or Neglect to Make Report or Statement.**—As this liability is common with directors, officers and agents it is treated under the heading hereafter entitled "Liabilities Common to Directors, Officers and Agents."<sup>2</sup> The statutes, and cases construing them, imposing (before their repeal) liabilities upon directors for making annual reports for the corporations will be found in an extensive note to the three hundred and forty-fifth section of this book.

**§ 304. Id.: For Falsity of or Omission in Statement of Corporate Affairs.**—As this liability is put upon officers and agents as well as directors it is discussed under a title, which comes

<sup>18</sup> § 378, *infra*.

<sup>19</sup> § 379, *infra*.

<sup>19a</sup> § 377, *infra*.

<sup>20</sup> § 380, *infra*.

<sup>1</sup> § 381, *infra*.

For a note on the question of sufficiency of demand and refusal to sustain remedy on right of stockholder to inspect corporate books, see 45 L.R.A. 446.

<sup>2</sup> § 382, *infra*.

As to duty of purchaser of corporate stock to verify statements made as to financial condition, see note in 14 L.R.A.(N.S.) 1176.

As to duty of director toward one from whom he purchases stock, see note in L.R.A.1916B, 708.

later, of "Liabilities Common to Directors, Officers and Agents."<sup>3</sup>

**§ 305. Id.: For Failure or False Certificate of Payment of Capital Stock.**—As this liability is common to officers and directors it is discussed in a later section under the heading "Liabilities Common to Directors and Officers."<sup>4</sup>

**§ 306. Id.: To One Becoming Creditor or Stockholder on Faith of False Representation In.**—As this liability is also imposed upon officers it is discussed in a subsequent section under the heading of "Liabilities Common to Directors and Officers."<sup>5</sup>

**§ 307. Id.: For Misconduct and Mismanagement.**—As this subject affects others than directors it is subsequently discussed.<sup>6</sup>

**§ 308. Officers: Election or Appointment, In General.**—Every corporation as such has power, though not specified in the law under which it is incorporated, to appoint such officers as its business shall require.<sup>7</sup> No by-law adopted by the board of directors regulating the election of officers is valid unless published for at least once a week for two successive weeks in a newspaper in the county where the election is to be held, and at least thirty days before such election.<sup>8</sup> The directors of a stock corporation may appoint from their number a president, and (not necessarily from their number) may appoint a secretary, treasurer and other officers, agents and employees, who respectively have such powers and must perform such duties in the management of the property and affairs of the corporation, subject to the control of the directors, as may be prescribed by them or in the by-laws.<sup>9</sup> "Who shall act as officers of a corporation is and must be determined by the directors."<sup>10</sup> If in addition to nominations printed on a ballot for secretary of a corporation others may be inserted on the day of election, and another nomination

<sup>3</sup> § 383, *infra*.

False statements in reports required by statute to be made to public officer as basis of action by individuals at common law for deceit against directors personally is discussed in a note in 6 L.R.A.(N.S.) 325.

<sup>4</sup> § 351, *infra*.

<sup>5</sup> § 352, *infra*.

<sup>6</sup> § 353 *et seq.*, *infra*.

On the question of inherent jurisdiction of equity, independently of statute, at the instance of stock-

holder, to appoint a receiver to wind up a corporation because of mismanagement or fraud of its officers, see notes in 39 L.R.A.(N.S.) 1032, L.R.A.1915A, 606.

<sup>7</sup> Gen. Corp. L. § 11 (L. 1909, c. 28).

<sup>8</sup> Gen. Corp. L. § 11 (L. 1909, c. 28).

<sup>9</sup> St. Corp. L. § 30 (L. 1909, c. 61).

<sup>10</sup> *Abbott v. Harbeson Textile Co.*, 162 A. D. 405, 147 N. Y. Supp. 1031 (1914).

is then presented, and if the meeting then decide, as directed to do by the by-laws, that the new nominee's name be written after those printed on the ballots before the vote should be taken, and some members neglect to make the insertion, but most do and scratch out the new name or the printed names according as they want to vote for one candidate or another, but two ballots appear with the old and new candidate's name all on and neither erased, those ballots should not be counted as there is no presumption that the man whose name was written in by hand was the one intended to be voted for.<sup>11</sup>

§ 309. **Id.: Compelling Election.**—Mandamus lies to compel an election of the officers of a private corporation if a proper case is made.<sup>12</sup> Mandamus to compel an election of corporate officers lies in the court's discretion, but not its *arbitrary* discretion; and while it will not be granted if the omission to hold an election was accidental, it will be when the neglect has continued for a number of years, as such neglect is equivalent to a refusal.<sup>13</sup>

§ 310. **Id.: Tenure of Office, Trying Out and Proving Title to Office.**—The Attorney-General may maintain an action upon either his own information or the complaint of a private person against a person who usurps, intrudes into or unlawfully holds or exercises within the State an office in a domestic corporation.<sup>14</sup> In such an action the Attorney-General, besides stating the cause of action in the complaint, may in his discretion set forth therein the name of the person rightfully entitled to the office and the facts showing his right thereto, and obtain an order from the court or judge to arrest the defendant upon proof by affidavit that the defendant by means of his usurpation or intrusion has received fees or emoluments belonging to the office.<sup>15</sup> The statute hereinafter quoted, provides that the portion of the Code of Civil Procedure governing arrest applies in general to the order of arrest and the proceedings thereon; that judgment in the action may determine the right of the defendant and relator or the defendant alone; that the action is triable as of right by a jury; that on rendition of judgment for the relator he may execute his office after taking oath and giving bond, and receive the books and papers from the defendant; that relator

<sup>11</sup> People *ex rel.* Thorn v. Pangburn, 3 A. D. 456, 38 N. Y. Supp. 248 (1896), *aff'd* 157 N. Y. 719.

<sup>12</sup> People *ex rel.* Walker v. Board of Governors of Albany Hospital, 61 Barb. 397 (1871).

<sup>13</sup> People *ex rel.* Walker v. Board of Governors of Albany Hospital, 61 Barb. 397 (1871).

<sup>14</sup> C. C. P. § 1948.

<sup>15</sup> C. C. P. § 1949.

may recover his damages from defendant for the latter's usurpation of office; that any number of persons claiming title to the same office may be sued in one action by the Attorney-General; that a temporary injunction against defendant may be had in certain cases and a final one in others; that the plea of incrimination will not avail a witness and that final judgment may oust the defendant and subject him to costs and a fine.<sup>16</sup>

An action may be brought by the Attorney-General in behalf of the People of the State against one or more managers or other officers of a corporation to procure a judgment to suspend them from exercising their office, when it appears that they have abused their trust; or to remove them from office, upon proof or conviction of misconduct, and directing a new election to be held by the body or board duly authorized to hold the same, in order to supply the vacancy created by the removal, or, when there is no such body or board or when all the members thereof are removed, to direct the removal to be reported to the Governor, who may, with the advice and consent of the Senate, fill the vacancies.<sup>17</sup> An injunction order suspending from office or restraining from the performance of his duties a trustee, director or other officer of a corporation can be granted only by the court upon notice of the application therefor to the trustee, director or other officer enjoined; and if such an injunction is made otherwise, it is void.<sup>18</sup> A trustee, director or other officer of a corporation cannot be suspended or removed from office by a court or judge otherwise than by the final judgment of a competent court, in an action brought by the Attorney-General as prescribed by statute.<sup>19</sup>

As this subject of title to office arises more frequently with regard to directors than officers and has already been treated in that regard, reference is made to the section in which such treatment is found.<sup>20</sup>

<sup>16</sup> C. C. P. §§ 1949-1956, both inclusive.

<sup>17</sup> Gen. Corp. L. §§ 90 and 91 (L. 1909, c. 28).

<sup>18</sup> Gen. Corp. L. § 305 (L. 1909, c. 28). This statute applies not only to a domestic corporation, but to a foreign corporation which does business within the state or has within the state an agency, business, fiscal or for the transfer of its stock, see Gen. Corp. L. § 308.

<sup>19</sup> Gen. Corp. L. § 307 (L. 1909, c. 28.) The statute referred to is § 90, Gen. Corp. L. The statute referred to in the text applies not only to a domestic corporation, but to a foreign corporation which does business within New York, or has within New York an agency, business, fiscal or for the transfer of its stock. See Gen. Corp. L. § 308.

<sup>20</sup> § 276, *supra*.

**§ 311. Id.: Holding Over, Removal and Resignation.**—The directors may remove at pleasure any president, secretary, treasurer or other officer, agent or employee of a corporation appointed by them.<sup>1</sup> “. . . where officers of a corporation are elected annually or for a definite term, they continue in office until others are elected in their place.”<sup>2</sup> There is nothing in the statute authorizing an action by the Attorney-General to remove corporate trustees, directors, managers or other officers on proof of misconduct “to warrant the doctrine that a man who is at the same time a director and an executive officer of a corporation may, notwithstanding grave misconduct in one capacity, still insist that he is entitled to remain in partial control of the company in his other capacity.”<sup>3</sup> A corporate officer’s resignation duly tendered and delivered is complete; and its validity is not dependent upon its acceptance by the directors or upon the election of his successor.<sup>4</sup> As a general rule the officers and directors of a corporation may resign at any time, and the validity of their resignations does not depend upon their formal acceptance; but, independently of statute, they cannot all simultaneously resign for the purpose of enabling one of their number to go into court and say that the corporation is without officers to preserve its assets, and so to have a receiver appointed; and a statute authorizing the appointment by a court of a receiver for a corporation in an action by a stockholder to preserve its assets when it has no officer empowered to hold them does not apply when such simultaneous resignations are the basis for its invocation.<sup>5</sup>

**§ 312. Id.: Salaries, In General.**—“. . . the rule has become quite well settled that an officer of a corporation is not entitled to receive compensation, in the absence of an agreement securing it, for his services performed in the legitimate discharge of the duties of his office. While, if other

<sup>1</sup> St. Corp. L. § 30 (L. 1909, c. 61).

<sup>2</sup> Buell v. Baltimore & Ohio Southwestern R. R. Co., 39 A. D. 236, 57 N. Y. Supp. 111 (1899).

<sup>3</sup> People v. Lyon, 119 A. D. 361, 104 N. Y. Supp. 319 (1907); aff’d 189 N. Y. 544, 82 N. E. 1130; C. C. P. § 1781, now Gen. Corp. L. 590.

<sup>4</sup> Manhattan Co. v. Kaldenberg, 165 N. Y. 1, 58 N. E. 790 (1900).

<sup>5</sup> Zeltner v. Zeltner Brewing Co.,

174 N. Y. 247, 66 N. E. 810 (1903); C. C. P. § 1810, subd. 3.

On right of attorney-general or other representative of state to maintain suit or proceeding to remove officers of private corporation, see note in 18 L.R.A.(N.S.) 672.

On power of directors to remove their own appointee who is one of the class of officers to whom the management of the business is confided, see note in 23 L.R.A.(N.S.) 1293.

services are performed by the officer acting in another and different capacity than that of an officer, and it appears that the right to compensation is conceded, then he may recover compensation for those services, the same as though he held no office whatever under the corporation.”<sup>6</sup> An officer and director of a corporation may recover for services rendered the corporation outside the regular path of his duties; but the fact that its by-laws give him no salary does not absolve him from showing as a prerequisite to recovery that his services were beyond the range of his official duties as well as their character; nor need he show a specific resolution of employment by the board of directors.<sup>7</sup> One who is a director of a corporation and seeks to recover his salary as its president cannot recover upon *quantum meruit* or any implied contract, but is bound to show that the directors had assented to his right to compensation or had authorized the payment in some form.<sup>8</sup> It is permissible to conclude, from the facts that one claiming salary as a corporate officer was a stockholder, was interested as a banker in having the banking business of the company to do, and accepted the office and performed its duties without any express understanding that he should be compensated, that he accepted the office and performed its duties gratuitously.<sup>9</sup> A person, neither director nor stockholder of a corporation of which he is appointed secretary without any agreement, expressed or implied, as to compensation, is entitled to a reasonable compensation for his services, if not merely nominal but valuable; and that he rendered them during the hours of his employment by large stockholders in the company and made no claim for compensation therefor for a number of years does not preclude recovery thereof.<sup>10</sup> Salary to one acting as an officer of a corporation is provided as compensation for the services which he is expected to perform as such, and when, with his assent and by his co-operation, the company disposes of all its property and business, so that he has no further duty to perform or service to render as such officer, there is no basis in law or equity for a claim that his salary should continue, as any contract therefor must be deemed dissolved by the act and con-

<sup>6</sup> *Barril v. Calender Water-Proofing Co.*, 50 Hun, 257, 2 N. Y. Supp. 758 (1888).

<sup>7</sup> *Bagley v. Carthage, W. & S. H. R. R. Co.*, 165 N. Y. 179, 58 N. E. 895 (1900).

<sup>8</sup> *Farmers' L. & T. Co. v. Housa-*

*tonic R. R. Co.*, 152 N. Y. 251, 46 N. E. 504 (1897).

<sup>9</sup> *Mather v. Eureka Mower Co.*, 118 N. Y. 629, 23 N. E. 993 (1890).

<sup>10</sup> *Smith v. Long Is. R. R. Co.*, 102 N. Y. 190, 6 N. E. 397 (1886).

sent of the parties.<sup>11</sup> One who is director and secretary of a corporation and employed by its board of directors and directed by its president to do certain work he was under no duty as secretary or director to do is entitled to charge therefor.<sup>12</sup> One re-elected to the same corporate office which he has till then held "for the ensuing year" by resolution of the board of directors but without his salary being fixed is entitled to a salary on the same basis as before; but not to additional compensation originating in a former resolution of the directors by which payment thereof was left to the president's discretion.<sup>13</sup> ". . . a valid modification of a by-law of a corporation fixing the salary of its officer can be effected by an executed parol agreement between the company and the officer and . . . the conduct of the parties is evidence on the question of such agreement."<sup>14</sup> In order to support a claim by a vice-president of a corporation for services to it beyond his official duties it is insufficient to show that they were rendered by express direction of its president if its by-laws simply authorize the president to manage negotiations with other corporations either himself or through his corporation's proper subordinate officers, and make it the vice-president's duty to perform the president's duties in case of the latter's incapacity.<sup>15</sup> It may well be held that one cannot recover from a corporation for services rendered it as treasurer when he acted as such for a year without any claim for compensation, he was a stockholder and a member of a banking firm, his banking partner was a stockholder and promoter, the banking firm secured the corporation's account through such one being its treasurer, and no resolution or by-law gave him any salary though they did to other officers.<sup>16</sup> A raise of salaries all round to officers of a company, otherwise proper, is not invalidated because each officer involved agreed beforehand to vote the increase to every other one if the increase to him was voted in turn by them.<sup>17</sup> A court cannot

<sup>11</sup> Long Island Ferry Co. v. Tierbell, 48 N. Y. 427 (1871).

<sup>12</sup> Bogart v. New York & Long Island Railroad Co., 118 A. D. 50, 102 N. Y. Supp. 1093 (1907); aff'd 191 N. Y. 550, 85 N. E. 1106.

<sup>13</sup> Eicke v. Wittemann Co., 157 A. D. 412, 142 N. Y. Supp. 190 (1913).

<sup>14</sup> Bowler v. American Box Strap Co., 22 Misc. 335, 49 N. Y. Supp. 153 (1898).

<sup>15</sup> Bailey v. Buffalo Crosstown Ry.

Co., 14 Hun, 483 (1878). No offer was made to show the direction of the president was known to the board or that it was accompanied by any agreement to pay the vice-president for his services.

<sup>16</sup> Mather v. Eureka Mower Co., 44 Hun, 333 (1887); aff'd 118 N. Y. 629, 23 N. E. 993.

<sup>17</sup> McNab v. McNab & Harlin Mfg. Co., 62 Hun, 18, 16 N. Y. Supp. 448 (1891); aff'd 133 N. Y. 687, 31 N. E. 627.

fix what salaries shall be paid corporate officers, though it may review and disapprove salaries fixed by directors.<sup>18</sup> If resolutions of a board of directors of a corporation under which its president gets a salary are invalid, the corporation is entitled to recover the sum paid.<sup>19</sup> A judgment of a sister state invalidating a resolution of the board of directors of a corporation whereby a president gets a salary is binding in this state in an action in this state by the corporation to recover the salary.<sup>20</sup>

**§ 313. Id.: In Fraud of Creditors or Stockholders.**—Majority stockholders electing themselves directors and their officers cannot distribute surplus earnings to themselves as excessive salaries instead of as dividends if by so doing they break their trust duty as directors toward the stockholders; they will be allowed to retain a salary commensurate with the value of their official services, but no more; but the distinction is to be borne in mind that while a director, who is also an officer, drawing a salary as such, through his vote in part as director, is responsible for the excess salary paid, a director who is not an officer is not responsible for excess salary paid an officer, for the reason that in one case the relation to the company is fiduciary and in the other contractual.<sup>1</sup> Officers of a corporation will be restrained by the court from paying to themselves salaries in excess of those to which they are entitled if a minority stockholder shows the increase was made as a threat to compel him to sell some of his stock to one of the majority stockholders.<sup>2</sup> Payments by a corporation to an officer as salary when it is insolvent are void and must be returned by him, leaving him to receive a *pro rata* with other creditors of claims.<sup>3</sup> An amount paid by a corporation to one of its officers as salary after it had failed to pay rent due may be set aside by its receiver.<sup>4</sup>

<sup>18</sup> Fitchett v. Murphy, 46 A. D. 181, 61 N. Y. Supp. 182 (1899).

<sup>19</sup> Atlanta Hill Gold Mining & Milling Co. v. Andrews, 120 N. Y. 58, 23 N. E. 987 (1890).

<sup>20</sup> Atlanta Hill Gold Mining & Milling Co. v. Andrews, 120 N. Y. 58, 23 N. E. 987 (1890).

On right of officer *de jure* to salary for period during which *de facto* officer has acted and received pay, see notes in 19 L.R.A. 689; 16 L.R.A.(N.S.) 794; 24 L.R.A.(N.S.) 475.

<sup>1</sup> Carr v. Kimball, 153 A. D. 825, 139 N. Y. Supp. 253 (1912); *aff'd* 215 N. Y. 634, 109 N. E. 1068.

<sup>2</sup> Ziegler v. Hoagland, 52 Hun, 385, 5 N. Y. Supp. 305 (1889).

<sup>3</sup> Dwight v. Williams, 25 Misc. 667, 55 N. Y. Supp. 201 (1898).

<sup>4</sup> Montague v. Hotel Gotham Co., 149 A. D. 687, 133 N. Y. Supp. 954 (1912); St. Corp. L. § 66.

As to priority of claims against property in hands of receiver for services of officers, see note in 2 L.R.A.(N.S.) 1036, 1060.

**§ 314. Id.: On Removal or Resignation.**— One re-elected “ for the ensuing year ” to a corporate office which he had previously held at an annual salary, on adoption some months later of a directors’ resolution removing him from office is entitled only to compensation for the months he has served in his new term.<sup>5</sup> One employed as an officer of a corporation at an annual salary, payable monthly or quarterly, while a corporate by-law of the corporation is in effect that the officers hold their offices during the pleasure of the board and till appointment of their successors, is not subject to discharge only at the expiration of any year of service, but at any time, by due action of the board and election of a successor; and he has no right to recovery of the balance due at discharge for the balance of the year.<sup>6</sup> It seems there is no objection to an agreement by a corporation to pay one of its officers who has severed his relation with it an annual sum for his life if he do not engage in a business competing with its own.<sup>7</sup> An agreement by a corporation to pay a recently resigned officer a perpetual salary for life in consideration of past services is *ultra vires*.<sup>8</sup>

**§ 315. Id.: Bond Of.**— The directors may require any president, treasurer, secretary or other officer, agent or employee of a corporation appointed by them to give security for the faithful performance of his duties.<sup>9</sup> “ It is well settled that where an officer of a private corporation gives a bond conditioned for the faithful performance of his duties, and unlimited as to time, such bond is only for the term for which the officer had been elected at the time it was given, and that the sureties thereon are not liable for any breach of the condition happening after the expiration of the term, although the officer may be continued in office under the same or a new appointment or election, unless the bond has been renewed (*citations*), or filing a stipulation that the sureties shall be liable during any successive term of office to which the officer may be elected or appointed.”<sup>10</sup> A bond for a corporation’s

On effect of corporate dissolution on employment contracts of officers, see note in 69 L.R.A. 144.

<sup>5</sup> Eicke v. Wittemann Co., 157 A. D. 412, 142 N. Y. Supp. 190 (1913).

<sup>6</sup> Douglass v. Merchants’ Insurance Co., 118 N. Y. 484, 7 L.R.A. 822, 23 N. E. 806 (1890).

<sup>7</sup> Stover v. Gamewell Fire Alarm Telegraph Co., 164 A. D. 155, 149 N. Y. Supp. 650 (1914).

<sup>8</sup> Beers v. New York Life Insurance Co., 66 Hun, 75, 20 N. Y. Supp. 788 (1892).

<sup>9</sup> St. Corp. L. § 30 (L. 1909, c. 61).

<sup>10</sup> Order der Herrmann’s Sohne v. Freifeld, 20 Misc. 276, 45 N. Y. Supp. 420 (1897). Bond recited that F. F. “ is about to act as grand treasurer of the above-named O. der U. S.” and if discharged duties

treasurer "during his continuance in office" does not cover defaults of his occurring after the expiration of the term for which he was elected, even though he acted as such after the expiration of his elective term.<sup>11</sup>

**§ 316. Id.: Personal Profit and Advantage, In General.—**

The rule that an agreement made by an officer of a corporation with himself by which he derives a benefit is voidable at its option, irrespective of whether or not the agreement is fair to it, is subject to the exception that if creditors are not involved the stockholders may with full knowledge of all the facts ratify the agreement so as to estop the corporation from claiming it to be invalid.<sup>12</sup> Not only an officer of a corporation making a contract in which it is interested whereby he individually obtains a secret profit, but all the directors failing to prevent the wrong and actively participating in it, may be made in equity to account for their misconduct and to restore to the corporation the entire sum which they diverted.<sup>13</sup> "Where in disregard of his duty an officer makes purchases or enters into contracts whereby he acquires a personal advantage, the profits thus obtained belong not to him but to the corporation;" and he is accountable therefor to it.<sup>14</sup> Officers of a corporation cannot buy in its stock at a large discount for their individual account and then supply the subscribers for shares, who had paid for them at par, with a part of their shares, and make the corporation their debtor for the shares so supplied at their par value.<sup>15</sup> An officer of a corporation may lend it money at six per cent. but not at any greater rate of interest.<sup>16</sup> One who while vice-president of a corporation asked its bookkeeper, who also performed the duties of secretary and assistant treasurer, for a copy of his account on its books, cannot hold it thereon as on an account stated.<sup>17</sup> When the facts tend to show acquiescence by a corporation in the assertion by its wrongdoing officer of a right to act for it in doing a thing for his personal benefit, the wholesome rule

"then this obligation to be void, otherwise to remain in full force and effect."

<sup>11</sup> *Ulster Co. Sav. Inst. v. Osterlander*, 163 N. Y. 430, 57 N. E. 627 (1900).

<sup>12</sup> *Goss & Co. v. Goss*, No. 2, 147 A. D. 698, 132 N. Y. Supp. 76 (1911); *aff'd* 207 N. Y. 742, 101 N. E. 1099.

<sup>13</sup> *Asphalt Construction Co. v. Bouker*, 150 A. D. 691, 135 N. Y.

Supp. 714 (1912); *aff'd* 210 N. Y. 643, 105 N. E. 1098.

<sup>14</sup> *Rickert v. White*, 54 Misc. 114, 105 N. Y. Supp. 653 (1907).

<sup>15</sup> *East New York & Jamaica R. Co. v. Elmore*, 5 Hun, 214 (1875).

<sup>16</sup> *Tilton v. Gaus*, 90 Misc. 84, 152 N. Y. Supp. 981 (1915); *aff'd* 168 A. D. 910, 152 N. Y. Supp. 1146.

<sup>17</sup> *Harvey v. West-Side Elevated R. Co.*, 13 Hun, 392 (1878).

charging those dealing with a corporate officer under such circumstances with the necessity of inquiring into his authority should not preclude leaving the jury to pass on the question of authority.<sup>18</sup> One taking in payment of a debt from an individual the cheque of a corporation signed by him as an officer which is not itself indebted to the individual's creditor is put upon inquiry to ascertain if the corporation's funds are being lawfully used.<sup>19</sup> An officer of a corporation holding its bonds to raise money for corporate purposes who pledges them as collateral security for an individual loan becomes a naked wrongdoer without title, even though he own all but two shares of the corporate stock, and the bank making the loan participates in an unauthorized diversion of the corporate property.<sup>20</sup> "One who receives from an officer of a corporation its money or property in payment of his personal debt, does so at his peril; and if the person receiving the same knows — or facts are presented which, if acted upon, would disclose — that such officer was thereby misappropriating the funds of the corporation, he is liable to it for the amount so received."<sup>1</sup> When it is shown that a note is signed by two officers of a corporation in its name to the order of one of them individually, a brother of the latter cannot recover thereon when it is shown that it was issued to the payee without consideration and the plaintiff paid for the note precisely the amount loaned by his brother to the corporation and ten per cent. less than its face value, as plaintiff was put on inquiry when he found his brother was negotiating the note for his personal benefit; and the fact that another corporate officer joined in the note does not relieve him from making inquiry.<sup>2</sup> The power of corporate officers to sign and endorse

<sup>18</sup> *Hanover National Bank v. American Dock Co.*, 75 Hun, 55, 26 N. Y. Supp. 1055 (1894); *aff'd* 148 N. Y. 612, 43 N. E. 72.

<sup>19</sup> *Rochester & Charlotte Turnpike Road Co. v. Paviour*, 164 N. Y. 281, 52 L.R.A.: 790, 58 N. E. 114 (1900). The cheques were given to pay premiums of policies issued on buildings in New Mexico in the individual's name. The payee had never had dealings with the corporation and its name showed its kind of business did not include owning buildings in New Mexico.

<sup>20</sup> *Buffalo L., T. & S. D. Co. v. Medina Gas Co.*, 162 N. Y. 67, 56

N. E. 505 (1900). A resolution authorizing the company to borrow to pay its existing indebtedness and for its other lawful purposes was spread on the face of the mortgage.

<sup>1</sup> *Lanning v. Trust Co. of America*, 137 A. D. 722, 122 N. Y. Supp. 485 (1910). The creditor knew the capital stock of M. Co. was \$100,000, it had little or no surplus and the debtor was president of M. Co., yet took M. Co.'s cheque for \$35,048.77 — though signed by another of its officers than the debtor — and applied it to the debt.

<sup>2</sup> *Newman v. Newman*, 160 A. D. 331, 145 N. Y. Supp. 325 (1914).

commercial paper in the name of their corporation for various uses is hereinafter fully discussed.<sup>3</sup>

**§ 317. Id.: Of President.**—"The president of a corporation, in the absence of bad faith, has the right to take obligations or security from his corporation for an actual indebtedness to himself."<sup>4</sup> An individual who has bought goods from a corporation under an established custom that he should at the end of certain established periods be refunded a sum sufficient to make the amount paid by him no more than the amount paid by any other customer of the company for like goods for a like period may continue to deal with the company in the same way after he becomes its president, so long as he deals with it openly and fairly; but once he has adjusted his account with it for a certain period he cannot later claim overpayment; nor can he claim he did not know of such overpayment because he left the adjustment to an employee distinctly his own.<sup>5</sup> When contracts are made between two corporations under such circumstances that they result greatly to the advantage of one and its president individually, who negotiated them, and are grossly inequitable and unconscionable as to the other, in which such president was director, chairman of its executive committee and influential generally, the contracts may be repudiated at the option of such other, and if the repudiation be accompanied by its offer to place the first corporation in the same position in which it was before the making of such contracts, they cease to be valid and are unenforceable.<sup>6</sup> A note given in the name of a corporation by its president to pay an indebtedness of the president individually and his wife contracted before the organization of the corporation and evidenced by their note will bind the corporation if he promised prior to incorporation that

<sup>3</sup> See § 325, *et seq.*, *infra*.

On validity of contract to pay an officer of a railroad company for his own benefit conditioned on specific location of road or a depot, see notes in 6 L.R.A.(N.S.) 524; 25 L.R.A.(N.S.) 967.

<sup>4</sup> First National Bank v. Commercial Travelers' Assn., 108 A. D. 78, 95 N. Y. Supp. 454 (1905); *aff'd* 185 N. Y. 275, 78 N. E. 1103.

<sup>5</sup> Consolidated Fruit Jar Co. v. Weisner, 103 A. D. 453, 93 N. Y. Supp. 128 (1905).

<sup>6</sup> Globe Woolen Co. v. Utica Gas & Electric Co., 151 A. D. 184, 136

N. Y. Supp. 24 (1912). "The right of the corporation to avoid such dealings does not depend upon the bad faith of the director. But the acts of the director, in violation of this rule, cannot be avoided, in the absence of proof of his bad faith, without restoring to him what the corporation has received. . . . Nor is it important that plaintiff's president in the transaction in question represented the defendant silently, that he did not openly advocate or vote for the adoption of the contracts."

the corporation would assume the debt and was in fact the corporation and was entrusted with its entire business and its management in every detail.<sup>7</sup> One advancing money to another individually upon the faith of a warehouse receipt signed by the latter as president of a corporation cannot claim the rights of a *bona fide* holder but is considered to have notice that a corporate officer is using his official position for his personal benefit.<sup>8</sup> An innocent *bona fide* holder of a corporate note issued by its president for his own personal benefit but under apparent if not actual authority from the corporation so to do may hold the corporation liable on it.<sup>9</sup> "While a presumption arises that a check signed by a corporation is issued in connection with its business and only to be used therefor, this presumption may be overcome, except as against creditors, by proof of a course of conduct between the corporation and its president, showing an authorization by the corporation of the use of its checks for payment of personal debts by its president."<sup>10</sup> A bank receiving, with full notice that they were fraudulently drawn *ultra vires* the corporation, cheques of a corporation signed by its president and payable to the president's order as an individual, is liable to the corporation not only for the principal thereof but for interest thereon from their date.<sup>11</sup> If a corporate president have no authority to endorse its cheques, a bank is chargeable with notice that indorsements of corporate cheques by him are in his handwriting and is bound at its peril to inquire into his authority to endorse and deposit them to his individual account.<sup>12</sup> If cheques to a corporation's order are endorsed by its president in its name, deposited by him with a bank to his individual credit, the proceeds paid out on his cheques — all without corporate authority and without any representation by the corporation to the bank misleading the latter as to the president's authority — the bank is liable to the corporation for the amount of the cheques either in conversion or for money had and received, irrespective of the bank's good faith.<sup>13</sup> The power of the president of a corporation to sign

<sup>7</sup> *Quee Drug Co. v. Plant*, 55 A. D. 87, 67 N. Y. Supp. 10 (1900).

<sup>8</sup> *Bank of N. Y. v. American Dock & Trust Co.*, 70 Hun, 152, 24 N. Y. Supp. 406 (1893); *aff'd* 143 N. Y. 559, 38 N. E. 713.

<sup>9</sup> *Schreger v. Bailey & Co.*, 97 A. D. 185, 89 N. Y. Supp. 870 (1904).

<sup>10</sup> *Ehrlich, Inc., v. Levine*, 83 Misc. 136, 144 N. Y. Supp. 818 (1913).

<sup>11</sup> *Reynolds Elevator Co. v. Merchants' National Bank*, 55 A. D. 1, 67 N. Y. Supp. 397 (1900).

<sup>12</sup> *Moch Co. v. Security Bank*, 176 A. D. 842, 163 N. Y. Supp. 277 (1917).

<sup>13</sup> *Moch Co. v. Security Bank*, 176 A. D. 842, 163 N. Y. Supp. 277 (1917).

and endorse commercial paper of his corporation for various purposes is hereinafter fully discussed.<sup>14</sup>

**§ 318. Id.: Of Treasurer.**—A bank receiving corporate stock as security for a loan to its treasurer as an individual is not charged with his knowledge that he had no authority to pledge the stock, and will get good title thereto if it had no notice of the infirmity in its pledgor's title and the pledgor had become possessed thereof lawfully.<sup>15</sup> The power of a corporation's treasurer to sign and endorse its commercial paper for various uses is hereinafter discussed.<sup>16</sup>

**§ 319. Id.: Powers and Duties, In General, Of All Officers.**—The president, treasurer and other officers, agents and employees of a corporation have such powers and must perform such duties in the management of the property and affairs of the corporation as may be prescribed by them or in the by-laws.<sup>17</sup> “Officers of a corporation are *special* and not *general agents*; consequently they have no power to bind the corporation except within the limits prescribed by the charter and by-laws.”<sup>18</sup> “The presumption is that acts which an officer of a corporation usually and customarily performs in behalf of the company are authorized by the directors; and the authority to act in a class of cases may be conferred by a single resolution, as well as by a distinct resolution for each case.”<sup>19</sup> An injunction to restrain corporate officers from acting as such granted in violation of law is not validated or effectuated by a motion by the defendants to dissolve it for irregularity, particularly if obtained in a stockholder's representative action to collect a debt due the corporation in which the complaint shows no application to or refusal by the corporation to itself bring the suit.<sup>20</sup> There is no duty upon officers of a corporation to put in an answer in an action brought against it upon a debt which is confessedly due, even if such corporation should happen to be insolvent.<sup>1</sup>

**§ 320. Id.: Of President.**—Every corporation has power to make by-laws not inconsistent with any existing law prescribing the powers and duties of the president of the corporation.<sup>2</sup>

<sup>14</sup> See § 326, *infra*.

<sup>15</sup> *Brady v. Mount Morris Bank*, 65 A. D. 212, 73 N. Y. Supp. 532 (1901).

<sup>16</sup> See § 327, *infra*.

<sup>17</sup> St. Corp. L. § 30 (L. 1909, c. 61).

<sup>18</sup> *Adrianse v. Roome*, 52 Barb. 399 (1868).

<sup>19</sup> *Elwell v. Dodge*, 33 Barb. 336 (1861).

<sup>20</sup> *Wilkie v. Rochester & State Line Ry. Co.*, 12 Hun, 242 (1877); L. 1870, c. 151.

<sup>1</sup> *Ridgway v. Symons*, 4 A. D. 98, 38 N. Y. Supp. 895 (1896).

<sup>2</sup> St. Corp. L. § 30 (L. 1909, c. 61).

A president having full personal charge of the business which his corporation was organized to transact represents the corporation and *prima facie* has power to do any act which the directors could authorize or ratify.<sup>3</sup> "The general rule is that an agreement by an officer or agent of a corporation who assumes to act in its behalf can be enforced against the corporation where it has received the benefit of the agreement (*citations*). The president of a corporation has *prima facie* power to do any act which the board of directors could authorize or ratify."<sup>4</sup> The scope of the authority conferred by a corporation upon its president, though it may not appear in terms, may be implied from the power he was accustomed to exercise without the dissent of the company and with its acquiescence.<sup>5</sup> A president has power to direct one employed by a board of directors to do services within the line of the services which he was employed to perform.<sup>6</sup> An instrument executed by the president of a corporation and with its seal affixed, supplemented by his affidavit that he was such and was authorized by the directors to execute the instrument and affix the seal, is *prima facie* duly executed to bind the corporation; and this presumption of authority is not overcome by the testimony of but one director who acted as clerk of the board that the records contained no resolution giving the president authority to execute the instrument and did not know of the passage of such a resolution.<sup>7</sup> In the absence of evidence of want of authority in the president to represent and act for the corporation, a tender by a stockholder of a cheque for the amount of an assessment duly made on him, to the president at the office of the company during business hours, is properly made and the president's refusal to accept is the refusal of the corporation.<sup>8</sup>

§ 321. **Id.: Of Other Officers.**—Every corporation has power to make by-laws not inconsistent with any existing law pre-

<sup>3</sup> Oakes v. Cattaraugus Water Co., 143 N. Y. 430, 26 L.R.A. 544, 38 N. E. 461 (1894). The corporation had resolved to do certain work and put it in charge of its president and chief promoter who was on the ground directing the work and adopted a contract pertaining to the work made by himself before the corporation was legally created.

<sup>4</sup> Davies v. Harvey Steel Co., 6 A. D. 166, 39 N. Y. Supp. 791 (1896).

<sup>5</sup> Chambers v. Lancaster, 160 N. Y. 342, 54 N. E. 707 (1899).

<sup>6</sup> Bogart v. New York & Long Island Railroad Co., 118 A. D. 50, 102 N. Y. Supp. 1093 (1907); aff'd 191 N. Y. 550, 85 N. E. 1106.

<sup>7</sup> Mutual Life Insurance Co. v. Yates County National Bank, 35 A. D. 218, 54 N. Y. Supp. 743 (1898).

<sup>8</sup> Mitchell v. Vermont Copper Mining Co., 67 N. Y. 280 (1876).

scribing the powers and duties of the secretary of the corporation.<sup>9</sup> Every corporation has power to make by-laws not inconsistent with any existing law prescribing the powers and duties of the treasurer of the corporation.<sup>10</sup> Every corporation has power to make by-laws not inconsistent with any existing law prescribing the powers and duties of its officers.<sup>11</sup> A treasurer of a corporation is not one "having a general superintendence of its concerns" so as to permit him to sue a former treasurer who has gone from office without leaving with or turning over to the corporation moneys which belong to it, under the statute permitting an action against corporate officers, etc., to account for corporate funds they have acquired to be brought by such an one or a trustee, director, etc.<sup>12</sup>

**§ 322. Id.: To Contract, In General.**—The liability of a corporation for its officers' contracts in its behalf is later discussed.<sup>13</sup> " . . . persons dealing with the officers of a corporation, or with persons assuming to represent it, are chargeable with notice of the purpose of its creation and its powers and with the authority, actual or apparent, of its officers or agents with whom they deal; and when they seek to charge the corporation with liability upon a contract made apparently in its behalf, the burden is upon them to prove the authority of the person assuming to act as such officer or agent to so make it;" and this authority depends upon the particular facts in each case.<sup>14</sup> " . . . if the officer assuming to act for the corporation, in the making of a contract with a third person, is one whose office is attended with inherent general executive authority for the ordinary conduct

<sup>9</sup> St. Corp. L. § 30 (L. 1909, c. 61).

<sup>10</sup> St. Corp. L. § 30 (L. 1909, c. 61).

<sup>11</sup> St. Corp. L. § 30 (L. 1909, c. 61).

<sup>12</sup> *Loughlin v. Wocker*, 152 A. D. 466, 137 N. Y. Supp. 257 (1912); Gen. Corp. L. §§ 90, 91.

*Pollock v. Shultze*, 1 Hun, 320 (1874). There is no opinion, but only this head note: "The president and vice-president of the N. I. W., having full authority to employ such persons, as, in their judgment, were necessary in and about the business of the company, and the company having resolved to enter upon the business of manufac-

turing water meters, of the kind invented by one Van Duzen, *held*, that it was within the scope of their authority to secure a patent in the name of Van Duzen, of his invention, and, for this purpose, to employ plaintiff to advise and counsel the company in relation to the said meter, and to obtain a patent therefor, and that the corporation were liable for his services, rendered in pursuance of such employment."

As to when vice-president may exercise authority of president, see note in 14 L.R.A. 360.

<sup>13</sup> See §§ 434, 436 and 438, *infra*.

<sup>14</sup> *Wilson v. Kings Co. Elevated R. R. Co.*, 114 N. Y. 487, 21 N. E. 1015 (1889).

and management of the corporate business, and the contract is one within the power of the corporation to make, and the making of which could, therefore, be delegated to an officer or agent, the officer so assuming to act is clothed with apparent authority upon which such third person may rely in the absence of notice of limitations upon the officer's authority which are imposed by the by-laws or the proceedings of the board of directors; but if the officer, with a liability for whose act the corporation is sought to be charged, is one to whose office there is attached no inherent executive authority, then, and in that event, the third person dealing with the officer in an executive capacity is chargeable with notice of an apparent want of authority and so deals with the latter at his peril; and in such case, if the officer's authority to make the contract is disputed, it is incumbent upon such third person to establish the authority by proper evidence. If the by-laws, which are relied upon as evidence, impose certain limitations or restrictions upon the exercise of the authority, such limitations or restrictions may not be disregarded, but must be held to determine the extent of the authority."<sup>15</sup> " . . . when the directors permit its officers to hold themselves out as clothed with full power to manage all its affairs for a long time, and thus lead innocent persons to contract with them in the belief that they had such powers, they cannot be heard to repudiate such contracts by invoking a by-law which they themselves allowed to fall into desuetude."<sup>16</sup> A contract made by an officer of a corporation within the apparent scope of his powers raises such a presumption of his authority to act for it as to put on it the task of proving the contrary.<sup>17</sup> To show the authority of one who signs a contract for a corporation as its officer it is competent to prove he was in its offices, attending to its business and conversing with persons desiring to do business with it.<sup>18</sup> Persons signing a contract as a " building committee " and sealing it with their individual seals may nevertheless put liability therefor upon the corporation for the benefit of which it was made.<sup>19</sup> A guaranty by a corpora-

<sup>15</sup> *Parmelee v. Associated Physicians & Surgeons*, 9 Misc. 458, 30 N. Y. Supp. 250 (1894).

<sup>16</sup> *Parmelee v. Associated Physicians*, 11 Misc. 363, 32 N. Y. Supp. 149 (1895). The secretary and treasurer of a foreign corporation made alone a contract by the corporation, although its by-laws required a board resolution and the

president's signature besides the secretary's.

<sup>17</sup> *Dentz Lithographing Co. v. International Registry Co.*, 32 Misc. 687, 66 N. Y. Supp. 540 (1900).

<sup>18</sup> *Dentz Lithographing Co. v. International Registry Co.*, 32 Misc. 687, 66 N. Y. Supp. 540 (1900).

<sup>19</sup> *Haight v. Sahler*, 30 Barb. 218 (1859).

tion of a lease to its customer by a landlord, signed by its vice-president in its name, does not bind it unless it be proven either that the vice-president had power to bind it by such signature or that it had knowledge of such signing.<sup>20</sup>

§ 323. **Id.: Of President.**—A contract made by the president of a corporation in its name which it had power to authorize him to make or to ratify after he had made it is *prima facie* one which he had power to make for it and it must show it had not ratified it.<sup>1</sup> If a contract by a corporation is one which the board of directors or trustees has power to authorize its president to make, or to ratify after it is made, the burden is on it to show that a contract executed by its president was not authorized or ratified by its board.<sup>2</sup> “If the terms of a contract entered into in behalf of a corporation by its officers are extraordinary or unusual, such as are not ordinarily made by the president or other officer in the ordinary course of the transaction of the current business of the corporation, the party contracting with the officer is put upon inquiry as to his authority.”<sup>3</sup> Equity will not cancel an agreement by the president of a corporation made for it with a third person for commissions, determine the amount of commissions which should be paid and enjoin actions by such third person arising from such agreement, at the request of a stockholder, however fabulous the commissions may be, if the president had general management of the corporate property and business.<sup>4</sup> “*Prima facie*, the president of a \$10,000 corporation could not, without express authorization of the board of directors, bind the corporation by contracts relating to the erection on another’s land of a building to cost

<sup>20</sup> Aaronson v. David Mayer Brewing Co., 29 Misc. 289, 60 N. Y. Supp. 523 (1899).

On implied power of employee of corporation to employ physician to attend injured employee, see notes in 4 L.R.A.(N.S.) 58; 34 L.R.A.(N.S.) 351, L.R.A.1915C, 809.

Time for which contracts of employment may be made on behalf of corporation by its officers, directors and agents, see notes in 49 L.R.A. 471; 17 L.R.A.(N.S.) 177.

<sup>1</sup> Norman v. Loomis-Manning Filter Co., 123 A. D. 739, 108 N. Y. Supp. 261 (1908).

<sup>2</sup> Patterson v. Robinson, 116 N. Y. 193, 22 N. E. 372 (1889).

<sup>3</sup> Stanley v. Franco-American Ferment Co., 97 Misc. 401, 161 N. Y. Supp. 365 (1916). “A contract to pay interest at the rate of one hundred and thirty per cent per annum, . . . the sums borrowed amounting to as much as \$30,000, cannot be held to be within the apparent scope of the authority of the president or general manager, having charge of the current business.”

<sup>4</sup> Aetna Explosives Co., Inc., v. Bassick, 176 A. D. 577, 163 N. Y. Supp. 917 (1917). The by-laws gave the president general management. There was no resolution of its board authorizing the commission agreement.

many times the amount of the total capital stock of the corporation, which building, in the absence of an express agreement to the contrary, would become the property of the owner of the land.”<sup>5</sup> It is proper to permit a corporation sued on a contract, signed simply with the name of its president with the word “President” added, and without any corporate seal or corporate acknowledgment, to put in evidence its by-laws prohibiting any contract to be executed as its act save on its being first passed by its board of trustees.<sup>6</sup> Acceptance by a letter signed by the individual name only of the president of a corporation of a contract contained in a letter addressed to the corporation does not make the contract the personal obligation of the individual who is president; but if the contract is silent as to terms of payment, a promise by such individual to pay the indebtedness to be incurred by the corporation under the contract is not within the Statute of Frauds and entitles the plaintiff to go to trial on his claim against the individual.<sup>7</sup> If one send a proposition to sell goods in a letter addressed to another as president of a corporation, and three days later receive a written order for such goods signed by the president and secretary of such corporation individually, not mentioning the corporate name and referring to the place where the goods are to be put as “my factory,” one may nevertheless hold the corporation for the price if such two officers and a third person were the corporation’s three directors, discussed the sale and authorized the president to buy; and this in spite of a provision in its certificate of incorporation that such a contract should not bind the corporation unless ratified by its board, as such ratification is assumed as the result of its assent before the purchase.<sup>8</sup> A resolution by the directors of a corporation which authorizes him in its behalf to make a contract with a contractor to build a railway for it upon such terms in cash, stock or bonds of the company as in his judgment may be best for the most immediate construction of the road and to the company’s interests, is sufficient to empower him to bind the company by a contract to build a whole railway and to extend the time for its completion and pay in advance therefor in the company’s stock and bonds.<sup>9</sup> It is

<sup>5</sup> *Thompson v. Marseillaise French Baking Co.*, 85 Misc. 392, 147 N. Y. Supp. 402 (1914).

<sup>6</sup> *De Bost v. Albert Palmer Co.*, 36 Hun, 386 (1885).

<sup>7</sup> *Richardson Press v. Vandergrift*, 165 A. D. 180, 150 N. Y.

Supp. 238 (1914). The letter of acceptance was placed in the first person plural.

<sup>8</sup> *Globe Gas Light Co. v. Metropolitan Investment Co.*, 10 A. D. 342, 41 N. Y. Supp. 797 (1896).

<sup>9</sup> *Hudson River & Washington*

sufficient to warrant a finding that a contract by the president of a corporation retaining an attorney at a retainer payable in its stock was approved or acquiesced in by its board of directors to show that the president had authority to contract, that the corporation customarily had retained attorneys through its president with the board's approval, that they had been paid in stock, and that the attorney in question had rendered the services required by the contract with the knowledge of the directors.<sup>10</sup> A president of a corporation has general authority to employ counsel for it; and even if such employment be *ultra vires* the counsel may recover for his services if the contract is executed and the corporation has received the benefits therefrom.<sup>11</sup> A corporation's president has power to cause an attorney to appear for it on an application for appointment of receivers to wind it up and distribute its assets in this State, notwithstanding by arrangement he was by convention limited in his usual functions.<sup>12</sup>

**§ 324. Id.: Of Secretary and Treasurer.**—"There can be no implied authority upon the part of the secretary and treasurer of a corporation to execute an apparently *ultra vires* contract;" and the burden is on one seeking to put in evidence, as a contract of the corporation, an instrument signed by its secretary and treasurer, which goes outside the widest scope of its business as prescribed by its certificate of incorporation, to prove special authority in him to execute it.<sup>13</sup> Acceptance and payment by a corporation of an individual's services for one week is sufficient *prima facie* evidence of its treasurer's authority to bind it by an alleged contract of employment of the individual made by him orally for the corporation.<sup>14</sup> There is no implied authority in the treasurer of a corporation to make an agreement binding upon it to issue treasury stock as a commission to any one bringing about the purchase

County Midland R. R. Co. v. Hanfield, 36 A. D. 605, 55 N. Y. Supp. 877 (1899).

<sup>10</sup> Merrill v. Consumers' Coal Co., 114 N. Y. 216, 21 N. E. 155 (1889).

<sup>11</sup> Potter v. New York Infant Asylum, 44 Hun, 367 (1887).

<sup>12</sup> Moe v. McNally Co., 138 A. D. 480, 123 N. Y. Supp. 71 (1910).

On powers of president as to contracts generally, see note in 14 L.R.A. 356.

For authorities discussing the

right of a president of a corporation to contract, see note in 14 L.R.A. 356.

As to presumption that a contract with a corporation is within the authority of its president, see note in 7 L.R.A. (N.S.) 376.

<sup>13</sup> Broadway Theatre Co. v. Des-sau Co., 45 A. D. 475, 61 N. Y. Supp. 335 (1899).

<sup>14</sup> Latimer v. Wonderland Amusement Co., 161 A. D. 554, 146 N. Y. Supp. 779 (1914).

of its treasury stock.<sup>15</sup> Evidence may be given by parol that one signing a contract in his personal name, adding the words "Secretary and Treasurer," was such officers of a corporation and that he was authorized to enter into such a contract at a meeting of its officers; and the fact that its minutes show no such meeting or authorization, and that its by-laws provided that the corporation's contracts must be executed in a certain way to bind it, will not prevent its being held on the contract.<sup>16</sup>

**§ 325. Id.: Commercial Paper, To Sign and Endorse, In General.**—"Where a negotiable promissory note has been given for the payment of a debt contracted by a corporation, and the language of the promise does not disclose the corporate obligation, and the signatures to the paper are in the names of individuals, a holder, taking *bona fide* and without notice of the circumstances of its making, is entitled to hold the note as the personal undertaking of its signers, notwithstanding they affix to their names the title of an office. Such an affix will be regarded as descriptive of the persons and not of the character of the liability. Unless the promise purports to be by the corporation, it is that of the persons who subscribe to it; and the fact of adding to their names an abbreviation of some official title has no legal signification as qualifying their obligation, and imposes no obligation upon the corporation whose officers they may be. . . . Unless the language creates, or fairly implies, the undertaking of the corporation, if the purpose is equivocal, the obligation is that of its apparent makers."<sup>17</sup> A note signed by an individual with that word following his name which indicates his official position in a corporation is on its face his individual obligation and not of the corporation, and by suing the corporation the holder is not prevented from suing the individual.<sup>18</sup> In law a note signed by individual names, though with the word "President" after one and "Treasurer" after another and with the name of a corporation in the margin, is the individual note of each signer.<sup>19</sup> A note signed by the names of two individuals, after one of which is written the word "President"

<sup>15</sup> Hill v. Troegerlith Title Co., 168 A. D. 639, 154 N. Y. Supp. 535 (1915).

<sup>16</sup> Morrill v. C. T. Segar Manufacturing Co., 32 Hun, 543 (1884).

<sup>17</sup> Casco National Bank v. Clark, 139 N. Y. 307, 34 N. E. 908 (1893).

The language of the note was "we promise to pay;" and the name of B. C. N. Y.—24

the company, "Ridgewood Ice Co.," was printed on the margin.

<sup>18</sup> First National Bank v. Wallis, 84 Hun, 376, 32 N. Y. Supp. 382 (1895); aff'd 156 N. Y. 663, 50 N. E. 1117.

<sup>19</sup> First National Bank v. Wallis, 150 N. Y. 455, 44 N. E. 1038 (1896).

and after the other the word "Secretary," followed by the words "of the \_\_\_\_\_" (a corporation), and which makes no reference in its body to the corporation as a promisor, is upon its face the individual note of the two makers; but, if an action thereon is brought between the original parties thereto, it is competent for the makers "to show that there was a corporation by that name; that the makers were its president and secretary; that the corporation had the benefit of the consideration; that the makers were authorized to make the note as the act of the corporation, and intended to do so, and that the payee "at the time he received the note knew these facts, and took the note with the understanding that the corporation was its maker."<sup>20</sup> A corporate officer cannot generally bind the corporation on a promissory note without special authority by specific directors' resolution or corporate by-laws; and if there be no corporate seal on the note simple production of the note does not make out a *prima facie* case against the corporation, but power of the officer to execute the note must be shown.<sup>1</sup> It is doubtful if the mere fact that a note is signed by the president and treasurer of a corporation is sufficient to establish its validity, as "there should be proof of the specific authority to affix the corporate name to the note as its obligation, or that the corporation received the avails of the note or that there was a course of business which justified the bank in accepting it as the obligation of the corporation;" and "even if proof of the execution of the note by the president and treasurer were sufficient to bind the corporation on a note for its benefit, such rule does not obtain if the note was in fact accommodation paper, and the bank knew of this defect."<sup>2</sup> In spite of a promissory note of a corporation not having been executed as prescribed by its by-laws, it is still a question of fact if its execution was authorized, when the officer signing it had signed other notes for its benefit, his act has not been repudiated by its directors and it received the benefits of the note.<sup>3</sup> "Undoubtedly the general rule is that one who receives from an officer of a corporation the notes or securities of such corporation, in payment of, or as security for, a personal debt of such officer, does so at his own peril. *Prima facie* the act is unlawful, and, unless actually authorized, the purchaser will be deemed to have taken them with notice of

<sup>20</sup> Bush v. Gilmore, 45 A. D. 89, 61 N. Y. Supp. 682 (1899).

<sup>1</sup> Westchester Mortgage Co. v. McIntire, Inc., 171 A. D. 518, 157 N. Y. Supp. 725 (1916).

<sup>2</sup> National Bank of Newport v. Snyder Mfg. Co., 107 A. D. 95, 94 N. Y. Supp. 982 (1905).

<sup>3</sup> Grant v. Treadwell Co., 82 Hun, 591, 31 N. Y. Supp. 702 (1894).

the rights of the corporation.”<sup>4</sup> When paper of a corporation signed by an officer and payable to himself is presented by him it bears upon its face sufficient notice of his incapacity to issue it; but when such paper is payable to another and reaches an innocent holder, even though through the endorsement of the endorsee of such other which is a firm of which the officer is a member, the innocent holder is protected.<sup>5</sup> One receiving a corporate cheque in payment of an individual’s liability is not to be held liable for the amount thereof to the corporation when the rights of none of its creditors are involved if inquiry made by him (though he made none) of the corporation would have disclosed that it, as a custom known and consented to by its officers, accepted deposits from such individual from his outside personal transactions and credited his personal account with it with moneys owing him by it against which it issued its corporate cheques for his personal use.<sup>6</sup> A bank or an endorsee is not required to inquire into the correctness of a cheque of a corporation, regular on its face and signed by a duly authorized officer to his own order and endorsed by him, save when there are circumstances indicating the cheque is being used for the officer’s personal benefit, or the bank participates in the diversion to its own benefit.<sup>7</sup> “The rule may be stated, generally, to be that where a director or an officer has knowledge of material facts respecting a proposed transaction, which his relations to it, as representing the bank, have given him, then, as it becomes his official duty to communicate that knowledge to the bank, he will be presumed to have done so, and his knowledge will then be imputed to that bank. But no such duty can be deemed to have existed . . . where [the officers] . . . have made and delivered a promissory note, purporting to be their individual promise.”<sup>8</sup> When a corporate cheque is presented to satisfy the individual indebtedness of the officer who drew it to his corporate creditor which has representatives on

<sup>4</sup> *Wilson v. Metropolitan Elevated Ry. Co.*, 120 N. Y. 145, 24 N. E. 384 (1890).

<sup>5</sup> *Cheever v. Pittsburgh, S. & L. E. R. R. Co.*, 150 N. Y. 59, 34 L.R.A. 69, 44 N. E. 701 (1896).

<sup>6</sup> *Martindale v. De Kay*, 101 Misc. 728, 166 N. Y. Supp. 405 (1917).

<sup>7</sup> *Thornton v. Netherlands-American Steam Navigation Co.*, 178 A. D. 604, 165 N. Y. Supp. 682 (1917).

<sup>8</sup> *Caseo National Bank v. Clark*,

139 N. Y. 307, 34 N. E. 908 (1893). By a note with “Ridgewood Ice Co.” printed in the margin, “John Clark, Prest.” and “E. H. Close, Treas.” agreed to pay “Clark & Chaplin Ice Co.”, of which Winslow was a director, as well as of the bank discounting the note. Winslow’s knowledge that the note was a corporate note, or otherwise, was held not imputable to the discounting bank.

the board of directors of the former corporation, the latter corporation is put upon inquiry, and, while it is entitled to the benefit of facts which would have dispelled the presumption of illegal use and which would have been discovered on reasonable inquiry, yet it is also responsible for such unfavorable facts as reasonable inquiry would have discovered.<sup>9</sup>

§ 326. **Id.: Of President.**—When the nature of a corporation's business is such as to justify the giving of negotiable paper and the making of such instruments is an incident to the business it carries on, the authority of its president, general manager and financial agent to sign such paper need not be shown in order to bind the corporation to paper signed by him alone for it, even though its by-laws require its secretary, too, to sign, if such by-laws be not known to the one dealing with the paper.<sup>10</sup> When a promissory note of a trading corporation is executed and delivered by its president in its name and is such a note as it might authorize or ratify, it is not necessary to show *prima facie* that the contract was in fact authorized by specific authority of the corporation but want of authority must be plead and proven as a defense.<sup>11</sup> “It being the usual custom of the company to transfer its notes by the mere indorsement of the president, such indorsement is all that is requisite to effect a transfer of the title, where the transfer itself is authorized by a resolution of the directors.”<sup>12</sup> The fact of the uniform practice of a corporation to have its notes to raise money for its business endorsed by its president for the purpose of passing title justifies an inference of competent authority for such a purpose in any certain case.<sup>13</sup> A corporation, despite a by-law requiring its treasurer and president or secretary to sign its notes, is bound by the notes signed by its president alone like others signed in the same way and the proceeds of which it used, even if the only authorization by its directors for the notes in question was by implication through their knowledge that he was the only person trying to raise money for the company and actually raising it in some way, and the entry

<sup>9</sup> Ward v. City Trust Co., 192 N. Y. 61, 84 N. E. 585 (1908).

On power of agents to indorse negotiable paper, see note in 27 L.R.A. 401.

On right of one who takes commercial paper of corporation in payment of note or as security for individual debt of officer, see note in 31 L.R.A.(N.S.) 169.

<sup>10</sup> Martin v. Niagara Falls Paper Mfg. Co., 122 N. Y. 165, 25 N. E. 303 (1890).

<sup>11</sup> Westchester Mortgage Co. v. McIntire, Inc., 174 A. D. 446, 161 N. Y. Supp. 390 (1916).

<sup>12</sup> Clark v. Titecomb, 42 Barb. 122 (1864).

<sup>13</sup> Marine Bank of N. Y. v. Clements, 31 N. Y. 33 (1865).

of the notes on the corporate books which were open to their inspection.<sup>14</sup> To hold a corporation on notes endorsed in its name by an individual it is not sufficient simply to show that such individual was its president, but acquiescence or ratification of his assumption of power to endorse by the directors, or proof of such a course of dealing by him and such negligence by them as would estop it from denying his authority, must be shown.<sup>15</sup> A promissory note for value executed by a corporation through its president but without the signature of the treasurer as required by its by-laws creates a legal obligation against it if not diverted from its original purpose, in the hands of a *bona fide* holder if the proceeds be received of the company.<sup>16</sup> "If the president should forge the name of the treasurer to a check and countersign it and put it in circulation and use the proceeds for his individual benefit, we apprehend it would not be doubted that this would be regarded as a certificate of the due execution of the check, so far as to render the company responsible to any person who innocently and in good faith became the holder of it."<sup>17</sup> When a note signed "James R. Wilson, Prest. T. M. Co.," is proven to have been signed by the company's president as such for its benefit and to have accrued to its benefit in that it received the proceeds and subsequently acknowledged its liability thereon, the note is the company's.<sup>18</sup> A draft signed "James R. Wilson, Prest. T. M. Co.," on its face directing that its acceptor "charge to motive power and account," will be held that of the corporation and not of the individual who signed it if the testimony shows it was in the power of the president to sign drafts for the company.<sup>19</sup> One signing a promissory note with the name of a corporation "by" himself as its president impliedly warrants his authority so to sign and if he signs without such authority becomes liable upon such warranty for the damages resulting from the breach.<sup>20</sup> A bill purporting on its face to be that of the individual who is president of a corporation, if shown by evidence to have been drawn for its debt by an agent authorized to

<sup>14</sup> *Grant v. Treadwell Co.*, 1 A. D. 367, 37 N. Y. Supp. 392 (1896).

<sup>15</sup> *National Bank v. Navassa Phosphate Co.*, 56 Hun, 136, 8 N. Y. Supp. 929 (1890).

<sup>16</sup> *Bigelow Co. v. Automatic Gas Co.*, 56 Misc. 389, 107 N. Y. Supp. 894 (1907).

<sup>17</sup> *Fifth Avenue Bank of N. Y. v. Forty-second St. & Grand St. Ferry*

*R. R. Co.*, 137 N. Y. 231, 19 L.R.A. 331, 33 N. E. 378 (1893). *Dictum*.

<sup>18</sup> *Thompson v. Tioga R. R. Co.*, 36 Barb. 79 (1861).

<sup>19</sup> *Olcott v. Tioga Rail Road Co.*, 40 Barb. 179 (1862); *aff'd* 27 N. Y. 546.

<sup>20</sup> *Miller v. Reynolds*, 92 Hun, 400, 32 N. Y. Supp. 660 (1895).

draw it, binds the corporation when, upon the whole instrument, it can be collected that such was the intention.<sup>1</sup>

**§ 327. Id.: Of Treasurer.**—The treasurer of a business corporation has no implied authority to make promissory notes in its name and one holding them and attempting to hold it must show either that the treasurer had authority or that a course of dealing implied his authority or that the corporation was estopped — through acceptance of the benefits of the note or otherwise — from denying such authority.<sup>2</sup> A plaintiff suing on note of a corporation made by its treasurer empowered by its by-laws simply to incur indebtedness in the regular course of business, to establish the corporation's liability on the note, must show either acquiescence or ratification by the directors of the power assumed by the treasurer or such a course of dealing by that officer and such negligence on the part of the directors as could estop the corporation from denying the treasurer's authority.<sup>3</sup> A corporation is bound by a note executed in its name by its treasurer on which a loan is made for its benefit if it consciously invested him with such powers as a sole manager of its affairs would have, and a by-law requiring another officer's countersignature to the corporation's notes will not affect its liability.<sup>4</sup> When one to whom a note is payable with the abbreviation "Treas." after his name, is in fact treasurer of a corporation to the knowledge of an endorsee, to whom he endorses it by signing his name and adding the word "Treasurer," and such endorsee receives it on account of a demand against the corporation, the treasurer is not individually liable.<sup>5</sup> A cheque in payment of salary alleged to be due the president of a corporation, signed by the treasurer or assistant treasurer and appearing on its face to be the corporation's cheque is evidence of the obligation of the corporation.<sup>6</sup>

**§ 328. Id.: Of Others.**—A note, given without authority, of the vice-president and secretary of a corporation in its name

<sup>1</sup> *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546 (1863).

On power of president or vice-president of corporation to make negotiable paper, see note in 14 L.R.A. 357.

<sup>2</sup> *Hubbard v. Syenite-Trap Rock Co.*, 178 A. D. 531, 156 N. Y. Supp. 486 (1917).

<sup>3</sup> *Bangs v. National Macaroni Co.*, 15 A. D. 522, 44 N. Y. Supp. 546 (1897).

<sup>4</sup> *Perry v. Council Bluffs Water-Works Co.*, 67 Hun, 456, 22 N. Y. Supp. 151 (1893); *aff'd* 143 N. Y. 637, 37 N. E. 826.

<sup>5</sup> *Babcock v. Beman*, 11 N. Y. 200 (1854).

<sup>6</sup> *Farmers' L. & T. Co. v. Housatonic R. R. Co.*, 152 N. Y. 251 (1897).

<sup>6</sup> *Farmers' L. & T. Co. v. Housatonic R. R. Co.*, 152 N. Y. 251 (1897).

and the benefits of which it did not receive is void.<sup>7</sup> Proof of endorsement of a note by the secretary of a corporation and of his authority to do so *prima facie* establishes the corporation's liability; and the burden of showing it to be *ultra vires* must then be pleaded and proven as an affirmative defense of the corporation.<sup>8</sup> A brokerage firm accepting a corporation's cheques signed by its manager to cover his individual account with the firm is liable for the amount thereof.<sup>9</sup>

**§ 329. Id.: Accommodation Paper, In General.**—When there is nothing on the face of a note to indicate that it is not business paper, an endorsement by the corporation payee by its proper officer in the usual form, though for accommodation of the borrower, binds the corporation as against one discounting it in good faith and in the usual course of business.<sup>10</sup> An officer of a corporation, high in rank, who agrees for it that if an individual will be party to a note it will not hold him thereon, as he will sign solely to enable it to make the loan to another corporation the note of which it cannot take because it has already made it one loan, has power to make such an agreement and the corporation is bound thereby, particularly if it sues on it, as this is a ratification by it of his authority.<sup>11</sup>

**§ 330. Id.: Of Secretary and Treasurer.**—It is essential for one claiming that a domestic manufacturing corporation is liable for an accommodation note made and endorsed by its treasurer because of its previous acts and conduct to show that he was influenced by and relied upon such acts and conduct in honoring the note.<sup>12</sup> A corporation organized to dress and manufacture stone is not bound by an accommodation endorsement by its secretary having only general authority to endorse notes and bills “in the prosecution of its business.”<sup>13</sup>

**§ 331. Id.: To Buy, Sell, Assign, Mortgage, Pledge and Lease, In General.**—When a corporate resolution directs the “proper officers” of a corporation to execute an assignment by it, it will be presumed, at least in favor of third persons,

<sup>7</sup> *Emmet v. Northern Bank of N. Y.*, 173 A. D. 840, 160 N. Y. Supp. 183 (1916); *aff'd* 221 N. Y. Mem. 26.

<sup>8</sup> *Kersch v. Pottier & Stymus Mfg. & Improvement Co.*, 82 A. D. 230, 81 N. Y. Supp. 782 (1903).

<sup>9</sup> *Huie v. Allen*, 87 Hun, 516, 34 N. Y. Supp. 577 (1895); *aff'd* 156 N. Y. 658, 50 N. E. 1118.

<sup>10</sup> *Banking Assn. v. White Lead Co.*, 35 N. Y. 505 (1866).

<sup>11</sup> *Simmons v. Thompson*, 29 A. D. 559, 51 N. Y. Supp. 1018 (1898).

<sup>12</sup> *Jacobus v. Jamestown Mantel Co.*, 211 N. Y. 154, 105 N. E. 210 (1914).

<sup>13</sup> *Central Bank v. Empire Stone Dressing Co.*, 26 Barb. 23 (1858).

that the president and secretary are such.<sup>14</sup> The president, or cashier, or other officer of a corporation has generally no power to mortgage, assign or dispose of its property, without the assent and authority of the directors.<sup>15</sup> A sale of corporate property by an officer of the corporation in the habit of making such sales, with the company's sanction though without power so to do under the company's by-laws, binds the corporation.<sup>16</sup>

**§ 332. Id.: By President.**— One in complete and absolute control of the affairs of a corporation of which he is president may make an agreement which will bind it to buy the goods it sells for twenty years exclusively from one source.<sup>17</sup> “ If the president of a corporation buys fittings for its place of business and they are placed therein and adapted thereto, and pass to its lessee, the principal's conduct indicates that its president acted presumptively within the limits of his powers, inasmuch as the appropriation of the objects of purchase shows approval thereof.”<sup>18</sup> The president of a membership corporation has no authority, by virtue merely of his office or resolutions empowering him to take charge of the corporation's fiscal affairs and to sign and execute all documents, to purchase real estate for the corporation, as by statute such a purchase can be authorized only by the concurring vote of a specified number or percentage of the corporation's directors.<sup>19</sup> Purchasers, for valuable consideration, without any notice of any defect in title, from one who is president of a corporation, of its property sold him, acquire good title notwithstanding his title might have been impeached by its creditors while such property remained in his hands because it was insolvent at the time of the sale to him, and had refused payment of its notes, and he was its president and took the property in discharge of its antecedent debt.<sup>20</sup> A sale of property of a corporation by its president when not empowered to do so by his position or vote of the directors to the knowledge of the purchaser, is of no effect, even though he applied the purchase price to the payment of its debts, if such application was without the directors' knowledge and

<sup>14</sup> *Carroll v. Cone*, 40 Barb. 220 (1862); *aff'd* 41 N. Y. 216.

<sup>15</sup> *Hoyt v. Thompson*, 5 N. Y. 320 (1851).

<sup>16</sup> *Phillips v. Campbell*, 43 N. Y. (4 Hand) 271 (1870).

<sup>17</sup> *Petrolia Mfg. Co. v. Jenkins*, 29 A. D. 403, 51 N. Y. Supp. 1028 (1898).

<sup>18</sup> *Pearson v. Liberty Avenue Theatre Co.*, 152 A. D. 771, 137 N. Y. Supp. 712 (1912).

<sup>19</sup> *Catholic Foreign Mission Soc. of America v. Oussani, The*, 215 N. Y. 1, 109 N. E. 80 (1915); *Memb. Corp. L.* § 13.

<sup>20</sup> *Heroy v. Kerr*, 41 N. Y. (2 Keyes) 582 (1866).

consent.<sup>1</sup> A corporate deed executed by its president without complying with the requirements of the resolution of the board authorizing the sale of the real estate conveyed thereby does not make the conveyance absolutely void but at best only voidable; and the purchaser in good faith thereof is safe, as against any claim by the corporation which has received the purchase price or any creditor subsequently obtaining judgment against it, from any lien attaching on the property.<sup>2</sup> A general assignment by a president of a corporation to himself as assignee pursuant to a resolution of its board of directors "that the company execute a general assignment", is not void, but only voidable at the election of the corporation or some one authorized to act for it.<sup>3</sup> An assignment by the president of a corporation of its assets for the benefit of creditors, not authorized by its board of directors, is void as against its creditors and stockholders.<sup>4</sup> A person taking a lease of premises used by a corporation is not to be held to have taken it for it, necessarily, simply because he is its president and majority stockholder and one of its directors.<sup>5</sup> A pledge of corporate property participated in by the corporation's president binds it, and the fact that the corporation was insolvent when the pledge was made does not entitle the person claiming to be owner of the property to the benefit of the statute inhibiting transfers by a corporation of its property while insolvent, unless it be shown that the transferee was a person to whom a transfer is forbidden, viz., an officer, director or stockholder, and that the pledge was made to secure a pre-existing debt.<sup>6</sup> An agreement by a corporation to give to one loaning it money a lien on its property enforceable on refusal by it to repay the advances, if made by its president and resulting in its obtaining money enabling it to do business, binds it although neither its directors nor stockholders by vote approve it.<sup>7</sup>

<sup>1</sup> Giebler Mfg. Co. v. Kranenberg, 102 A. D. 471, 92 N. Y. Supp. 843 (1905).

<sup>2</sup> White v. Sheppard, 41 A. D. 113, 58 N. Y. Supp. 563 (1899). The directors' resolution authorized the sale subject to a bond and mortgage which the grantee should agree to pay, and a deed signed by the president and attested by the secretary. The deed was not attested by the secretary and did not contain an assumption by the buyer of the bond and mortgage.

<sup>3</sup> Rogers v. Pell, 154 N. Y. 518, 49 N. E. 75 (1898).

<sup>4</sup> Schaefer v. Scott, 40 A. D. 438, 57 N. Y. Supp. 1035 (1899).

<sup>5</sup> Crooked Lake Navigation Co. v. Keuka Navigation Co., 37 Hun, 9 (1885).

<sup>6</sup> Wood v. Simpson, No. 1, 149 A. D. 471, 133 N. Y. Supp. 1069 (1912); St. Corp. L. § 66.

<sup>7</sup> Mathews v. Hardt, 79 A. D. 570, 80 N. Y. Supp. 462 (1903).

§ 333. **Id.: By Other Officers.**—An assignment under seal, signed by the vice-president and attested by the secretary, made by the corporation for its own benefit in instituting suit, under by-laws providing that its president or vice-president is authorized to sign its name and affix its seal to all contracts and conveyances by the company whenever necessary, is *prima facie* the corporate act, and no vote of the directors authorizing or approving it need be shown.<sup>8</sup> “. . . the secretary of a corporation has no implied authority to execute and deliver a lease on behalf of his corporation.”<sup>9</sup>

§ 334. **Id.: Actions and Service of Process On.**—The service of process in actions against corporations is generally discussed in the four hundred and forty-third section of this book. The verification of pleadings in corporate actions is generally discussed in the four hundred and forty-first section of this book. Process served on one as an officer of a corporation will not be set aside on proof that he was not elected to any office at an election held prior to the service, if he was such officer prior to such election, unless it be proven that new officers were elected.<sup>10</sup> Service of process on a person who has been president and a director in a corporation but who had resigned before the service (though no action had been taken on his resignation) is not sufficient to justify the entry of judgment against the corporation.<sup>11</sup> Service of process on one who had resigned as president of a corporation and whose successor had been elected is not binding on the corporation.<sup>12</sup> Service of process on the president *de facto* of a corporation concludes it.<sup>13</sup> Non-resident officers of a local corporation coming to the State to take part in bankruptcy proceedings of such corporation are exempt from service of process by the State courts, although merely notified in an order of reference to appear.<sup>14</sup> Service of process in actions against corporations is generally discussed in a succeeding section.<sup>15</sup>

<sup>8</sup> *Imbrie v. Schlicht Combustion Process Co.*, 130 A. D. 675, 115 N. Y. Supp. 333 (1909).

<sup>9</sup> *Fischer v. Motor Boat Club*, 61 Misc. 66, 113 N. Y. Supp. 56 (1908).

<sup>10</sup> *Fridenberg v. Lee Construction Co.*, 27 Misc. 651, 58 N. Y. Supp. 391 (1899).

<sup>11</sup> *Yorkville Bank v. Zeltner Brewing Co.*, 80 A. D. 578, 80 N. Y. Supp. 839 (1903); app. dism'd 178 N. Y. 572, 70 N. E. 1111.

<sup>12</sup> *Buchanan v. Prospect Park*

*Hotel Co.*, 14 Misc. 435, 35 N. Y. Supp. 712 (1895).

<sup>13</sup> *Stillman v. Associated Lace Makers' Co.*, 14 Misc. 503, 35 N. Y. Supp. 1071 (1895).

<sup>14</sup> *Powell v. Pangborn*, 161 A. D. 453, 145 N. Y. Supp. 1073 (1914).

<sup>15</sup> See § 443, *infra*.

As to what service is sufficient as basis of judgment *in personam* against corporation, see note in 50 L.R.A. 588.

On validity of statutes authoriz-

§ 335. **Id.: Liabilities, In General.**—"The relation of an officer of a corporation to it is fiduciary, and he must at all times act in good faith and unselfishly toward the corporation."<sup>16</sup> The fact that an individual who refuses to give up possession of chattels concededly belonging to another and left in the possession of a corporation is president of such corporation does not relieve him of personal liability for conversion.<sup>17</sup> ". . . where the president of a corporation, having knowledge and the management of its business affairs and knowing that it is largely indebted and probably insolvent, makes statements of its affairs false in fact for the purpose of obtaining credit on its behalf, he becomes personally liable for the consequences of the fraud he thus commits"; and it is immaterial to the right of the creditor to sue at once that the period of credit has not expired.<sup>18</sup> The individuals who are officers of a corporation are not immune from criminal liability for conspiring on the theory that they are but the many fingers of one corporate hand which, being single, cannot conspire.<sup>19</sup> A corporate officer ordered to produce the corporation's books on his examination before trial to refresh his recollection is guilty of a contempt of court if he refuse to produce them on the ground that they would tend to incriminate him.<sup>20</sup> An officer of two corporations involved in litigation in a foreign state is not compellable, in a proceeding instituted in this State under the statute permitting a commission to take testimony, to testify as to things in the corporate books not before the court to answer which would require an

ing constructive or substitute service on domestic corporation, see note in 4 L.R.A.(N.S.) 117.

Service of process on servant or agent of lease of railroad corporation, see note in 4 L.R.A.(N.S.) 272.

On admission or waiver of service by statutory agent of corporation appointed to receive service, see note in 2 L.R.A.(N.S.) 389.

Service of process after appointment of receiver, upon person designated by statute to receive service for corporation, see note in 47 L.R.A.(N.S.) 179.

Service of process on railroad or steamship company by delivery to station or ticket agent, see note in L.R.A.1916F, 453.

<sup>16</sup> Billings v. Shaw, 209 N. Y. 265, 103 N. E. 142 (1913).

<sup>17</sup> McCrea v. McClenahan, 131 A. D. 247, 115 N. Y. Supp. 720 (1909).

<sup>18</sup> Phillips v. Wortendyke, 31 Hun, 192 (1883).

<sup>19</sup> People v. Duke, 19 Misc. 292, 44 N. Y. Supp. 336 (1897). "A trading corporation is entitled to all the advantage it can secure under fair and free competition, but its officers and agents may become criminally liable if they confederate to secure a monopoly by threats and menaces directed against competitors to force and coerce them to relinquish the rights to the fullest enjoyment of which all are entitled."

<sup>20</sup> Pray v. Blanchard Co., 95 A. D. 423, 88 N. Y. Supp. 650 (1904); C. C. P. §§ 870-876.

outside examination, if he was not commanded so to do by the subpoena served upon him: he can only be required to testify to such facts as rest within his memory.<sup>1</sup> When an action is brought by a creditor of a corporation and the law makes its stockholders, trustees or other officers, or any of them, liable in any event or contingency for the payment of his debts, they may be made parties defendant by the original or by a supplemental complaint and their liability may be declared and enforced by the judgment in the action; or the plaintiff in the action may, instead of making them parties, maintain a separate action against them to procure a judgment declaring, apportioning and enforcing their liability; and in either kind of action the court must when it is necessary cause an account to be taken of the property and of the debts of the corporation and thereupon the defendant's liability must be apportioned accordingly, though if it affirmatively appears that the corporation is insolvent and has no property to satisfy its creditors the court may, without taking such an account, ascertain and determine the amount of each defendant's liability, and enforce the same accordingly.<sup>2</sup> If it appears that the property of the corporation and the sums collected or collectible from the stockholders upon their stock subscriptions are or will be insufficient to pay the debts of the corporation the court must ascertain the several sums for which the directors, trustees or other officers, or the stockholders of the corporation, being parties to the action, are liable; and must adjudge that the same be paid into court, to be applied, in such proportions and in such order as justice requires, to the payment of the debts of the corporation.<sup>3</sup>

**§ 336. Id.: For Political Contributions.**—The liability of officers for contributions for political purposes is shared by directors and agents and is therefore treated in a subsequent section under the heading "Liabilities Common to Directors, Officers and Agents."<sup>4</sup>

<sup>1</sup> Matter of Dittman, 65 A. D. 343, 72 N. Y. Supp. 886 (1901).

<sup>2</sup> Gen. Corp. L. §§ 109, 110, 111 (L. 1909, c. 28).

<sup>3</sup> Gen. Corp. L. § 114 (L. 1909, c. 28).

Authorities discussing the question of garnishment of an officer or agent of a corporation to secure a demand against the corporation, are collated in a note in 36 L.R.A. 561.

Does statutory liability of officers

of corporation include liability for torts, see note in 22 L.R.A.(N.S.) 256.

Personal liability of officers for torts or negligence of corporation, is discussed in a note in 28 L.R.A. 421.

Personal liability of directors for personal injuries resulting from tort, see notes in 39 L.R.A.(N.S.) 901, and L.R.A.1915C, 874.

<sup>4</sup> § 377, *infra*.

**§ 337. Id.: For Omitting to Disclose Service on Himself of Injunction Against Corporation.**—This liability is shared by directors, officers and agents and is therefore discussed in a subsequent section found under the heading “Liabilities Common to Directors, Officers and Agents.”<sup>5</sup>

**§ 338. Id.: For Fraudulent Issue of Stocks and Bonds.**—As this liability is imposed equally upon directors, officers and agents it is appropriately discussed in a subsequent section found under the heading “Liabilities Common to Directors, Officers and Agents.”<sup>6</sup>

**§ 339 Id.: For Fraud in Procuring Corporate Organization.**—As this liability is imposed not only upon officers but upon agents it is properly considered in a subsequent section under the heading “Liabilities Common to Officers and Agents.”<sup>7</sup>

**§ 340. Id.: On Corporate Dissolution.**—The dissolution of a corporation for any cause does not take away or impair any remedy against its officers for any liabilities incurred previous to its dissolution.<sup>8</sup>

**§ 341. Id.: With Regard to Corporate Books, For Omission of, or Making False Entry in Books.**—This liability is suffered not only by officers but also by directors and agents and consequently is discussed in a subsequent section under the heading “Liabilities Common to Directors, Officers and Agents.”<sup>9</sup>

**§ 342. Id.: For Refusal or Neglect to Make Entries in, or Allow Inspection of, Stock Books.**—This liability is shared by officers with directors and agents and is treated in a later section under the heading “Liabilities Common to Directors, Officers and Agents.”<sup>10</sup>

**§ 343. Id.: For Refusal or Neglect to Make Report or Statement.**—This liability is shared by officers with directors and agents and is discussed in a later section under the heading “Liabilities Common to Directors, Officers and Agents.”<sup>11</sup> The officers of a corporation required to keep a corporate book by law and declared guilty by law of a misdemeanor if they did not, have the burden of proving their claim, on an application for production of such book, that they could not do so.<sup>12</sup>

<sup>5</sup> § 378, *infra*.

<sup>6</sup> § 379, *infra*.

<sup>7</sup> § 376, *infra*.

<sup>8</sup> Bus. Corp. L. § 5 (L. 1909, c. 12).

<sup>9</sup> § 380, *infra*.

False statements in reports required to be filed with public officer as fraud which will sustain an action against corporation, see note in 35 L.R.A. 858.

<sup>10</sup> § 381, *infra*.

On right of corporation, corporate officer, or other person having custody of its books and papers to refuse to produce them on the ground that they may tend to incriminate, see note in 30 L.R.A.(N.S.) 725.

<sup>11</sup> § 382, *infra*.

<sup>12</sup> Fenlon v. Dempsey, 50 Hun, 131, 2 N. Y. Supp. 763 (1888); C. C. P. §§ 872, 873.

**§ 344. Id.: For Falsity of, or Omission In, Statement of Corporate Affairs.**—This liability is shared by officers with directors and agents and is considered in a subsequent section under the heading “Liabilities Common to Directors, Officers and Agents.”<sup>13</sup>

**§ 345. Id.: For Failure to Make and File Annual Report.**—The statute requires every stock corporation except moneyed and railroad corporations to file with the Secretary of State annually a report made by its president or a vice-president or treasurer or a secretary.<sup>14</sup> Any president, vice-president, treasurer or secretary of a stock corporation (except moneyed and railroad corporations) who refuses or neglects, after its annual report to the Secretary of State has not been filed within the time limited by statute, to make and to file such report within ten days after written request so to do has been made by a creditor or stockholder of the corporation, forfeits to the People of the State the sum of fifty dollars for every day he so neglects or refuses.<sup>15</sup>

<sup>13</sup> § 383, *infra*.

On liability of corporate officers for false statements in reports required by statute to be made to public officers, see note in 6 L.R.A. (N.S.) 872.

<sup>14</sup> St. Corp. L. § 34 (L. 1909, c. 61).

<sup>15</sup> St. Corp. L. § 34 (L. 1909, c. 61). The present statute is section 34 of the Stock Corporation Law; which is the same section of chapter 61, Laws of 1909 (Consolidated Laws); which is the same as the same section of chapter 415, Laws of 1905; which is the same as section 30 of chapter 354, Laws of 1901, except that the law of 1901 did not contain the subdivision found in the later laws which is numbered “4”; which is the same as section 30 of chapter 384, Laws of 1897, except that the last paragraph read in the 1897 law: “Such report shall be signed by a majority of its directors, and verified by the oath of the president or vice-president and treasurer or secretary, and filed in the office of the secretary of state, and in the office of the county clerk of the county within this state where its principal business office

may be located. If such report is not so made and filed, all the directors of the corporation shall jointly and severally be personally liable for all the debts of the corporation then existing, and for all contracted before such report shall be made. No director shall be liable for the failure to make and file such report if he shall file with the secretary of state, within thirty days after the first day of February, or the first day of May, as the case may be, a verified certificate, stating that he has endeavored to have such report made and filed, but that the officers or a majority of the directors have refused and neglected to make and file the same, and shall append to such certificate a report containing the items required to be stated in such annual report, so far as they are within his knowledge or are obtainable from sources of information open to him, and verified by him to be true to the best of his knowledge, information and belief.” The 1897 law is the same as chapter 688, Laws of 1892, section 30, except that the latter only says the report shall be filed “in the office of the county clerk of the county”

and does not then add the three words "within this state" which the 1897 law does add. The laws of 1875, chapter 611, section 18, differed materially from the succeeding laws above mentioned and read in whole: "Every such corporation shall annually, within twenty days after the first day of January, make a report, which shall state the amount of capital, and the proportion actually paid in, the amount and, in general terms, the nature of its existing assets and debts, and the names of its then stockholders, and the dividends if any declared since the last report, which report shall be signed by the president and a majority of the directors, and shall be verified by oath of the president or secretary of such corporation, and filed in the office of the Secretary of State, and if any such corporation shall fail so to do, all the directors thereof shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be contracted before such report shall be made. Provided that if any director shall file with the Secretary of State, at any time within thirty days after such first of January, a certificate, verified by the oath of such director, stating that he has endeavored to have such report made and signed as aforesaid, but that the officers or a majority of the directors have refused or neglected to make and file such report; and shall append to such certificate a report containing the items aforesaid, so far as they are within his knowledge or are obtainable from sources of information open to him, which report shall be verified by him as being true to the best of his knowledge, information and belief, in that case such director shall not be liable on account of such failure to make and file such report upon making proof of such facts in any action which may be commenced against him, upon the trial thereof. Whenever, under this section, a judgment shall

be recovered against a director, severally, all the directors of the corporation shall contribute a ratable share of the amount paid by such director on such judgment, and such director shall have a right of action against his co-directors, jointly or severally, to recover from them the proportion of the amount so paid on such judgment." The Law of 1875 (the same year), but chapter 510, section 12, read in whole: "Every such company shall within twenty days from the first day of January, if a year from the time of the filing of the certificate of incorporation shall then have expired, and, if so long a time shall not have expired, then within twenty days from the first day of January in each year after the expiration of a year from the time of filing such certificate, make a report which shall be published in some newspaper published in the town, city or village, or if there be no newspaper published in said town, city or village, then in some newspaper published nearest the place where the business of the company is carried on, which shall state the amount of capital, and of the proportion actually paid in, and the amount of its existing debts, which report shall be signed by the president and a majority of the trustees, and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on, and if any of the companies shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made; but whenever under this section a judgment shall be recovered against a trustee severally, all the trustees of the company shall contribute a ratable share of the amount paid by such trustee on such judgment, and such trustee shall have a right of action against

his co-trustees, jointly or severally, to recover from them their proportion of the amount so paid on such judgment; provided that nothing in this act contained shall affect any action now pending." The Laws of 1848, chapter 40, section 12, read in whole: "Every such company shall annually, within twenty days from the first day of January, make a report which shall be published in some newspaper, published in the town, city or village, or if there be no newspaper published in said town, city or village, then in some newspaper published nearest the place where the business of said company is carried on, which shall state the amount of capital, and of the proportion actually paid in, and the amount of its existing debts, which report shall be signed by the president and a majority of the trustees; and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on; and if any of said companies shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company, then existing, and for all that shall be contracted before such report shall be made."

The decisions under these various statutes are collected in this note because among their great number are found principles of construction of the expressions in the old statutes which may be helpful in determining the meaning of analogous expressions in other statutes:

Decisions under L. 1901, c. 354, § 1.

A law requiring directors of a corporation to file an annual report is not binding after the corporation has abandoned its business and franchise and is entirely without property or means of continuing or resuming its business and has no intention of so doing. *Watertown National Bank v. Bagley*, 134 A. D. 831, 119 N. Y. Supp. 592 (1909);

St. Corp. L. § 30, now § 34; L. 1897, c. 384, and L. 1901, c. 354, § 1. The last-named act is identical with the present statute except that the subdivision numbered "4" in the existing law is not found in the 1901 law. "To absolve directors from the liability imposed upon them by statute for failure to file an annual report of their corporation "it must appear that the corporation is insolvent, that it has ceased to exist by dissolution or as a matter of fact from a total abandonment of its business and its being put in such a position that it does not intend to and cannot continue or resume operations under its franchise." *Horrocks Desk Co. v. Fangel*, 71 A. D. 313, 75 N. Y. Supp. 967 (1902); St. Corp. L. § 30, now § 34. The corporation had made a general assignment for creditors' benefit. Held, insufficient to dispense with filing of report.

Decisions under L. 1897, c. 384, § 30.

The statute making directors of a corporation liable for its debts if it does not file an annual report is penal in its nature and must be construed strictly in their favor; and a corporate creditor cannot sue them thereunder "unless three things co-exist: The default in making the report; the fact that at the time of such default the defendants were trustees or directors, and a debt due from the company." *Hoboken Beef Co. v. Hand*, 104 A. D. 390, 93 N. Y. Supp. 834 (1905); St. Corp. L. § 30 (L. 1897, c. 384), requiring a corporation "doing business without the United States" to file its report "before the first day of May." The beef company did business within the U. S. A. and in England, Canada and Germany. The defendants resigned as directors April 21, 1900. The indebtedness arose from a sale in August, 1899, and the suit was for defendants' corporation's failure to make a report on or after January 1, 1900. Held, not liable. The conditions upon which the liability of directors for failure of their corpo-

ration to file an annual report depend under the statute are in the nature of provisos and need not be alleged and proved in a complaint to establish that liability, but must be averred and proved in the answer. *Boynton v. Sprague*, 100 A. D. 443, 91 N. Y. Supp. 839 (1905); *aff'd* 183 N. Y. 505, 76 N. E. 1089; St. Corp. L. § 30 (L. 1897, c. 384). "While a technical dissolution of the company is not necessary to relieve directors from the consequences of not filing an annual report, the abandonment of the business and its franchises must be certain and final, and such as to put the company beyond the possibility of resuming business." *Stevenson v. Cowan*, 84 A. D. 135, 82 N. Y. Supp. 78 (1903); St. Corp. L. § 30 (L. 1897, c. 384). It had no receipts and did no business because a municipality undertook a same business, but it sued the municipality. A liability of a corporation on bonds becomes due and the cause of action against its directors (because no corporate annual report has been filed) for such liability matures when the principal of the bonds becomes due, and a director elected within three years therefrom is liable to the penalty for failure to file such report as the debt on the bonds was "then existing", within the statute's meaning, when he was elected. *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26 (1900); St. Corp. L. § 30. The statute making the directors of a corporation not filing an annual report jointly and severally personally liable for the corporate debts then existing declares the legislative policy in regard to the various laws embraced in the revision made by it; is but a continuation of prior laws; include within its meaning mortgage debts, and is remedial and should be liberally construed if necessary. *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26 (1900); St. Corp. L. § 30. One purchasing of a director who was in default in filing the annual report required of

a corporation is not liable to the penalty of personal liability for the corporation's debts put by statute on such a defaulting director and is not precluded (as would be his transferrer) from holding his transferrer's co-directors to such personal liability. *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26 (1900); St. Corp. L. § 30. "The statute makes every director jointly and severally liable for the penalty incurred by the default of the board of which he is a member, in filing the report. The liability is for debts 'then existing'—that is, whether due or not, . . . successive defaults by the same directors do not renew as to them the penalty already incurred, but when a new member comes into the board a new default makes him jointly and severally liable for the debts 'then existing'—that is, he becomes jointly liable with the old members of the new defaulting board as they were already liable because of their previous default, the new member is jointly associated with them in that liability, so long as their several liability is concurrent." *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26 (1900); St. Corp. L. § 30. ". . . the directors who have failed to file a report are liable for a judgment entered for costs against the corporation, precisely to the same extent as they would be for any debt if the judgment is entered while their default continues." *Matty v. Simpson*, 64 A. D. 1, 71 N. Y. Supp. 731 (1901). The statute making directors omitting to file corporate annual reports personally liable for all the corporation's debts "then existing, and for all contracted before such report shall be made" means "that the liability for default in publishing the required annual report is limited to debts contracted while the director continues in office, and does not include a debt incurred after he ceases to be a director, although the default continues." *Sinclair v. Fuller*, 158

N. Y. 607, 53 N. E. 510 (1899); St. Corp. L. § 30.

Decisions under L. 1892, c. 688, § 30.

In seeking to hold a director liable for a deposit made with his corporation on the grounds that its annual reports had not been filed and that it failed, the action must be brought within the period limited by statute for the recovery of a penalty computing the time when the cause of action arose from the moment it received the deposit, if in doing so it exceeded its corporate powers and engaged in a business not authorized for it, irrespective of any demand for the deposit. *Chapman v. Lynch*, 156 N. Y. 551, 51 N. E. 275 (1898); C. C. P. § 383, subd. 3. Corporate directors may validly waive the statute of limitations applicable to an action against them under the statute to enforce their personal liability for debts of a corporation for which they failed to file an annual report. *Costello v. Outterson*, 112 A. D. 680, 98 N. Y. Supp. 880 (1906); St. Corp. L. § 30 (L. 1892, c. 688); repealed — see L. 1897, c. 384; L. 1901, c. 354; L. 1905, c. 415. Persons who have, after election, accepted the office of corporate directors, managed the corporate affairs and assumed the duties and emoluments of their office may not raise the point that they are not directors because they held no stock, in order to escape a statutory liability imposed on directors. *Donnelly v. Pancoast*, 15 A. D. 323, 44 N. Y. Supp. 104 (1897). [Failure to file annual report.] A corporation has not ceased to do or abandoned its business, so as to absolve, from his statutory liability for failure to file a report, a director, "so long as the trustees [directors] and the stockholders still had the right and the power to rescind former action and continue the business." *Brown v. Clark*, 81 Hun, 267, 30 N. Y. Supp. 801 (1894). A majority of acting directors, who have tried unavailingly to fill up the membership

of their board and officers, comply with a statute requiring a majority of the corporation's directors to sign a report verified by the oath of the president or vice-president and treasurer or secretary, if they sign the report and have it verified by the only officer of the corporation authorized to do so. *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, 58 N. E. 790 (1900); L. 1892, c. 2, § 30. "The recovery of a judgment and the return of an execution are not conditions precedent to the right of a creditor to recover from the directors of the corporation for failing to file reports." *Rose v. Chadwick*, 9 A. D. 311, 41 N. Y. Supp. 190 (1896); St. Corp. L. § 30 (L. 1892, c. 688). "The right to maintain the action [to hold a director individually liable for the debt of his corporation by reason of failure to file an annual report] depends upon the existence of three facts: the failure to make and file a report, a debt against the corporation and the directorship of the defendant at the time of the default." *Union National Bank v. Scott*, 53 A. D. 65, 66 N. Y. Supp. 145 (1900); St. Corp. L. § 30 (L. 1892, c. 688). ". . . in order to charge a director with a debt of the corporation, three elements must exist, directorship, failure to make and file the report, and a debt against the corporation existing at some period of the directorship and at the time of the failure . . . the debt must be one existing in fact, and . . . a director cannot be held liable for unliquidated damages arising out of a breach of contract made with the corporation . . ." *Hill v. Weidinger*, 110 A. D. 683, 97 N. Y. Supp. 473 (1906); St. Corp. L. § 30 (L. 1892, c. 688). The statute penalizing directors if the annual report of their corporation be not filed in the office of the clerk of the county where its principal business office is located refers to the business office of the corporation in fact and not to one existing because of a pre-

sumption arising in consequence of the insertion of a locality in its certificate of incorporation. *Uptegrove v. Schwarzwaelder*, 46 A. D. 20, 61 N. Y. Supp. 623 (1899); *aff'd* 167 N. Y. 587, 60 N. E. 1121; *St. Corp. L. § 30* (L. 1892, c. 688). The stockholders voted to change its principal business office to another county where, as a fact, its principal business office was thereafter located. The filing of the report in such county was held sufficient. An officer of a corporation making a false statement in an annual report becomes liable for the damages which naturally flow from or are caused by the falsehood, and the measure thereof is that applicable in cases of fraud and breach of warranty. *Parsons v. Johnson*, 28 A. D. 1, 50 N. Y. Supp. 780 (1898); *St. Corp. L. § 30* (L. 1892, c. 688). The value at which land was taken for stock was held properly considered in determining the value of the stock. One suing a director for a corporate debt and alleging a cause of action arising out of a breach of his assignor's contract with the corporation for which the director was not liable cannot prove and recover on a wholly different cause of action, against objection and without amendment of his pleadings; and the pleadings cannot be conformed to the proof even though the defendant was probably not misled. *Hill v. Weidinger*, 110 A. D. 683, 97 N. Y. Supp. 473 (1906); *St. Corp. L. § 30* (L. 1892, c. 688).

Decisions under L. 1875, c. 611, § 18.

"It is essential to the liability of directors, by virtue of the statute, for default in filing a report, that their occupancy of that relation, such default and the debt of the corporation have existence at the same point of time. . . . It is only necessary for the protection of directors against liability upon a particular debt against their corporation that the requisite report be filed prior to the existence of such

debt." *Gold v. Clyne*, 134 N. Y. 262, 17 L.R.A. 767, 31 N. E. 980 (1892); L. 1875, c. 611, § 18. The corporation's existence ended under its charter before completion of the contract under which the indebtedness arose. "The indebtedness of the corporation was dependent upon performance of the contract by the plaintiff, and did not until then arise."

Decisions under L. 1875, c. 510, § 12.

A judgment for costs in an action by a corporation rendered against it is a debt which can be enforced against one of its trustees by reason of the company's failure to make, publish and file its capital stock report. *Allen v. Clark*, 108 N. Y. 269, 15 N. E. 387 (1888); *Gen. Mfg. Act, L. 1848, c. 40, § 12*, as amend'd L. 1875, c. 510. "The word 'indebtedness' in this section clearly includes, not only every debt voluntarily contracted by the company, but every debt of every nature however contracted or arising." While the statutory liability imposed on trustees or directors for their corporation's debts when the corporation fails to file its annual report is highly penal and not to be extended by construction, so that one seeking to hold them under it must allege and prove affirmatively every fact and circumstance upon which his right to recover depends, yet all the terms of the statute must be substantially complied with to relieve the directors from liability, e. g., the report if made within the statutory period may be filed or published as soon as practicable thereafter, but it must be filed or published, and a delivery to the corporation's secretary and his neglect to file it does not relieve the directors. *Whitney v. Cammann*, 137 N. Y. 342, 33 N. E. 305 (1893); *Gen. Mfg. Act, L. 1848, c. 40, § 12*, as amend'd L. 1875, c. 510. To show, in an action to hold a director personally liable for his corporation's promissory note, that the debt

was contracted while he acted as such and was payable within one year from the time it was contracted, it is not sufficient that he was a director when the note was given. *Straus v. Sage*, 5 Misc. 255, 25 N. Y. Supp. 93 (1893); L. 1875, c. 267, § 8.

Decisions under L. 1848, c. 40, § 12.

A complaint in an action against corporate directors to recover a debt due from it to the plaintiff because of failure to make its annual report, when the corporate charter from the Legislature provides that directors "shall incur no personal liabilities beyond the amount of the capital stock held and owned by them respectively" must allege that such directors are stockholders. *Wright v. Booth*, 69 N. Y. 620 (1877); L. 1848, c. 40; L. 1873, c. 493. When corporate trustees are sought to be held liable for their corporation's debts by reason of the falsity of one or more of its statutory annual reports, the reports should receive a liberal interpretation and the benefit of any doubt as to their true sense and meaning should be given the trustees in the absence of bad faith. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62 (1875); Gen. Mfg. Act, L. 1848, c. 40, § 12, as amend'd L. 1853, c. 333. "The [annual] report [of a corporation] is to be the act of the trustees, and the duty of making it is devolved upon them. The secretary is but the servant of the company, performing such acts and rendering such services as are incident to the office or may be specially imposed. He might, under the direction of the trustees, prepare the paper and verify it by his oath in place of the president, but he could not subscribe to it the names of the trustees, or verify it in any way to make it the act of the corporation and a compliance with the statute, so as to relieve the trustees from their duty, or the liability resulting from an omission to perform it." *Bolen v. Crosby*, 49

N. Y. 183 (1872); Gen. Mfg. Act, L. 1848, c. 40, § 12. Although an action to recover the amount of a claim against a manufacturing company on the ground of the failure of the defendant as one of its trustees to make and file its annual report as required by statute would have absolutely abated if either party had died at any time before verdict, because it is a penal action and therefore properly characterized as *ex delicto*, yet if it go to judgment before the death of either party, the reversal of the judgment, followed by the death of either or both parties, does not prevent appeal from the judgment by the representatives of the losing side, because while there could be no new trial after the reversal and death the judgment still had a potential existence till determined by appeal. *Carr v. Rischer*, 119 N. Y. 117, 23 N. E. 296 (1890); Gen. Mfg. Act, L. 1848, c. 40, § 12. "An assignee of a claim against a manufacturing corporation may maintain an action against a trustee thereof, to enforce a liability for its debts . . . because of failure to file an annual report, or because of signing a false report." *Pier v. George*, 86 N. Y. 613 (1881); Gen. Mfg. Act. Headnote. No opinion reported. As an action against an individual who is trustee of a manufacturing corporation to hold him for a debt due by it because of failure by him to make its annual report is not to recover a debt he owes but to impose on him, as penalty for his default, its debt, the action is one for a penalty and his answer need not be verified. *Gadsden v. Woodward*, 103 N. Y. 242, 8 N. E. 653 (1886); C. C. P. §§ 523, 837; Mfg. Act, L. 1848, c. 40, § 12. ". . . when a debt against a corporation, owned by a trustee, is assigned to him absolutely for value, the assignee, on a default by the company subsequently occurring to make a report, may proceed under the . . . [statute to hold the trustees personally liable for

the debt] although the assignor continued to be a trustee up to the time of the default." *Cornell v. Roach*, 101 N. Y. 373, 5 N. E. 52 (1886); *Gen. Mfg. Act*, L. 1848, c. 40, § 12. When a corporate lessee agrees that taxes are payable by it and if not paid by a certain date shall be payable as additional rent, they become a debt of the company (for which its directors or trustees are liable on failure to file its annual report) at the moment the tax authorities impose the taxes, though the cause of action against the company does not accrue until the date set in the lease; and if such date is subsequent to the statutory limitation of time within which the company's annual report should have been, but was not filed, the short statute of limitations against the directors begins to run from such date. *Rector, etc., of Trinity Church v. Vanderbilt*, 98 N. Y. 171 (1885); *Gen. Mfg. Act*, L. 1848, c. 40, § 12. The action given by statute against a corporate trustee to recover the penalty imposed upon the corporation for failure to make and file its annual report is final and *ex delicto* in character and does not survive against the personal representatives of the trustee on his decease. *Stokes v. Stickney*, 96 N. Y. 323 (1884); *Gen. Mfg. Act*, L. 1848, c. 40, § 12. One named in a certificate of incorporation as a trustee for one year is not liable (without proof that he held over) to one who became a creditor of the corporation after the expiration of such year for the debt then contracted by the corporation to such creditor on the ground that the corporation failed to publish and file the annual statutory report. *Philadelphia & Reading Coal & Iron Co. v. Hotchkiss*, 82 N. Y. 471 (1880); L. 1848, c. 40, § 12. Trustees of a corporation elected for a year during which it discontinues business because of insolvency and they resign cannot be held responsible for filing a corporate annual report or for any statutory conse-

quences resulting from such failure. *Van Amburgh v. Baker*, 81 N. Y. 46 (1880); *Gen. Mfg. Act*, L. 1848, c. 40, § 12. Even had they not resigned, but merely neglected to hold over, they would not have been liable. An action against trustees of a corporation for its debt because of alleged failure to file an annual report need not be commenced within three years after the debt of the company arose, but may be brought at any time within six years from its appearing that the company fails to file its report (provided that the time of bringing the action be within three years of such failure to file). *Duckworth v. Roach*, 81 N. Y. 49 (1880); *Gen. Mfg. Act*, L. 1848, c. 40, § 12. Debt arose April, 1873. Failure to file report was in January, 1875. Held, the action could be brought any time to April, 1879. The liability imposed on trustees of a corporation by statute for failure to file an annual report "does not attach, if a report is made in terms complying with the statute, although some of the representations be untrue." *Bonnell v. Griswold*, 80 N. Y. 128 (1880); *Gen. Mfg. Act*, L. 1848, c. 40, § 12. An action against a trustee of a corporation to hold him for its debt must be commenced within three years after the date set by statute for the filing of the corporation's report. *Knox v. Baldwin*, 80 N. Y. 610 (1880); *Gen. Mfg. Act*, L. 1848, c. 40, § 12; *Code of Procedure*, § 92, subd. 2. The fact that a corporation is bankrupt and has ceased to do business relieves its trustees from the obligation of making and filing the report required by statute. *Bruce v. Platt*, 80 N. Y. 379 (1880); *Gen. Mfg. Act*, L. 1848, c. 40, § 12. The reason for the resignation of a corporate trustee is unnecessary to be told, nor his motives or intentions to be examined, in an action to hold him for liability for corporate debts by reason of failure to file its annual report. *Bruce v. Platt*, 80

N. Y. 379 (1880); Gen. Mfg. Act, L. 1848, c. 40, § 12. ". . . the liability of a trustee [of a corporation for its debts for failure to file its annual report] does not depend upon the fact that he was such when the debt was contracted, but upon his being a trustee when the default as to filing the report occurred." *Bruce v. Platt*, 80 N. Y. 379 (1880); Gen. Mfg. Act, L. 1848, c. 40, § 12. An action to hold a trustee liable for a debt of his corporation evidenced by a judgment recovered against it the year before failure to file its annual report (on which his liability is founded) occurred must be brought within three years from such failure; i. e., from the time the cause of action against him accrued. *Losee v. Bullard*, 79 N. Y. 404 (1880); L. 1848, c. 40, § 12. One who is proceeded against for a debt of a corporation because of its failure to file its annual report should be permitted to show that the corporate enterprise was abandoned before final incorporation. *DeWitt v. Hastings*, 69 N. Y. 578 (1877); L. 1848, c. 40, § 12. In a suit against corporate directors based on an allegation of omission to make, file and publish any annual report the question of the falsity of a report made is not in issue. *Whitney Arms Co. v. Barlow*, 68 N. Y. 34 (1876); L. 1848, c. 40, § 12. The allegation by one seeking to hold trustees of a corporation liable for its debts by reason of its failure to file its annual report that the company had not made, filed and published its report as required by law, puts upon the one making it the duty of affirmatively proving it, even though this can only be done by proof of a negative. *Whitney Arms Co. v. Barlow*, 68 N. Y. 34 (1876); L. 1848, c. 40, § 12. "For an omission to file any report all the trustees are liable, jointly and severally, to the creditors; for making and filing a false report, only such of the trustees as do the act are liable;" so that to justify a union

in one complaint of causes of action both for such omission and for making a false report, each of the causes of action must affect all the parties to the action. *Bonnell v. Griswold*, 68 N. Y. 294 (1877); L. 1848, c. 40, §§ 12 and 15; Code, § 167. One who is creditor of a corporation and as such seeks to hold one of its trustees for the debt on the ground of its failure to file its annual report cannot succeed if he be a co-trustee with the defendant; and he will be held to be such if he voluntarily assumed the character of trustee. *Easterly v. Barber*, 65 N. Y. 252 (1875); Gen. Mfg. Act, L. 1848, c. 40, § 12. The statutory liability of corporate trustees for all debts existing or previously contracted by the corporation at the time of its default in making its annual report "is coextensive and concurrent with that of the corporation. It is subject to the same conditions and qualifications that attach to the original indebtedness and whatever would defeat or abate an action against the corporation will serve as a shield and defense to the trustees. . . . the trustees are not liable to an action, except for debts actually due, and for which a present right of action exists against the corporation." *Jones v. Barlow*, 62 N. Y. 202 (1875); Gen. Mfg. Act, L. 1848, c. 40, § 12. The statute making corporate trustees liable individually for the debts of their corporation if it had failed to make its annual report "was, no doubt, intended to include all ordinary debts which might be contracted in the prosecution of the legitimate business of the company, but does not . . . embrace such as might be imposed upon the company by fraud or improper practices of the creditor." *Adams v. Mills*, 60 N. Y. 533 (1875); Gen. Mfg. Act, L. 1848, c. 40, § 12. The alleged debt was of money credited plaintiff on the corporate books claimed to have been borrowed by plaintiff's husband for the corpora-

tion's benefit, and was unknown to anyone save plaintiff's husband who was a trustee and secretary of the company, and another, who was a trustee and its treasurer. A trustee whose term has expired but who nevertheless continues to act, even though after the affairs of the company are wound up by sale of its property, is liable to suit for a corporate debt if the company fails to file its annual report. *Sanborn v. Lefferts*, 58 N. Y. 179 (1874); *Gen. Mfg. Act*, L. 1848, c. 40, § 12. In an action against trustees of a corporation to recover a debt due by it because of its failure to make and file its annual report, a judgment for the debt recovered by the creditor in an action against the corporation is not conclusive against the trustees, nor evidence against them, as they are not privies or parties to it, but should be personally served with process and given an opportunity of trying the question of debt. *Miller v. White*, 50 N. Y. 137 (1872); *Gen. Mfg. Act*, L. 1848, c. 40, § 12. In determining the right by one to recover from trustees a debt due by their corporation because of failure to file its annual report, "the right to the debt, as evidenced by the judgment against an insolvent corporation, and the right to recover the same debt from the defendants upon their personal liability, cannot exist in the hands of different persons. The assignment of the judgment necessarily carries the debt; they are inseparable." *Bolen v. Crosby*, 49 N. Y. 183 (1892); *Gen. Mfg. Act*, L. 1848, c. 40, § 12. An action against trustees of a corporation to charge them with its debt under the statute making them liable when it fails to file its annual report is limited by the three year statute, because the liability is in the nature of a penalty. *Merchants' Bank v. Bliss*, 35 N. Y. 412 (1866); *Gen. Mfg. Act*, L. 1848, c. —, § 12; *Code*, § 92, subd. 2. In order to hold a corporate trustee liable for his corporation's debt by

reason of failure to make and file its annual report "three circumstances must concur in point of time . . . : the existence of the debt; the existence of the default in making the report; and the trusteeship. Where these concur, the trustee is liable for all debts, if he was such trustee when the default occurred. If he was not a trustee at the time of the default, but became such afterwards, then his liability is limited to debts created while he remains trustee, and while the default continues." *Shaler & Hall Quarry Co. v. Bliss*, 27 N. Y. 297 (1863); *Gen. Mfg. Act*, L. 1848, c. 40, § 12. The object of the statutory provision requiring an annual report to be made and filed by corporations "so far as relates to creditors, or persons dealing with the corporation, appears to have been to give such notoriety to the pecuniary condition of the company, through the publication of its annual statement, as to deprive it of credit, if it should be unworthy of it, and to give to persons to whom it might become indebted while the statement should be withheld, the personal responsibility of the trustees for such indebtedness." *Shaler & Hall Quarry Co. v. Bliss*, 27 N. Y. 297 (1863); *Gen. Mfg. Act*, L. 1848, c. 40, § 12. Under a statute making trustees of a corporation liable for its debts existing and pre-existing its default in making its annual report, those guilty of such default in a certain year are liable only for antecedent debts and their successors, if they continue the default for a year till the next date for making an annual report, and no longer, are liable for the debts afterwards contracted during that year, and no longer. *Boughton v. Otis*, 21 N. Y. 261 (1860); *Gen. Mfg. Act*, L. 1848, c. 40, § 12. "If the persons succeeding to office promptly obey the requirement of the act they will escape all liability. . . . If they do not, they very properly incur the hazard of the debts which they themselves as trustees contract." In

**§ 346. Id.: Liabilities Common to Directors and Officers, In General.**—The mere fact that a director or officer has transactions with his corporation, appearing on the books, which show a credit balance at the time an action against him is brought for official misconduct, but the correctness of which are not successfully assailed, cannot be made the basis of a decision and an interlocutory judgment directing an accounting by him.<sup>16</sup> Intangible as well as tangible assets of a corporation constitute a trust fund, and whoever wrongfully appropriates such assets, whether he be a director or officer or not, may be charged therefor as constructive trustee.<sup>17</sup> One who is an officer and director of a corporation is bound to account to it for all moneys that come into his hands by virtue of his official acts and cannot be permitted to shield himself from

determining the liability of one for a debt of a corporation as being a trustee thereof (it having failed to file its annual report), "a debt for lumber furnished under . . . contract, subsequent to its execution, can [not] be said to have been contracted when the agreement was signed." *Garrison v. Howe*, 17 N. Y. 458 (1858); *Gen. Mfg. Act*, L. 1848, c. 40, § 12. The debt of a corporation for which a director is liable by statute for failure to file its report includes an unliquidated claim arising out of breach of a contract of employment, but not costs of the action against the corporation to recover therefor. *Green v. Easton*, 74 Hun, 329, 26 N. Y. Supp. 553 (1893); L. 1848, c. 40, § 12. A statute requiring directors of a corporation to see to it that its annual report is filed should be construed as though the words "during their continuance in office" were at its end, as the liability attaches to the individuals, who may change, and not to the office, which does not change. *The Shaler & Hall Quarry Co. v. Bliss*, 34 Barb. 309 (1861); *aff'd* 27 N. Y. 297; L. 1848, Act of Feb. 27, § 12. A statute making corporate directors individually liable "for all the debts of the company" existing at the time of failure to file the corporation's annual

report does not refer to claims of the directors themselves against the corporation. *Briggs v. Easterly*, 62 Barb. 51 (1872); L. 1848, c. 40, § 12. Neither a trustee of a corporation nor his assignee can hold a co-trustee for liability for the corporate debts (incurred while they were both trustees) by reason of failure to file the statutory report, because if this could be done, he could profit by his own default. *Knox v. Baldwin*, 80 N. Y. 610 (1880); *Gen. Mfg. Act*, L. 1848, c. 40, § 12. To constitute a liability upon a corporate trustee for its debts because of its failure to file its annual report it must be averred that the debts existed at the time the default in making the report was made, or that they were contracted afterwards and before such report was published. *Chambers v. Lewis*, 28 N. Y. 454 (1863); *Gen. Mfg. Act*, § 35.

The question of liability of corporate officers who fail to file report required by statute, to surety or guarantor of corporate paper, is discussed in a note in 35 L.R.A. (N.S.) 855.

<sup>16</sup> *Stokes v. Stokes*, 91 Hun, 605, 36 N. Y. Supp. 350 (1895); C. C. P. § 1781; now *Gen. Corp. L.* § 90.

<sup>17</sup> *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L.R.A.1915D, 632, 105 N. E. 818 (1914).

such liability under the claim that his acts were illegal and unauthorized.<sup>18</sup>

**§ 347. Id.: For Sale of Stock Which Do Not Own.**—A director or officer of a stock corporation is guilty of a misdemeanor punishable by imprisonment for not less than six months or by a fine not exceeding five thousand dollars or by both, who sells, or agrees to sell, or is directly or indirectly interested in the sale of any share of stock of such corporation, or in any agreement to sell the same, unless at the time of such sale or agreement he is an actual owner of such share.<sup>19</sup> A director of a corporation, *i. e.*, any person having by law the direction or management of the affairs of a corporation by whatever name described, is deemed to have concurred in the violation of the provision of law just stated, either if present at a meeting of the directors at which any act, proceeding or omission of such directors constituting such violation occurs without at the time causing or in writing requiring his dissent therefrom to be entered on the minutes of the directors, or if absent from such meeting and the facts constituting such violation appear on the record or minutes of the proceedings of the board of directors and he remains a director of the corporation for six months thereafter without causing or in writing requiring his dissent from such violation to be entered upon such record of minutes.<sup>20</sup> A director is also deemed to have such a knowledge of the affairs of the corporation as to enable him to determine whether any act, proceeding or omission of its directors is a violation of the provision of law just stated.<sup>1</sup>

**§ 348. Id.: For Increasing Capital Stock Beyond Amount Authorized.**—The increase of corporate capital stock has been already discussed.<sup>2</sup> A director or officer of a stock corpora-

<sup>18</sup> McClure v. Law, 161 N. Y. 78, 55 N. E. 388 (1899). The defendant took money from those whom he had elected as directors and had given the control of the corporation.

On personal liability of officers for act or transaction in excess of corporate powers or in violation of law, see note in 6 L.R.A.(N.S.) 1003.

On liability of officers of mutual insurance company to members for permitting diversion of funds, see note in 2 L.R.A.(N.S.) 165.

On liability of directors for permitting business before capital stock

is all subscribed, see note in 35 L.R.A.(N.S.) 453.

On liability of directors directly to creditors of the corporation, suing in their own right for negligence or other breach of duty owed primarily to the corporation, see note in 45 L.R.A.(N.S.) 421.

On liability of the directors of a corporation to the corporation, see notes in 55 L.R.A. 751; 39 L.R.A. (N.S.) 173.

<sup>19</sup> Penal L. § 664 (L. 1909, c. 88).

<sup>20</sup> Penal L. § 667 (L. 1909, c. 88).

<sup>1</sup> Penal L. § 667 (L. 1909, c. 88).

<sup>2</sup> See § 102 *et seq.*, *supra*.

tion is guilty of a misdemeanor punishable by imprisonment for not less than six months or by a fine not exceeding five thousand dollars or by both who issues, participates in issuing, or concurs in a vote to issue any increase of its capital stock beyond the amount of the capital stock thereof, duly authorized by or in pursuance of law.<sup>3</sup> A director of a corporation, *i. e.*, any person having by law the direction or management of the affairs of a corporation by whatever name described, is deemed to have concurred in the violation of the provision of law just stated, if either present at a meeting of the directors at which any act, proceeding or omission of such directors constituting such violation occurs without at the time causing or in writing requiring his dissent therefrom to be entered on the minutes of the directors, or absent from such meeting and the facts constituting such violation appear on the record or minutes of the proceedings of the board of directors and he remains a director of the corporation for six months thereafter without causing or in writing requiring his dissent from such violation to be entered on such record of minutes.<sup>4</sup> A director of a corporation, *i. e.*, any person having by law the direction or management of the affairs of a corporation by whatever name described, is deemed to have such a knowledge of the affairs of the corporation as to enable him to determine whether any act, proceeding or omission of its directors is a violation of the provision of law just stated.<sup>5</sup>

**§ 349. *Id.*: For Loans to Stockholders.**—The power of a corporation to loan money is hereinafter treated.<sup>6</sup> A director or officer making or assenting to a loan of moneys by a stock corporation or any officer thereof out of its funds to any stockholder therein, or receiving or discounting any note or other evidence of debt discounted by any such corporation or officer thereof or received by any such corporation or officer thereof in payment of any installment or any part thereof due or to become due on any stock in such corporation to enable any stockholder to withdraw any part of the money paid in by him on his stock, is jointly and severally personally liable to the extent of such loan and interest for all the debts of the corporation contracted before the repayment of the sum loaned, and to the full amount of the notes or other evidences of indebtedness so received or discounted, with interest from the time such liability accrued.<sup>7</sup> A creditor of a corporation may

<sup>3</sup> Penal L. § 664 (L. 1909, c. 88).

<sup>6</sup> See § 399, *infra*.

<sup>4</sup> Penal L. § 667 (L. 1909, c. 88).

<sup>7</sup> St. Corp. L. § 29 (L. 1909,

<sup>5</sup> Penal L. § 667 (L. 1909, c. 88). c. 61).

recover from its officers and directors the amount of a loan by the corporation to a stockholder to which they assented.<sup>8</sup>

**§ 350. Id.: For Transfer to Directors, Officers or Stockholders of Property of Corporation Not Paying Due Obligations.**—The transfer, while insolvent or after failure to pay liabilities, by a corporation of its property is hereinafter discussed.<sup>9</sup> Every director or officer violating or concerned in the violations of the statute prohibiting the transfer by a corporation, its officers or directors, of any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt or upon any other consideration than the full value of the property paid in cash, when such corporation has refused to pay any of its notes or other obligations when due in lawful money of the United States, is personally liable to the creditors and stockholders of the corporation of which he is director or officer to the full extent of any loss they may respectively sustain by such violation.<sup>10</sup> The Municipal Court has jurisdiction of an action against directors of a corporation to hold them individually liable for transfers of its property by them while it was insolvent.<sup>11</sup> Those receiving money of a corporation are the ones from whom recovery must be had under the statute making every person receiving any property of a corporation by means of a transfer to its officers, directors, stockholders or creditors with intent to give a preference; and if the transferee is not in one of such groups and has received none of the corporate property, the statute does not apply.<sup>12</sup> A judgment creditor of a corporation, without assets as a result of a transfer thereof by its directors to themselves as stockholders, may have relief that the directors themselves personally pay his judgment against the corporation, and, if they do not, that the property transferred be held by them in trust for the corporation and subjected to satisfaction of his judgment by proper process.<sup>13</sup> In order to permit a recovery by a creditor of a corporation against a director, officer and stockholder for a transfer to him of corporate property while the corporation

<sup>8</sup> Helmsley & Co., Ltd. v. Duncan & Co., Inc., 98 Misc. 338, 164 N. Y. Supp. 282 (1917); St. Corp. L. § 29.

<sup>9</sup> See § 402 *et seq.*, *infra*.

<sup>10</sup> St. Corp. L. § 66 (L. 1909, c. 61).

<sup>11</sup> Trustees of Masonic Hall v. Fontane, 99 Misc. 497, 164 N. Y. Supp.

370 (1917); Mun. Ct. Code, §§ 6, subd. 1, and 7; St. Corp. L. § 66.

<sup>12</sup> Kiendl v. Cochrane, 153 A. D. 802, 138 N. Y. Supp. 630 (1912); St. Corp. L. § 66.

<sup>13</sup> Flaum v. Kaiser Bros. Co., 66 Misc. 586, 122 N. Y. Supp. 100 (1910); *aff'd* 144 A. D. 897, 129 N. Y. Supp. 1122.

is insolvent, there must be alleged and proven the loss sustained by the creditor from the transfer, the amount of which will be the difference between the amount he would have received from the corporation if its property had not been diverted and the amount which he can obtain from the corporation after its diversion.<sup>14</sup> A judgment against a corporation conclusively, in the absence of fraud or collusion, establishes the status of the plaintiff as a creditor of the corporation and the amount of his claim, and is competent evidence against the officers and directors of the corporation to enforce the personal liability imposed upon them by statute for any loss sustained by creditors or stockholders of the corporation by reason of a transfer of the corporation's property to any of its officers, directors or stockholders for the payment of its debt while insolvent.<sup>15</sup> In the statement of a cause of action against an officer or director of a corporation to impose upon him, pursuant to statute, personal liability for a loss sustained by a creditor or stockholder by reason of a transfer of its property while insolvency exists or is imminent to an officer, director or stockholder, it is not necessary to allege that the defendant officer or director violated, or was concerned in the violation of the statute, in his capacity as officer or director, as "an officer may, without acting officially, violate the statute by inducing other officers to transfer assets of the corporation in violation of law to himself or to another."<sup>16</sup> A trustee in bankruptcy may join all the officers and directors of a corporation and others as defendants in a single action to make them account individually for transfers of its property when they knew it was insolvent.<sup>17</sup> In an action to compel officers to account individually for property of their corporation transferred while it was insolvent it is not necessary for the plaintiff to allege that the corporation has defaulted in the

<sup>14</sup> *Agnelli v. Shatzin*, 68 Misc. 329, 123 N. Y. Supp. 797 (1910); St. Corp. L. § 66.

<sup>15</sup> *Caesar v. Bernard*, 156 A. D. 724, 141 N. Y. Supp. 659 (1913); *aff'd* 209 N. Y. 570, 103 N. E. 1122; St. Corp. L. § 66.

<sup>16</sup> *Caesar v. Bernard*, 156 A. D. 736, 141 N. Y. Supp. 668; *aff'd* 209 N. Y. 570, 103 N. E. 1122; St. Corp. L. § 66. Defendant was director; voted as such to authorize mortgage said to be made against the statute; as secretary executed necessary

papers, and as individual benefited. *Caesar v. Bernard*, 156 A. D. 737, 141 N. Y. Supp. 668; *aff'd* 209 N. Y. 570, 103 N. E. 1122; St. Corp. L. § 66. Defendant not director but stockholder and treasurer when mortgage complained of was executed; as stockholder signed consent to execution of mortgage; and received therefrom \$2,500 corporate note.

<sup>17</sup> *Sherwood v. Holbrook*, 178 A. D. 462, 165 N. Y. Supp. 514 (1917); Gen. Corp. L. § 591-a; St. Corp. L. § 66.

payment of its notes or other obligations within the contemplation of the statute.<sup>18</sup>

**§ 351. Id.: For Failure or Falsity of Certificate of Payment of Capital Stock.**—The statute requires one-half of a corporation's capital stock to be paid in within one year of incorporation on penalty of its dissolution, and its directors within thirty days after such payment to make a certificate of the fact of such payment, signed and acknowledged by a majority of themselves and verified by the president or vice-president and secretary or treasurer, and to file it in the offices where the certificates of incorporation are filed; but the statute imposes no penalty upon them for not making and filing such certificate, though it does provide that the corporation's dissolution for any cause does not take away or impair any remedy against it, its stockholders or officers "for any liabilities incurred previous to its dissolution."<sup>19</sup>

**§ 352. Id.: To One Becoming Creditor or Stockholder on Faith of False Representation In.**—The officers and directors of a stock corporation signing any certificate, report or public notice made or given by them which is false in any material representation are jointly and severally personally liable to any person who has become a creditor or stockholder of the corporation upon the faith of any such certificate, report, notice or any material representation therein, and such liability exists to the amount of the debt contracted upon the faith thereof if not paid when due or of the damage sustained by any purchaser of or subscriber to its stock upon the faith thereof, and whether the contents of such certificate, report or notice or of any material representation therein has been communicated directly or indirectly to the person so becoming

<sup>18</sup> *Sherwood v. Holbrook*, 178 A. D. 462, 165 N. Y. Supp. 514 (1917); *St. Corp. L.* § 66.

<sup>19</sup> *Bus. Corp. L.* § 5 (L. 1909, c. 12). In this note are collected cases under former statutes which imposed penalties for failure to file or falsely to make a corporation's report of payment of its capital stock: A report, whether true or false made by a corporation, pursuant to statute, as to payment of its capital stock, is a compliance with so much of the law as requires it to be made. *Bonnell v. Griswold*, 89 N. Y. 122 (1882); *Gen. Mfg. Act*, L. 1848, c. 40, § 15. A misstatement

in a corporation's report of its capital stock is not equivalent to an entire failure of the company to make the required report, and does not *per se* render all the trustees liable. *Pier v. Hanmore*, 86 N. Y. 95 (1881); *Gen. Mfg. Act*, L. 1848, c. 40, §§ 12, 15; L. 1853, c. 333 § 14. The report stated: "Capital stock, \$60,000; capital paid in, \$36,500; amount existing debts, \$30,130.24."

As to false statements in reports required by statute to be made to public officer as basis of action at common law for deceit against officers or directors personally, see note in 6 L.R.A.(N.S.) 872.

a creditor or stockholder, provided he became such on the faith thereof; but no action can be maintained for a cause of action created by the liability aforesaid unless brought within two years from the time the certificate, report or public notice has been made, or given by the officers or directors of such corporation.<sup>20</sup>

<sup>20</sup> St. Corp. L. § 35 (L. 1909, c. 61). "The directors generally cannot know, and have not the ability or knowledge requisite to learn, by their own efforts, the true condition of the affairs of the company. They select agents in whom they have confidence, and largely trust to them. They publish their statements and reports, relying upon the figures and facts furnished by such agents; and if the directors, when actually cognizant of no fraud, are to be made liable in an action for fraud for any error or misstatement in such statements and reports, then we have a rule by which every director is made liable for any fraud that may be committed upon the company in the abstraction of its assets and diminution of its capital by any of its agents, and he becomes substantially an insurer of their fidelity;" and such is not the law. *Wakeman v. Dalley*, 51 N. Y. 27 (1872).

The following cases are instructive in considering the liability of directors and officers under the present statute because they were decided on an earlier law basically similar to the present statute (L. 1875, c. 611, § 21). The specific section under the earlier law read in whole: "If any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof."

A statute making a corporate

officer liable while such for the corporate debts if a certificate, report or public notice is made or given by him which is "false in any material representation" is not unconstitutional. *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544 (1890); L. 1875, c. 611, § 21. In order to hold a corporate officer to his statutory liability while such for the corporate debts by reason of a certificate, report or public notice made or given by him which is "false in any material representation," it is not necessary that he have knowledge of the false statement. *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544 (1890); L. 1875, c. 611, § 21. The statute making corporate officers signing a false report or certificate liable for all corporate debts contracted while they are officers does not "cover debts of the corporation contracted before the making of the certificate or report." *Torbett v. Godwin*, 62 Hun, 407, 17 N. Y. Supp. 46 (1891); L. 1875, c. 611, § 21. "Thus, the intention was, first, to compel the filing of the report, to make the directors liable for *all debts* in case of failure in this particular and to continue this liability until compliance; then, upon compliance, to create a new liability in favor of all subsequent creditors who might possibly be affected by the falsity of any material representation in the report as filed." *Torbett v. Godwin*, 62 Hun, 407, 17 N. Y. Supp. 46 (1891); L. 1875, c. 611, § 21. An action against a director of a corporation by one of its creditors to recover statutory penalties for making and recording a false certificate that the corpora-

tion's capital stock had all been paid in must be tried in the county where the certificate is to be recorded. *Taylor v. Attrill*, 31 Hun, 132 (1883); L. 1875, c. 611, §§ 21, 37.

The following decisions were rendered under an act (L. 1848, c. 40, § 15, *i. e.*, the Gen. Mfg. Act) in effect prior to the present statute and the later L. 1875, c. 611, § 21, *supra*; but similar in some degree to both such prior statutes; and the decisions may, therefore, be of help in interpreting the present law. The particular section of the act of 1848 read in whole: "If any certificate or report made, or public notice given, by the officers of any such company, in pursuance of the provisions of this act, shall be false in any material representation, all the officers who shall have signed the same, knowing it to be false, shall be jointly and severally liable for all the debts of the company contracted while they are stockholders or officers thereof." In seeking to hold a corporate officer individually liable for the corporation's debts on the ground that he joined in making and filing a false certificate that its capital stock had been paid in the plaintiff has the burden of establishing: "*First*, that the certificate filed was in point of fact false, and *second*, that with knowledge of its falsity the defendant signed it." *Ferguson v. Gill*, 74 Hun, 566, 26 N. Y. Supp. 596 (1893); L. 1848, c. 40, § 15. A person is not liable to suit for the debt of a corporation of which he is trustee because of the falsity of the report filed of its affairs unless the report was false, or the trustee signed it knowing it to be false, or he was guilty of fraud or bad faith. *Butler v. Smalley*, 101 N. Y. 71, 4 N. E. 104 (1885); Gen. Mfg. Act, L. 1848, c. 40, § 15. In an action against trustees of a corporation to enforce their liability under the statute for making a false report of payment of its capital

stock, the question is whether they signed the report "knowing it to be false", within the meaning of the statute; and they do not so sign it if they merely know that the whole capital has not been paid in, in cash, when the report says the capital has been fully paid in, but bad faith and an intent to deceive must also be shown. *Bonnell v. Griswold*, 89 N. Y. 122 (1882); Gen. Mfg. Act, L. 1848, c. 40, § 15; L. 1853, c. 333. In order that a trustee of a corporation be held to have signed a report of its capital stock "knowing it to be false", so as to make him liable for corporate debts, there must be "a willful misrepresentation, with actual knowledge of its falsity, and not merely such constructive knowledge as can be imputed from the presumption that the officer signing the report knew the law and comprehended the precise import of the language used, when construed with reference to statutory provisions. . . . a general statement that so much capital had been paid in would not, in common parlance, be very far from correct, even though the capital had not been all paid in cash." *Pier v. Hanmore*, 86 N. Y. 95 (1881); Gen. Mfg. Act, L. 1848, c. 40, §§ 12, 15; L. 1853, c. 333, § 14. The report stated: "Capital stock, \$60,000; capital paid in, \$36,500; amount existing debts, \$30,130.24." A report of a company's capital stock that a certain amount of its capital stock is paid contains an untrue representation and material misrepresentation that it has been paid in cash, unless it is specified that the alleged payment consists of the issue of stock for property purchased. *Pier v. Hanmore*, 86 N. Y. 95 (1881); Gen. Mfg. Act, L. 1848, c. 40, §§ 12, 15; L. 1853, c. 333, § 14. The report stated: "Capital stock, \$60,000; capital paid in, \$36,500; amount existing debts, \$30,130.24." A report stating that a corporation's capital stock is a stated amount and that

it has been "paid up in full" imports that it has been paid in cash, if it be not specified that the whole or part of it has been paid in property, and if some has been so paid, the report contains an untrue representation as to the amount of capital paid in, which is material. *Bonnell v. Griswold*, 89 N. Y. 122 (1882); Gen. Mfg. Act, L. 1848, c. 40, § 15; L. 1853, c. 333. In determining whether a director had knowledge of the falsity of a report that his corporation's capital stock had been fully paid in, in an action to hold him for its indebtedness, the facts that he had seen the property for which the stock was issued, that he knew its character, that he knew a conduit passed title thereto to his corporation, that this conduit gave him a lot of stock *gratis* (as well as his corporation), and that he voted to pledge \$70,000 of its bonds and \$100,000 of its stock for a loan of \$35,000, are all admissible. *Blake v. Griswold*, 103 N. Y. 429, 9 N. E. 434 (1886); Gen. Mfg. Act, L. 1848, c. 40, § 15. An action under the statute imposing liability upon corporate officers for the corporation's debts as a penalty for a false report is penal and must be tried in the county where the cause of action arose, which is the county in which the false report is filed. *Veeder v. Baker*, 83 N. Y. 156 (1880); Gen. Mfg. Act, L. 1848, c. 40, § 15; C. C. P. § 983. But under a more recent statute it has been held that an action against a treasurer of a corporation by one who bought its stock on the faith of a report of its affairs made by him pursuant to statute and alleged to be false is not penal, and need not be brought in the county where the cause of action arose. *Hutchinson v. Young*, 80 A. D. 246, 80 N. Y. Supp. 259 (1903); St. Corp. L. § 31 (L. 1892, c. 688); C. C. P. § 983. The right to enforce the liability imposed by statute on an officer for the debts of his corporation contracted while he is

such if any certificate signed by him be materially false is not dependent upon the creditor's reliance upon such certificate or upon the creditor being the original creditor rather than the latter's assignee. *Ferguson v. Gill*, 64 Hun, 284, 19 N. Y. Supp. 149 (1892); L. 1848, c. 40, § 15. An action by a creditor of a corporation against its officers to recover the indebtedness by reason of their false statement of the amount of its capital paid in dies with the creditor. *Brackett v. Griswold*, 103 N. Y. 425, 9 N. E. 438 (1886); Gen. Mfg. Act, L. 1848, c. 40, § 15. In an action to recover from a director the amount of his corporation's debt to the plaintiff because of a false annual report the corporate books are admissible to prove the falsity of the statement in the report of full payment of capital stock to some extent; the stock-book as presumptive evidence of the facts recorded and the minute books to show the corporate action as to the mode of payment of the capital stock, though not to show that the director in question was charged with actual knowledge of what transpired in his absence. *Blake v. Griswold*, 103 N. Y. 429, 9 N. E. 434 (1886); Gen. Mfg. Act, L. 1848, c. 40, § 15. It is not essential, to relieve a corporate trustee from liability for his corporation's debts, for failure to make and file its annual report, that it be both made and filed within twenty days after the first of the year; it is sufficient if it be made within that time, and then filed within a reasonable time after the expiration of such period. *Butler v. Smalley*, 101 N. Y. 71, 4 N. E. 104 (1885); Gen. Mfg. Act, L. 1848, c. 40, § 15. "To prepare a report for filing and publication, to place it in good faith in the hands of the secretary for deposit in the clerk's office and in the office of a newspaper," and its filing on February 13th, is a reasonable filing.

**§ 353. Id.: For Misconduct and Mismanagement, Governing Statutes.**—An action may be maintained against one or more trustees, directors, managers or other officers of a corporation to procure a judgment compelling the defendants to account for their official conduct, including any neglect of or failure to perform their duties, in the management and disposition of the funds and property committed to their charge; compelling the defendants to pay to the corporation which they represent, or to its creditors, any money and the value of any property which they have acquired to themselves or transferred to others or lost or wasted, by or through any neglect of or failure to perform, or by any other violation of, their duties; setting aside an alienation of property made by one or more trustees, directors, managers or other officers of a corporation contrary to a provision of law or for a purpose foreign to the lawful business and objects of the corporation, where the alienee knew of the purpose of the alienation; restraining and preventing such an alienation, where it is threatened or where there is good reason to apprehend that it will be made.<sup>2</sup> The Supreme Court also has and exercises jurisdiction in equity at the suit of a corporation or of a receiver or of a trustee in bankruptcy thereof, to compel one or more trustees, directors, managers or other officers of the corporation to account for injury to or losses of the funds, assets or property of the corporation caused by or through any neglect or failure of the defendants to perform, or for violation of, their duties.<sup>3</sup> When the Attorney-General has good reason to believe that an action can be maintained in behalf of the People of the State against the trustees, directors, managers or other officers of a corporation to procure a judgment to compel them to account for their official conduct; to pay over what they have acquired, transferred, lost or wasted through neglect of their duties; to suspend them for abuse of their trust; to remove them for misconduct and require a new election; to set aside or restrain alienation of property by them contrary to law, he must bring an action accordingly, or apply to a competent court for leave to bring an action, as the case requires, if, in his opinion, the public interest requires that an action should be brought, and if the case be one in which the action can be brought only by the Attorney-General in behalf of the People, if a creditor, stockholder, director or trustee of the corporation applies to him for that purpose and furnishes the security required by law, he must bring the

<sup>2</sup> Gen. Corp. L. § 90 (L. 1909, c. 28).

<sup>3</sup> Gen. Corp. L. § 96 (L. 1913, c. 633).

action, or apply for leave to bring it, if he has good reason to believe that it can be maintained, and when such an application is made section nineteen hundred and eighty-six of the code of civil procedure applies thereto and to the action brought in pursuance thereof.<sup>4</sup> A defendant may be arrested in an action when it is brought to recover for money received or to recover property or damages for the conversion or misapplication of property and it is alleged in the complaint that the money was received or the property was embezzled or fraudulently misapplied by an officer or agent of a corporation in the course of his employment.<sup>5</sup>

**§ 354. Id.: In General.**—"The relations of trust and fidelity existed between the corporation and the directors, and not between the latter and the shareholders, and they could be held liable on the ground of negligence only for such damages sustained by the corporation as were the natural and proximate result of their acts or omissions": *e. g.*, directors of a company which did business for but one month cannot be held liable to stockholders for all the money the latter had invested and which was represented by stock; nor for all debts on the theory that the shareholders personally were legally liable therefor.<sup>6</sup> A stockholder of a corporation cannot hold a director and officer thereof to account for a transaction between the latter and the corporation which is beneficial to the corporation and its stockholders and is approved by a majority thereof at a meeting at which the complaining stockholder was present but at which he expressed no opinion.<sup>7</sup> Minority stockholders who have neither assented to mismanagement of the directors of the corporation resulting in turning it over to a rival nor done anything to estop themselves from demanding an accounting from the directors, may demand it even from those directors who may

<sup>4</sup> Gen. Corp. L. § 304 (L. 1909, c. 28). Section 1986, C. C. P. provides: "Where an action is brought by the attorney-general, as prescribed in this title, on the relation or information of a person, having an interest in the question, the complaint must allege, and the title of the action must show, that the action is brought upon the relation of that person. In such a case, the attorney-general must, as a condition of bringing the action, require the relator to give satisfactory se-

curity to indemnify the people against the costs and expenses thereof. Where security is so given, all costs and disbursements taxed in favor of the plaintiff shall be payable to the relator." (As amend'd L. 1918, c. 104, effective Sept. 1, 1918.)

<sup>5</sup> C. C. P. § 549, subd. 2.

<sup>6</sup> Bloom v. Nat. Sav. & Loan Co., 152 N. Y. 114, 46 N. E. 166 (1897).

<sup>7</sup> Steinway v. Steinway, 2 A. D. 301, 37 N. Y. Supp. 742 (1896); aff'd 157 N. Y. 710, 53 N. E. 1132.

have acted in good faith.<sup>8</sup> A stockholder cannot maintain an action to recover damages from waste by his corporation's directors after the appointment of a receiver for it, even though the latter has refused to bring the action, if the receiver, with approval of court, has transferred the corporate property under a contract which, among other things, released the directors from any personal liability for their acts as such.<sup>9</sup> An action by a stockholder "in his own behalf . . . and in behalf of all others similarly situated, against defendants, who were directors . . . , to call them to account as trustees for the manner in which they have discharged their trust" is one of which a court of equity has jurisdiction, although there may be issues which ought to be tried by jury and may be ordered to be so tried.<sup>10</sup> An action prosecuted in the name of the People by the Attorney-General pursuant to statute to compel directors to account for their conduct and disposition of corporate funds is in the right of the corporation and for its benefit, and the statute gives rise to no new cause of action except with respect to the removal or suspension of directors.<sup>11</sup> "The effect of this statute [giving the Supreme Court equity jurisdiction over accountings by corporate officers] is to do away with the distinctions recognized . . . between strict actions for an accounting of property actually received and for wrongful acts, and to authorize a single comprehensive action in equity in which the directors or officers of a corporation may be called to account for all of their acts while in office, whether the said acts consisted of the actual misappropriation of funds or mere negligence or neglect of duty, resulting in damage."<sup>12</sup>

**§ 355. Id.: Grounds of Action, In General.**—"The officers and directors of a corporation may not be called to account by a stockholder as a matter of right, but only for some specific act of negligence or misconduct in the management of the affairs of the corporation, or in the disbursement of its funds;" and it is therefore incumbent on the plaintiff to

<sup>8</sup> *Jacobus v. Diamond Soda Water Mfg. Co.*, 94 A. D. 366, 88 N. Y. Supp. 302 (1904).

<sup>9</sup> *Craig v. James*, 71 A. D. 238, 75 N. Y. Supp. 813 (1902).

<sup>10</sup> *Brinckerhoff v. Bostwick*, 105 N. Y. 567, 12 N. E. 58 (1887).

<sup>11</sup> *People v. Equitable Life Assurance Society*, 124 A. D. 714, 109 N. Y. Supp. 453 (1908); *C. C. P.*

§§ 1781, 1782; now *Gen. Corp. L. § 90 et seq.*

<sup>12</sup> *German-American Coffee Co. v. Diehl*, 86 Misc. 547, 149 N. Y. Supp. 413 (1914); *aff'd* 168 A. D. 913, 152 N. Y. Supp. 1113; *Gen. Corp. L. § 91-a* (L. 1913, c. 633).

Generally on liability of directors of a corporation to the corporation, see note in 55 L.R.A. 751.

allege the particulars of his complaint, and he may be required to give a specific bill of particulars, particularly if he has had a complete examination by accountants of the corporation's books and record.<sup>13</sup> A payment by an officer of an amusement corporation to hush up one about to take steps to prevent it from operating on Sunday is not merely *ultra vires* but *malum prohibitum* or *malum in se*, and a stockholder may in a representative action compel the officer to account for the payment even though he knew of it and acquiesced.<sup>14</sup> A suit may be maintained by a stockholder on a complaint alleging that the officers of the corporation are helping themselves to the corporate property and intend so to sell what is left that they shall individually acquire it, and that they so control the corporation as to make application to them or it for redress unavailing, and asking an accounting and payment by them to it of their misappropriations, an injunction against the sale and a receiver, as such a suit is not for dissolution.<sup>15</sup> The mere fact that a creditor of a corporation secured by its mortgage is also one of its directors and officers and forecloses is not enough to give the stockholders a cause of action against him for an account of the corporate property on the ground of its fraudulent acquisition by him.<sup>16</sup> A stockholder transferring to the president of the corporation individually certain of his corporate stock "to be disposed of by him as occasion may require for the prosecution of the interests of the corporation" cannot complain of a transfer thereof by such transferee to another stockholder, not fraudulently, but to recompense the latter for sacrifice of his holdings of stock in the company made for its benefit pursuant to the former's promise, as president, that his sacrifice would be recognized and his stock restored to him.<sup>17</sup> "It is well settled that in case the directors of a corporation combine with others to defraud a shareholder of his interest in the corporation by acts of spoliation, such conduct is actionable, and all persons so combining may be made parties defendant in an equitable action brought by a shareholder to restrain the consummation of the wrong, and recover the damages occasioned by the acts"; and the "acts of directors and of third persons,

<sup>13</sup> *Tilton v. Gaus*, 155 A. D. 612, 140 N. Y. Supp. 782 (1913).

<sup>14</sup> *Roth v. Robertson*, 64 Misc. 343, 118 N. Y. Supp. 351 (1909).

<sup>15</sup> *Watkins v. Watkins & Turner Lumber Co.*, 11 A. D. 517, 43 N. Y. Supp. 41 (1896).

<sup>16</sup> *Michel v. Betz*, 108 A. D. 241, 95 N. Y. Supp. 844 (1905).

<sup>17</sup> *Playa de Ora Mining Co. v. Gage*, 60 A. D. 1, 69 N. Y. Supp. 702 (1901); *aff'd* 172 N. Y. 630.

though constituting several independent causes of action in favor of a corporation, may be so connected as to constitute a single cause of action in favor of a shareholder against all of the wrongdoers . . . .<sup>18</sup> For acts of nonfeasance corporate directors are liable to an action at law for damages and not to a suit in equity, for an accounting, etc.; though if the complaining stockholders have to come into equity anyway, they may obtain relief in that suit against those directors.<sup>19</sup> A corporation may sue one of its directors who was a stockholder in one of its subsidiary corporations for damage caused it through depreciation in the value of stock in the subsidiary corporation due to the alleged embezzlement by the manager of the subsidiary company of moneys of the plaintiff corporation and their application by him, with the alleged acquiescence of such defendant director, and the latter's failure to advise the plaintiff corporation thereof. Such an action does not contravene the rule that a stockholder, merely as such, cannot have an action in his own behalf against one who has injured the corporation, however much the wrongful acts have depreciated the value of his shares, because in such case the stockholder sues another's agent, *e. g.*, the directors of a company, while in an action such as the one approved, the stockholder is suing its own agent on the ground that its agent (a director) is liable to it for failure to take the same care of its property that men of ordinary and average prudence take of their own property.<sup>20</sup> " . . . where the action is to hold persons responsible to the receiver of a corporation for a neglectful and wrongful performance of their duties as directors and to recover the losses sustained by the corporation, the action is one at law and . . . something more is required to warrant the intervention of a court of equity, than mere allegations showing that the acts complained of are numerous and complicated; that they are difficult of ascertainment, without a discovery with respect to them, and that a multiplicity of actions would be necessary, if all the directors, who were in office during the whole or a part of the time within which the acts complained of were committed, could not be associated as defendants in one action. . . . That an action in equity will lie by a stock-

<sup>18</sup> Gray v. Fuller, 17 A. D. 29, 44 N. Y. Supp. 883 (1897)..

<sup>19</sup> Moran v. Vreeland, 81 Misc. 664, 143 N. Y. Supp. 522 (1913); aff'd 162 A. D. 907, 146 N. Y. Supp. 1101.

<sup>20</sup> General Rubber Co. v. Benedict, 215 N. Y. 18, L.R.A.1915F, 617, 109 N. E. 96 (1915).

holder against the directors of his corporation, for violations of their duties, or breaches of the trust committed to them, is well settled . . . . But . . . there is a wide and vital difference between such a case and one where the action is by the corporation against its delinquent directors. . . . In such actions as these the defendants, as directors, are not proceeded against, strictly, as trustees, but as agents acting for a principal and for any damage caused by their neglect and violation of duty the remedy at law is adequate. . . ."<sup>1</sup> A stockholder in a corporation owning a controlling interest in another corporation cannot hold the directors of his corporation individually liable for negligence on the ground that they did not prevent or seek to recover a loan made by such other corporation to some of its directors in an alleged illegal manner, unless it be alleged and proven that the directors of such stockholder's corporation were guilty of a breach of trust in failing to embark on a litigation to prevent or recover such loan.<sup>2</sup>

**§ 356. Id.: Under Statute.**—The grounds for an action against a corporation's trustees, directors, managers or other officers are to make them account for their official conduct, including any neglect of or failure to perform their duties, in the management and disposition of the funds and property committed to their charge; to make them pay to the corporation or its creditors any money and the value of any property they have acquired to themselves or transferred to others or lost or wasted, by or through any neglect of or failure to perform or other violation of their duties; to set aside an alienation of property made by them contrary to a provision of law or for a purpose foreign to the lawful business and objects of the corporation, where the alienee knew the purpose of the alienation, or to restrain and prevent such an alienation, where it is threatened, or where there is good reason to apprehend that it will be made;<sup>3</sup> and to compel them to account for injury to or losses of the funds, assets or property of the corporation caused by or through any neglect or failure of the defendants to perform, or for violation of, their duties.<sup>4</sup> In order to hold a director liable for official misconduct under the statute not merely misfeasance but actual malfeasance in

<sup>1</sup> *Dykman v. Keeney*, 154 N. Y. 483, 48 N. E. 894 (1897).

<sup>2</sup> *Holmes v. St. Joseph Lead Co.*, No. 2, 168 A. D. 688, 154 N. Y. Supp. 513 (1915); *aff'd* without opinion 217 N. Y. 619, 111 N. E. 1088.

<sup>3</sup> Gen. Corp. L. § 90 (L. 1909, c. 28).

<sup>4</sup> Gen. Corp. L. § 91-a (L. 1913, c. 633).

office must be proven, *i. e.*, “ something more than the mere impropriety or unlawfulness of the act,” and, rather, “ the unjust performance of some act which the party had no right, or which he had contracted not to do, in other words, the performance of the act, the party being aware of the fact that the right to act did not exist.”<sup>5</sup> A cause of action for damages caused by the mere neglect of directors properly to perform their duties is contemplated by the statute permitting a suit against them by the Attorney-General in the name of the People.<sup>6</sup> “ The acquiescence of all the stockholders of a corporation in the action of the directors in dealing with its assets for the purpose of depriving future creditors of payment for their just claims, will not avail as a defense to a suit brought by an officer under section 1781 of the Code of Civil Procedure.”<sup>7</sup> An action may be maintained by the Attorney-General under the ninetieth section of the General Corporation Law when the purpose is to charge negligent officers and directors with a loss sustained by the corporation through their misfeasance as well as through their malfeasance.<sup>8</sup> The statute permitting action by the Attorney-General against corporate officers and directors makes no distinction between an accounting for the fruits of fraud and for damages arising from the loss of funds through official neglect.<sup>9</sup> Directors who sell and transfer corporate assets without taking the steps provided for the protection of corporate creditors by statute do so at their peril, and “ to set aside a fund for the purpose of paying debts but without paying them is no defense against a creditor whose judgment has been made worthless by the sale of all of the debtor’s property without notice and the division of the proceeds among the stockholders and directors.”<sup>10</sup> Though it is true that corporate assets are a trust fund for payment of its debts, yet mere failure by it formally to go through dissolution proceedings does not entitle a creditor, in the absence of proof of fraud

<sup>5</sup> *Stokes v. Stokes*, 23 A. D. 552, 48 N. Y. Supp. 722 (1897); C. C. P. § 1781; now Gen. Corp. L. § 90.

<sup>6</sup> *People v. Equitable Life Assurance Society*, 124 A. D. 714, 109 N. Y. Supp. 453 (1908); C. C. P. §§ 1781, 1782; now Gen. Corp. L. § 90.

<sup>7</sup> *Halpin v. Mutual Brewing Co.*, 20 A. D. 583, 47 N. Y. Supp. 412 (1897); C. C. P. § 1781; now Gen. Corp. L. § 90.

<sup>8</sup> *People v. Equitable Life Assurance Society*, 51 Misc. 339, 101 N. Y. Supp. 354 (1906); C. C. P. §§ 1781, 1782; now Gen. Corp. L. § 90.

<sup>9</sup> *People v. Equitable Life Assurance Society*, 51 Misc. 339, 101 N. Y. Supp. 354 (1906); C. C. P. §§ 1781, 1782; now Gen. Corp. L. § 90.

<sup>10</sup> *Shalek v. Jetter*, 171 A. D. 364, 155 N. Y. Supp. 975 (1915); Gen. Corp. L. §§ 90, 91, 221; St. Corp. L. §§ 16, 17.

or bad faith, to recover from the directors the amount of his claim when it affirmatively appears that he would not have been entitled to the payment of any part had the corporation been thus dissolved; his remedy extends only to the property which, but for the directors' action, would have been applicable to payment of his claim.<sup>11</sup> A judgment creditor of a corporation may compel to account for official misconduct and pay his judgment such of the directors of the corporation as transferred corporate property exceeding in value the amount of such judgment to one of themselves and then dissolved it without making provision for its creditors, but not such persons as were at one time directors but not at the time of the transfer of its property (having sold their stock) provided property was left in the corporation exceeding the amount of the judgment.<sup>12</sup> One cannot be directed to account if the action against him is for fraud or official misconduct in the management of corporate property and no such fraud or misconduct is shown; the action must be for an accounting.<sup>13</sup>

**§ 357. Id.: Who May Sue, Stockholder.**—"Where the objection to the acts of a corporation is that they are *ultra vires*, without being either *mala prohibita* or *mala in se*, a stockholder cannot maintain an action in his own behalf based on such objection, where he himself, with knowledge of the character of the acts, has acquired and accepted pecuniary benefits thereunder. . . . The officers of a corporation who are sued by stockholders for damages due to carrying on business not authorized by its charter may defend by showing the stockholders' acquiescence in or assent to the business, express or implied."<sup>14</sup> A stockholder may not bring an action directly against the officers of a corporation to make them account to him personally for property which belongs to the corporation: if fraud of the officers or managers of a corporation, whereby its assets are misappropriated, is alleged, redress should be had by an action brought either by the corporation to which the assets belonged or a stockholder derivatively in behalf of the corporation.<sup>15</sup> To warrant a stockholder in bringing a representative action to redress alleged wrongs of the corporation's officers, a refusal by the board of directors to bring the action in the corporation's

<sup>11</sup> Curran v. Oppenheimer, 164 A. D. 746, 150 N. Y. Supp. 369 (1914); Gen. Corp. L. §§ 90, 91.

<sup>12</sup> Cullen v. Friedland, 152 A. D. 124, 136 N. Y. Supp. 659 (1912); Gen. Corp. L. § 90.

<sup>13</sup> Stokes v. Stokes, 91 Hun, 605,

36 N. Y. Supp. 350 (1895); C. C. P. § 1781; now Gen. Corp. L. § 90.

<sup>14</sup> Wormser v. Metropolitan St. Ry. Co., 184 N. Y. 83, 76 N. E. 1036 (1906).

<sup>15</sup> Brock v. Poor, 216 N. Y. 387, 111 N. E. 229 (1915).

name is needed.<sup>16</sup> "The liability of the directors of corporations for violations of their duty or breaches of the trust committed to them, and the jurisdiction of courts of equity to afford redress to the corporation, and in a proper case to its shareholders, for such wrongs exist independently of any statute. . . . The action to recover such losses . . . should in general be brought in the name of the corporation, but if it refuses to prosecute, the stockholders, who are the real parties in interest, will be permitted to sue in their own names, making the corporation a defendant (*citation*). And that course of proceeding is also allowed if it appears that the corporation is still under the control of those who must be made the defendants in the suit."<sup>17</sup> The right of the stockholder to court relief for waste of corporate assets by directors and officers does not depend on the extent of his holdings.<sup>18</sup> A minority stockholder waiting eight years to attack a transaction of his corporation's directors as constituting a spoliation of its property is debarred from relief by his laches.<sup>19</sup> One who was a stockholder in a corporation at the time of misconduct by its directors detrimental to its interests but who had ceased to be a stockholder at the time of the commencement of a representative stockholder's action to hold the directors liable therefor is not a proper party plaintiff.<sup>20</sup> One who was a stockholder when he brought a representative action against his corporation's directors for fraudulent breach of trust though not so when the fraud was committed may nevertheless maintain the action; and need not first apply to the corporation to sue if it is still controlled by such directors.<sup>1</sup> A stockholder may, on behalf and for the benefit of himself and other stockholders, compel restitution

<sup>16</sup> *Leslie v. Lorillard*, 31 Hun, 305 (1883). The following allegation in a complaint was held insufficient and demurrable: "That heretofore, and before the commencement of this action the plaintiff requested the defendant, The O. D. S. Co., of D., to pay no more money to said J. L., or his assigns, under said contract, marked B, and to commence an action to procure the cancellation of said contract and to recover from said J. L. all sums of money paid to him under the same and under the contract first herein mentioned. That said defendant has neglected to bring such action and threatens to continue to make the monthly

payments provided for in said contract."

<sup>17</sup> *Brinckerhoff v. Bostwick*, 88 N. Y. 52 (1882). The receiver, who had been a director, of a National Bank, and who as director was alleged to be liable for misconduct, was held not the proper plaintiff. U. S. R. S. § 5239.

<sup>18</sup> *Nash v. Hall*, 11 Misc. 468, 32 N. Y. Supp. 701 (1895).

<sup>19</sup> *Norman v. Federal Mining & Smelting Co.*, 180 A. D. 325, 167 N. Y. Supp. 794 (1917).

<sup>20</sup> *Hanna v. Lyon*, 179 N. Y. 107, 71 N. E. 778 (1904).

<sup>1</sup> *Young v. Drake*, 8 Hun, 61 (1876).

to the corporation by directors of an amount paid by them to an individual for services rendered it as secretary and treasurer which were pretended only.<sup>2</sup> A stockholder in a corporation, in behalf of himself and other stockholders similarly situated, may maintain an action against such corporation and its directors, to set aside and enjoin transactions done by such directors, in the name of the corporation, for their own personal gain and benefit, and in fraud of the rights of the plaintiffs and other *bona fide* stockholders, when the directors have been requested to bring such action and refused.<sup>3</sup> "If the corporation failed to enforce the causes of action [for an accounting against its directors], a stockholder, on account of his personal interest as equitable owner of an undivided share in the assets (*citation*), is permitted in equity, although he has no standing at law, to bring an action in the right of the corporation for the benefit of all stockholders as well as himself, to enforce the causes of action, whether of a legal or of an equitable nature; and in such cases . . . because he is obliged to sue in equity, causes of action both at law and in equity may be joined; but . . . the defendants will be entitled to have issues settled and a trial before a jury as to the charges which would otherwise be of a legal nature . . ."<sup>4</sup> A stockholder will not be precluded from relief asked by him in the way of setting aside a transfer of the assets of his corporation by its directors as fraudulent because he also asks relief in the way of suspending its officers.<sup>5</sup>

**§ 358. Id.: Under Statute, Attorney-General.**—The Attorney-General, in behalf of the People of the State, may bring

<sup>2</sup> *Butts v. Wood*, 38 Barb. 181 (1862); *aff'd* 37 N. Y. 317.

<sup>3</sup> *Gray v. New York & Virginia Steamship Co.*, 3 Hun, 383 (1875).

<sup>4</sup> *People v. Equitable Life Assurance Society*, 124 A. D. 714, 109 N. Y. Supp. 453 (1908); C. C. P. §§ 1781, 1782; see now Gen. Corp. L. § 90.

<sup>5</sup> *Whitman v. Holmes Publishing Co.*, 33 Misc. 47, 68 N. Y. Supp. 167 (1900); C. C. P. §§ 1781-2; see now Gen. Corp. L. § 90.

As to whether corporation or stockholder is real party in interest by whom action must be brought, see note in 64 L.R.A. 609.

On right of stockholder to assail

agreement on ground that it tends to promote monopoly, see note in 26 L.R.A.(N.S.) 153.

On right of stockholder to attack fraudulent transaction occurring before he acquired his stock, see note in 38 L.R.A.(N.S.) 988.

The necessity of applying to board of directors as a condition of right of stockholder to sue on behalf of the corporation, is discussed in a note in 51 L.R.A.(N.S.) 99, and the question of necessity of applying to body of stockholders as a condition of right of stockholder to sue on behalf of the corporation, is discussed in note in 51 L.R.A.(N.S.) 112.

an action to compel trustees, directors, managers or other officers of a corporation to account for their official conduct, including any neglect of or failure to perform their duties, in the management and disposition of the funds and property committed to their charge; or to compel them to pay to the corporation or its creditors any money and the value of any property they have acquired to themselves or transferred to others or lost or wasted, by or through any neglect of or failure to perform or any other violation of their duties; or to set aside an alienation of property made by them contrary to a provision of law or for a purpose foreign to the lawful business and objects of the corporation, when the alienee knew the purpose of the alienation, or restraining and preventing such an alienation when it is threatened or there is good reason to apprehend that it will be made.<sup>6</sup>

§ 359. **Id.: Corporation.**— The corporation may sue in the Supreme Court in equity to compel one or more trustees, directors, managers or other officers of the corporation to account for injury to or losses of the funds, assets or property of the corporation, caused by or through any neglect or failure of the defendants to perform, or, for violation of, their duties.<sup>7</sup>

§ 360. **Id.: Creditor.**— A creditor of a corporation may maintain an action against its trustees, directors, managers or other officers to compel them to account for their official conduct, including any neglect of or failure to perform their duties, in the management and disposition of the funds and property committed to their charge; or to compel them to pay to the corporation or its creditors any money and the value of any property which they have acquired to themselves or transferred to others or lost or wasted by or through any neglect of or failure to perform or by other violation of their duties; or to set aside any alienation of property made by them contrary to a provision of law or for a purpose foreign to the lawful business and objects of the corporation, when the alienee knew the purpose of the alienation; or to restrain and prevent such alienation when it is threatened or there is good reason to apprehend that it will be made.<sup>8</sup> Only a judgment as distinguished from an ordinary creditor may bring an

<sup>6</sup> Gen. Corp. L. § 90 (L. 1909, c. 28).

On right of Attorney-General, or other representative of State, to maintain suit or proceeding to remove officer of private corporation,

see note in 18 L. R. A.(N.S.) 664, 672.

<sup>7</sup> Gen. Corp. L. § 91-a (L. 1913, c. 633).

<sup>8</sup> Gen. Corp. L. § 90 (L. 1909, c. 28).

equitable, representative suit under the statute to compel the directors and officers of his corporate debtor to account for their transactions.<sup>9</sup> A certificate of incorporation authorizing a company to buy and sell laces "and generally to carry on any other business . . . which may seem . . . capable of being carried on in connection with" the lace business does not authorize stock gambling, and the directors and stockholders cannot escape accountability to corporate creditors for corporate funds used in such speculation by authorizing the company to so speculate.<sup>10</sup>

**§ 361. Id.: Director, Trustee, Receiver or Other Officer.**—A trustee, director, manager or other officer of a corporation, having a general superintendence of its concerns, may maintain an action against its trustees, directors, managers or other officers to compel the latter to account for their official conduct, including any neglect of or failure to perform their duties in the management and disposition of the funds and property committed to their charge; or to compel them to pay to the corporation or its creditors any money and the value of any property they have acquired to themselves or transferred to others or lost or wasted, by or through any neglect or failure to perform, or by other violation of, their duties; or to set aside an alienation of property made by them contrary to a provision of law or for a purpose foreign to the lawful business and objects of the corporation, where the alienee knew the purpose of the alienation; or to restrain and prevent such an alienation when it is threatened or there is good reason to apprehend it will be made.<sup>11</sup> A receiver or trustee in bankruptcy of a corporation may sue in equity in the Supreme Court its trustees, directors, managers or other officers to make them account for injury to or losses of its funds, assets or property caused by or through any neglect or failure of the defendants to perform, or for violation of, their duties.<sup>12</sup> A director has the statutory right to maintain an action against an officer of his corporation for misappropriation of its funds.<sup>13</sup> A director, as distinguished from a stockholder, may bring an action for an accounting by other directors of their acts and for

<sup>9</sup> *Steele v. Isman*, 164 A. D. 146, 149 N. Y. Supp. 488 (1914); Gen. Corp. L. § 91.

<sup>10</sup> *Helmsley & Co., Ltd. v. Duncan Co., Inc.*, 98 Misc. 338, 164 N. Y. Supp. 282 (1917); Gen. Corp. L. §§ 90, 91, 91-a.

<sup>11</sup> Gen. Corp. L. § 90 (L. 1909, c. 28).

<sup>12</sup> Gen. Corp. L. § 91-a (L. 1913, c. 633).

<sup>13</sup> *Schoenherr v. Van Meter*, 215 N. Y. 548, 109 N. E. 625 (1915); Gen. Corp. L. §§ 90, 91.

the recovery of corporate moneys they have wasted, without making the corporation a plaintiff, or alleging demand of it to begin the action, or making any creditor a party defendant, though he must make the corporation a party defendant.<sup>14</sup> An action by an individual director of a foreign as well as of a domestic corporation may be brought in the courts of the State to compel other individuals who, while directors, had become wrongfully possessed of the corporate funds and property, to account therefor.<sup>15</sup> The right of one who is a director to bring the statutory action against his co-directors to obtain relief appropriate to their acts of misconduct in managing the corporate affairs depends wholly upon his holding the office of director; so that on his ceasing to be such the action abates.<sup>16</sup> Directors of a corporation failing to perform their trust duty of administering its affairs honestly and with reasonable prudence, not through excusable neglect but by actual misfeasance in appropriating corporate funds to their personal use, are responsible to a receiver of such corporation, as the representative of both the corporation and its creditors, for damages which their misconduct has occasioned to the corporation.<sup>17</sup> Directors of one corporation purchasing all the rights of incorporators of another company and paying therefor with the money of the company of which they were directors are individually liable to a receiver of the last named corporation for a waste of its funds, and are not entitled to any right of subrogation against such incorporators to which the company of which they were directors might have been entitled.<sup>18</sup>

**§ 362. Id.: Practice in Actions, In General.**—Equity will in one suit compel various directors of a corporation to account for their waste of its assets, though damages be asked as the result of their official misconduct, and though they be not equally culpable.<sup>19</sup> “Except where it is sought by, or in behalf of, the creditors of the corporation to hold its stockholders to some liability imposed by law, that persons, who are stockholders, should be sued as defendants in a stockholder’s

<sup>14</sup> *Miller v. Barlow*, 78 A. D. 331, 79 N. Y. Supp. 964 (1903); C. C. P. §§ 447, 448, 1782. See now Gen. Corp. L. §§ 91, 91-a.

<sup>15</sup> *Miller v. Quincy*, 179 N. Y. 294, 72 N. E. 116 (1904); C. C. P. §§ 1781, 1782, are not applicable only to domestic corporations. See now Gen. Corp. L. §§ 91, 91-a.

<sup>16</sup> *Hamilton v. Gibson*, 145 A. D.

825, 130 N. Y. Supp. 684 (1911); Gen. Corp. L. §§ 90, 91; C. C. P. § 756.

<sup>17</sup> *Bowers v. Male*, 186 N. Y. 28, 78 N. E. 577 (1906).

<sup>18</sup> *Gilbert v. Finch*, 173 N. Y. 455, 61 L.R.A. 807, 66 N. E. 133 (1903).

<sup>19</sup> *Mahon v. Miller*, 81 A. D. 10, 80 N. Y. Supp. 979 (1903).

action, merely, upon the allegation of their status as such, is an extraordinary proceeding"; and "the necessary defendants to an action, where . . . the complainant charges misconduct and malversation of funds on the part of some one, or more, of the officers, or directors, of a corporation, are the defaulting officials and the directors, or the trustees, who direct, and are responsible for, the corporation": not other stockholders on whose behalf it is not suggested even that the action is brought.<sup>20</sup> A stockholder cannot sue some of his corporation's directors for waste without making the corporation itself and the other stockholders parties.<sup>1</sup> In a complaint by a stockholder against directors of the corporation for what they did or failed to do in respect of one of its officer's and stockholder's acts in misusing the corporate property, such officer need not be a party defendant, nor those directors who have not countenanced such acts; but possibly the refusal of the corporation itself to bring the suit must be alleged.<sup>2</sup> It is improper to sue individually directors of a corporation not in existence at the time the liability of another corporation which is sued upon arose, merely because such directors' corporation is a consolidation of the other corporation and contracted to pay off the obligations of its constituent companies; as the consolidated corporation is the proper defendant in an action against which all necessary relief may be had.<sup>3</sup> A derivative action by a stockholder to recover for his corporation money from its directors is equitable and causes thereof may be joined against several directors with varying liability.<sup>4</sup> "In case A and B, directors in a corporation, waste its funds during one year, and B and C, directors, by some act not connected with a first devastation, waste its funds in another year, the three cannot be joined in an equitable action brought by or in behalf of the corporation to compel them to account for and pay the damages sustained by these independent, wrongful acts."<sup>5</sup> It is

<sup>20</sup> *McCrea v. Robertson*, 192 N. Y. 150, 84 N. E. 960 (1908).

<sup>1</sup> *Smith v. Rathbun*, 66 Barb. 402 (1873).

<sup>2</sup> *Smith v. Rathbun*, 22 Hun, 150 (1880); *dism'd* 88 N. Y. 60.

<sup>3</sup> *Chase v. Vanderbilt*, 62 N. Y. 307 (1875). The action was to recover guaranteed dividends of the old company.

<sup>4</sup> *Young v. Equitable Life Assurance Society*, 49 Misc. 347, 99 N. Y.

Supp. 446 (1906); *aff'd* 112 A. D. 760, 98 N. Y. Supp. 1052.

<sup>5</sup> *Nash v. Hall Signal Co.*, 90 Hun, 354, 35 N. Y. Supp. 940 (1895), "wasting the property of a corporation by its directors is a tort. A is not liable for the acts of B and C, and C is not liable for the acts of A and B, and these independent, tortious acts constitute distinct causes of action which cannot be united in one complaint."

proper to make a stockholder a party defendant to an action brought by his corporation against its president and treasurer, at his request, to recover for their mismanagement, if he has discontinued a representative action against it and them because he failed to make a demand that it bring such an action; if his request that he be permitted, on giving bond of indemnity to the corporation, to conduct the present action by the corporation, instituted at his request, be refused; and if the attorney employed by the corporation as plaintiff be the same as represented it and the president and treasurer as defendants in the stockholder's discontinued action.<sup>6</sup>

In a representative stockholders' action by one stockholder on behalf of the corporation against its officers for dereliction of duty by them, seeking substantially a legal remedy, though necessarily brought in equity because the corporation itself will not sue, another stockholder against whom no relief is sought cannot intervene as a party defendant.<sup>7</sup> In an action by a stockholder against the officers and directors of his own company to prevent them from calling a stockholders' meeting to approve a sale of the corporate property to a second corporation at a less price than has been offered therefor by a third corporation, the second corporation cannot intervene; if such stockholders' meeting is essential to the sale.<sup>8</sup> It is proper to grant an order bringing in as party defendant a receiver of a company appointed after the action was begun if it is by certain stockholders representing all stockholders based on the mis- and mal-feasance of the corporate directors, as the recovery inures to the corporation's benefit and the receiver is entitled to possession of any such recovery.<sup>9</sup>

A cause of action to set aside a written contract entered into between a corporation and one of its directors in partial execution of a conspiracy whereby assets were wrongfully to be diverted to him is properly united with a cause of action to compel the corporate directors to account for the injurious results of the arrangement of which the agreement was a part.<sup>10</sup> A cause of action by a shareholder to compel an accounting by corporate directors for their acts and restitution by them of property wrongfully received by them cannot

<sup>6</sup> *Ithaca Gas-Light Co. v. Treman*, 30 Hun, 212 (1883); C. C. P. § 452.

<sup>7</sup> *Hay v. Brookfield*, 160 A. D. 277, 145 N. Y. Supp. 543 (1914).

<sup>8</sup> *Lewisohn Bros. v. Anaconda Copper Co.*, 29 A. D. 552, 51 N. Y. Supp. 1089 (1898); C. C. P. §§ 447, 452.

<sup>9</sup> *Seagrist v. Reid*, 171 A. D. 755, 157 N. Y. Supp. 979 (1916).

<sup>10</sup> *Bosworth v. Allen*, 168 N. Y. 157, 55 L.R.A. 751, 61 N. E. 163 (1901).

be joined with a cause of action by a shareholder to recover damages he has personally sustained by reason of the directors' wrongful acts.<sup>11</sup> In an action by a stockholder for an accounting from individuals for salaries received as officers of the corporation the question of the validity of the election of the board of directors which voted the salaries cannot be raised.<sup>12</sup>

"As between the directors of a corporation and a stockholder insisting upon his legal right to the protection of his interests against an ill-advised or illegal act of the corporation, no relation exists which calls for the application of the rule . . . which holds a suitor to his once stated objections, when asserting the default of a party with whom he has contracted."<sup>13</sup> Directors answering a complaint based on fraud and deceit in misconducting themselves by giving out a false written report of their corporation's condition need not verify their answer.<sup>14</sup> Where an action is brought by a stockholder against directors of a corporation whereby they may be compelled to account for property of the corporation, a proceeding to compel them to account is strictly an equitable action, and in determining the sufficiency or correctness of the pleadings reference is to be had to the more liberal rule as to joinder of causes of action and of defendants that prevails in equity suits; but when the action is brought against such directors to recover damages for injury to or destruction or appropriation of property of the corporation by its employee while they were acting as directors with damage resulting to the stockholder suing by reason of negligence and want of proper care on their part, then the action is a legal one, and the rules of pleading and procedure governing legal actions apply.<sup>15</sup> An action by receivers of an insolvent corporation to recover against its directors for alleged misconduct and breaches of trust remains one at law and cannot be held one in equity though it allege that a multiplicity of suits will be required in case the plaintiffs have to sue each director, joining with him only those who aided him in the wrongful acts which would make them liable, as the multiplicity of suits which gives equity jurisdiction is a multiplicity against one

<sup>11</sup> *Brown v. Utopia Land Co.*, No. 2, 118 A. D. 364, 103 N. Y. Supp. 59 (1907).

<sup>12</sup> *Lewis v. Matthews*, 161 A. D. 107, 146 N. Y. Supp. 424 (1914).

<sup>13</sup> *Pollitz v. Wabash Railroad Co.* No. 1, 150 A. D. 709, 135 N. Y. Supp. 785 (1912).

<sup>14</sup> *Thompson v. McLaughlin*, 138 A. D. 711, 123 N. Y. Supp. 762 (1910); *St. Corp. L.* § 31; *C. C. P.* § 837.

<sup>15</sup> *Sayles v. White*, 19 A. D. 590 46 N. Y. Supp. 385 (1897); *aff'd* 154 N. Y. 763.

person and not against a multitude of people.<sup>16</sup> "Where an equitable action is commenced to require the officers or trustees of a corporation to account to the corporation for a breach of their trust, allegations as to the dealings of the officers or trustees of the corporation with the corporate property would seem to be material and proper allegations in the complaint"; and the court should be careful about ordering them stricken out.<sup>17</sup> Granting that a corporation may sue its directors in equity to recover losses sustained through their negligence, and also granting (what is most doubtful) that the facts plead in a particular case suffice to support the action as an equitable one as well as one at law, yet if the prayer for relief be appropriate only to an action at law, it will be held such.<sup>18</sup> In an action by a stockholder as representative of all others similarly situated for an accounting because of misfeasance by defendants it must be alleged that the latter are, or were at the time complaint is made of the corporate action, directors of the corporation, as the fact that they were stockholders does not make them liable.<sup>19</sup>

" . . . a stockholder has a remedy for losses sustained by the fraudulent acts, and for the misapplication or waste of corporate funds and property by an officer of a corporation: but . . . an action for injuries caused by such misconduct must be brought in the name of the corporation, unless such corporation or its officers, upon being applied to for such a purpose by a stockholder, refuse to bring such action. In that contingency, and then only, can a stockholder bring an action for the benefit of himself and others similarly situated, and in such an action the corporation must necessarily be made a party defendant. When a stockholder brings such an action, the complaint should allege that the corporation, on being applied to, refuses to prosecute; and as this averment constitutes an essential element of the cause of action, the complaint is defective and insufficient without it." It is not only when the stockholder seeks to recover his share of the loss which might be recovered from the company or when the loss is caused by depreciation of market value that the company must be made a party.<sup>20</sup> When redress is sought by a

<sup>16</sup> O'Brien v. Fitzgerald, 6 A. D. 509, 39 N. Y. Supp. 707 (1896); aff'd 150 N. Y. 572, 44 N. E. 1126.  
<sup>17</sup> Scharf v. Warren-Scharf Paving Co., 15 A. D. 480, 44 N. Y. Supp. 491 (1897).

<sup>18</sup> O'Brien v. Fitzgerald, 143 N. Y. 377, 38 N. E. 371 (1894).

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<sup>19</sup> Brown v. Utopia Land Co., No. 2, 118 A. D. 364, 103 N. Y. Supp. 50 (1907).

<sup>20</sup> Greaves v. Gouge, 69 N. Y. 154 (1877).

stockholder for "the loss of the corporate funds, resulting from the misconduct of" individual directors, the cause of action primarily is in the corporation and no stockholder can maintain an action for the loss he has individually suffered in the depreciation of the value of the share stock held by him; but "the action must be brought not only on behalf of the plaintiff [stockholder], but also on behalf of all the other stockholders of the company . . . It is quite plain that the complaint in such an action should set forth but two things: *First*, the cause of action in favor of the corporation, which should be stated in exactly the same manner and with the same detail of facts as would be proper in case the corporation itself had brought the action; *second*, the facts which entitle the plaintiff to maintain the action in place of the corporation, that he is a stockholder therein, and that the corporation itself has either refused or unreasonably failed to bring the action."<sup>1</sup> In a stockholder's representative suit against the corporation's directors based on fraud and a substantial misappropriation of the corporation's stock through a nominal purchase of property and the payment of a pretended claim for services two things must be set forth: "first, a cause of action in favor of the corporation with the same detail of facts as would be proper in case the corporation itself had brought the action; second, the facts which entitle the plaintiff to maintain the action in place of the corporation."<sup>2</sup> An action by a stockholder seeking to recover for the corporation from its directors money owing it from them can be maintained only by establishment of a cause of action in the corporation's favor and of the facts entitling the stockholder to sue in its stead.<sup>3</sup> The complaint in a representative action by a stockholder to enjoin acts of the officers of the corporation and to compel them to account as such should allege "(1) the cause of action in favor of the corporation, which should be stated in exactly the same manner and with the same detail of facts as would be proper in case the corporation had brought the action; (2) the facts which entitle the plaintiff to

<sup>1</sup> *Kavanaugh v. Commonwealth Trust Co.*, 181 N. Y. 121, 73 N. E. 562 (1905). The striking out of the statements in the complaint of the amount plaintiff paid for his stock and that its value had been reduced whereby plaintiff had lost the sum sued for was upheld as immaterial.

<sup>2</sup> *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 51 L.R.A. (N.S.) 112, 99 N. E. 138 (1912).

<sup>3</sup> *Young v. Equitable Life Assurance Society*, 49 Misc. 347, 99 N. Y. Supp. 446 (1906); *aff'd* 112 A. D. 760, 98 N. Y. Supp. 1052.

maintain the action in place of the corporation.”<sup>4</sup> Ordinarily no allegations are material or necessary to an action by a stockholder to recover from individual directors of a corporation damages for illegal acts whereby its assets have been lost or wasted than the cause of action in its favor (stated in exactly the same manner and detail as if the corporation itself were suing), the facts which entitle the plaintiff to maintain the action in place of the corporation, the statement that he is a stockholder in the corporation and the allegation that the corporation itself either has refused or unreasonably fails to bring the action.<sup>5</sup> In a stockholder’s representative suit it is not necessary to allege in the complaint, in addition to a demand upon and a refusal by the corporation and its board of directors to bring the suit, that notice has been given of the alleged fraud upon which the suit is based to the body of stockholders; that demand has been made of them that some action be taken to redress the wrong; and that such body has refused to take action.<sup>6</sup> A stockholder’s action against his corporation’s directors to recover damages sustained by it because of their mismanagement is a representative action and the claim is a corporate asset with the right of action thereon primarily in the corporation; so that “the complaint should allege a demand and express refusal [of the corporation] to bring the action, or facts which excuse the plaintiff from making such a demand, or such other facts as will warrant the conclusion that the corporation’s failure and neglect to bring the action after demand is so unreasonable as to amount to a refusal to act.”<sup>7</sup> A stockholder must request his corporation to bring an action for misconduct of its directors before he can do so in his own name, unless they are in control of the corporation.<sup>8</sup> In a representative action by a stockholder for an accounting by directors because of misfeasance there must be an allegation that a demand has been made upon the corporation to bring the action or facts stated enabling the stockholder to sue without such demand.<sup>9</sup> Under a specified notice to a corporation, its officers and directors, allegations of a complaint in a stockholder’s representative suit against such directors (to recover its stock alleged to have been fraudu-

<sup>4</sup> Weingreen v. Michelfacher, 139 A. D. 931, 124 N. Y. Supp. 41 (1910).

<sup>5</sup> Kolb v. Mortimer, 135 A. D. 542, 120 N. Y. Supp. 543 (1909).

<sup>6</sup> Continental Securities Co. v. Belmont, 206 N. Y. 7, 51 L.R.A. (N.S.) 112, 99 N. E. 138 (1912).

<sup>7</sup> Kavanaugh v. Commonwealth Trust Co., 103 A. D. 95, 92 N. Y. Supp. 543 (1905).

<sup>8</sup> Polhemus v. Polhemus, 114 A. D. 781, 100 N. Y. Supp. 263 (1906).

<sup>9</sup> Brown v. Utopia Land Co., No. 2, 118 A. D. 364, 103 N. Y. Supp. 50 (1907).

lently issued to them) of a request to the corporation, its officers and directors, to bring the suit and of their refusal so to do, were held sufficient.<sup>10</sup> An action in behalf of one plaintiff stockholder and all other stockholders and creditors of a corporation in behalf of the corporation, seeking an accounting by directors for waste, is in equity and must have the corporation as a defendant and must allege a request of and refusal by the directors to bring the suit, unless they continued such up to the commencement of the action.<sup>11</sup> A demand on the corporation to bring an action brought against its directors by a stockholder is not necessary if the directors sued for mis- or non-feasance are the same as control the corporation when the suit is brought.<sup>12</sup> A demand of a corporation to sue an officer to compel him to account for a payment of corporate funds made by him illegally need not be made when he controls the majority of its stock and elected its directors.<sup>13</sup> A stock- or bond-holder of an insolvent corporation may seek redress in equity for waste of its assets without first demanding of the corporation that it bring the suit if it is under the control of the very persons who must be defendants in the suit.<sup>14</sup> A demand on a corporation to bring an action which a stockholder wishes to bring as representative of other stockholders similarly situated need not be made as a prerequisite to institution of suit when the individual persons against whom the wrong which is the subject of the action is charged are the executive officers of the corporation and also constitute a majority of its acting board of directors.<sup>15</sup> The courts will restrain corporate officers and compel them to render account of their acts at the instance of one owning a minority of the stock in an equity suit in his own name without asking the corporation to bring it in its own name when such officers exclusively control the corporation.<sup>16</sup>

A trustee of a corporation is not subject to the rule applicable to a stockholder that demand of and refusal by it to sue trustees for their wrongful acts are conditions precedent to a

<sup>10</sup> *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 51 L.R.A. (N.S.) 112, 99 N. E. 138 (1912).

<sup>11</sup> *Corning v. Barrett*, 22 Misc. 241, 48 N. Y. Supp. 1013 (1898).

<sup>12</sup> *Young v. Equitable Life Assurance Society*, 49 Misc. 347, 99 N. Y. Supp. 446 (1906); *aff'd* 112 A. D. 760, 98 N. Y. Supp. 1052.

<sup>13</sup> *Roth v. Robertson*, 64 Misc. 343, 118 N. Y. Supp. 351 (1909). He

himself was one director, his brother another and his uncle the third.

<sup>14</sup> *Currier v. New York, West Shore & Buffalo R. R. Co.*, 35 Hun, 355 (1885).

<sup>15</sup> *Jacobson v. Brooklyn Lumber Co.*, 184 N. Y. 152, 76 N. E. 1075 (1906).

<sup>16</sup> *Lawrence v. Weber*, 65 Misc. 603, 120 N. Y. Supp. 289 (1910).

suit by him; and the following is, therefore, sufficient for an action by a trustee against co-trustees to restrain them from dealing with the corporate funds: "The existence of the corporation is set forth; the character of the plaintiff as a trustee and that of the defendants as co-trustees are alleged, together with facts and circumstances justifying a conclusion that the defendant trustees, if not restrained, will make an unlawful alienation of the corporate property to the injury of the corporation and its stockholders."<sup>17</sup> To sustain an action by a corporation against its treasurer to recover moneys received by him it is not necessary to prove a demand before suit was begun if the defendant asserts rights in himself to the money in hostility to plaintiff's right.<sup>18</sup>

Directors not parties to an action cannot be examined because their corporation is a party.<sup>19</sup> When the claim of one suing directors for waste of assets is in his complaint that he is a stockholder (as well as other things) and the directors deny his standing as stockholder, an order for their examination before trial cannot be limited to the sole issue of his standing as stockholder but should permit their examination as to the waste alleged, within reasonable limits.<sup>20</sup> Before an obligation to disclose the affairs of a corporation to a stockholder suing directors for waste can arise which they must satisfy in his attempt to secure their examination before trial to frame his complaint, a demand and proper reason must be shown.<sup>1</sup>

If one creditor of a corporation bring a representative action after its dissolution to hold its directors to personal liability under its charter and the action is discontinued after being dismissed on appeal, the plaintiff need not pay to other creditors money received by him in settlement from the defendants after such dismissal.<sup>2</sup>

<sup>17</sup> *Green v. Compton*, 41 Misc. 21, 83 N. Y. Supp. 588 (1903).

<sup>18</sup> *East New York & Jamaica R. R. Co. v. Elmore*, 5 Hun, 214 (1875).

<sup>19</sup> *Boorman v. Atlantic & Pacific R. R. Co.*, 17 Hun, 555 (1879); *aff'd* 78 N. Y. 599; C. C. P. § 870.

<sup>20</sup> *Eckman v. Lindbeck*, 178 A. D. 720, 165 N. Y. Supp. 145 (1917); C. C. P. § 870; G. R. P. 82.

<sup>1</sup> *Elmes v. Duke*, 39 Misc. 244, 79 N. Y. Supp. (1902); C. C. P. § 872, subd. 4; G. R. P. No. 82. The affidavits on which the motion for the examination were based showed

fraud enough by the directors; they gave as reasons for ordering the examination that the exact terms of the agreements under which the directors operated were unknown to plaintiff; that he did not know if the corporate property had been diverted to persons other than defendants; that he did not know the corporation's exact financial condition; and the affidavits, too, failed to show the information sought was exclusively in defendant's knowledge.

<sup>2</sup> *Dauids v. Bauer*, 155 A. D. 97,

An action by one stockholder in behalf of himself and other stockholders against directors as trustees to call them to account for the manner in which they discharged their trust is an equitable action governed by the ten year statute of limitations, and not by the three year statute of limitations governing "an action against a director . . . to enforce a liability created by law," as the "law" referred to in this latter statute is a statute law and not the common law under which such an equitable accounting is had.<sup>3</sup> When other stockholders become parties to a representative action by one of their number to call directors to account for the discharge of their trust the same limitation of time is applicable to them for bringing the action as is applicable to the original plaintiff.<sup>4</sup> An action for recovery of damages by a receiver of a corporation against its directors because of their waste of its assets is barred by the six year statute of limitations.<sup>5</sup> "A corporation may have a cause of action in equity for an accounting against one or more directors for an accounting with respect to property of the corporation that has actually came into his or their hands, or for a fraudulent breach of trust with respect to the management of the corporation or its property, and for the recovery of property lost and *incidental damages (citations)*. It may also have one or more causes of action *at law* against one or more directors *for damages* sustained by the corporation in consequence of his or their wrongful or negligent official acts falling within the terms misfeasance or nonfeasance (*citations*). A suit in equity may not be joined with an action at law against the same directors (*citation*). In some of the cases, on the particular facts arising therein, it has been held that there is a concurrent remedy at law and in equity, and in such cases equity applies the statute of limitations that would govern at law."<sup>6</sup> The statute of limitations and not laches determines if a cause of action is barred, if it seeks to enforce a legal right, to wit, the right of a corporation to recover from individuals damages resulting from their misuse of its assets, even though the enforcement of such right is sought in equity (where an accounting may be had to ascertain the sum of the damages.)<sup>7</sup>

140 N. Y. Supp. 55 (1913); *aff'd* 209 N. Y. 539, 102 N. E. 1101.

<sup>3</sup> *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663 (1885); C. C. P. §§ 388, 394.

<sup>4</sup> *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663 (1885).

<sup>5</sup> *Mason v. Henry*, 83 Hun, 546, 31 N. Y. Supp. 1068 (1895); *aff'd* 152

N. Y. 530, 46 N. E. 837; C. C. P. § 382, subd. 6.

<sup>6</sup> *People v. Equitable Life Assurance Society*, 124 A. D. 714, 109 N. Y. Supp. 453 (1908); C. C. P. §§ 1781, 1782; now Gen. Corp. L. §§ 90, 91.

<sup>7</sup> *Pollitz v. Wabash R. R. Co.*, 207 N. Y. 113, 100 N. E. 721 (1912).

**§ 363. Id.: Under Statute.**—In all actions against corporate directors, trustees, managers or other officers for their misconduct or negligence, whether in equity by the corporation, its receiver or its trustee in bankruptcy, or by the Attorney-General in behalf of the People of the State or a corporate creditor or a corporate trustee, director, manager or other officer having a general superintendence of its concerns, the court, upon the application of either party, must make an order directing the trial by jury of the issue of negligence or neglect or failure to perform their duties; and for that purpose the questions to be tried must be prepared and settled as prescribed in section nine hundred and seventy of the Code of Civil Procedure.<sup>8</sup> In an action brought to procure a judgment to compel the trustees, directors, managers or other officers of a corporation to account for their official conduct, or to pay over what they have themselves acquired, wasted, etc., or to suspend them for abuse of trust, or to remove them for misconduct and direct a new election, or to set aside or restrain an alienation of property unlawfully made or contemplated by them, or to account for injury or loss resulting from their failure to perform, or violation of, their duties, a stockholder is not excused from answering a question relating to the management of the corporation or the transfer or disposition of its property on the ground that his answer may expose the corporation to a forfeiture of any of its corporate rights, or will tend to convict him of a criminal offense, or to subject him to a penalty or forfeiture; but his testimony must not be used as evidence against him in a criminal action or special proceeding.<sup>9</sup> In an action brought to procure a judgment to compel the trustees, directors, managers or other officers of a corporation to account for their official conduct, or to pay over what they have themselves acquired, wasted, etc., or to suspend them for abuse of trust, or to remove them for misconduct and direct a new election, or to set aside or restrain an alienation of property unlawfully made or contemplated by them, or to account for an injury or loss resulting from their failure to perform, or violation of, their duties, the court may in its discretion on the application of either party at any stage of the action before or after final judgment and with or without security grant an injunction order restraining the creditors of the corporation from bringing actions against the defendants or any of them for the recovery of a sum of money, or from taking any further proceedings in such actions there-

<sup>8</sup> Gen. Corp. L. § 90 (L. 1909, c. 28), and § 91-a (L. 1913, c. 633).

<sup>9</sup> Gen. Corp. L. § 301 (L. 1909, c. 28).

tofore commenced; and such an injunction has the same effect, and is subject to the same provisions of law as if each creditor upon whom it is served was named therein and was a party to the action in which it is granted.<sup>10</sup> In an action brought to procure a judgment to compel the trustees, directors, managers or other officers of a corporation to account for their official conduct, or to pay over what they have themselves acquired; wasted, etc., or to suspend them for abuse of trust, or to remove them for misconduct and direct a new election, or to set aside or restrain an alienation of property unlawfully made or contemplated by them, or to account for an injury or loss resulting from their failure to perform, or violation of, their duties, the court may, at any stage of the action, before or after final judgment, make an order requiring all the creditors of the corporation to exhibit and prove their claims, and thereby make themselves parties to the action, in such manner and in such a reasonable time, not less than six months from the first publication of notice of the order, as the court directs; and that the creditors who make default in so doing shall be precluded from all benefit of the judgment and from any distribution which may be made thereunder; except that, notwithstanding such order any such creditor who may exhibit and prove his claim in the manner directed by the order, with proof by affidavit or otherwise that he has had no notice or knowledge thereof in time to comply therewith, is entitled at any time before an order is made directing a final distribution of the assets of such corporation to have his claim received, and has the same rights and benefits thereon, so far as the assets of such corporation then remaining undistributed may render possible, as if his claim had been exhibited and proved within the time limited by such order.<sup>11</sup> Notice of the order must be given by publication in such newspapers and for such length of time as the court directs.<sup>12</sup>

An action in the name of the People brought by the Attorney-General pursuant to statute to compel directors to account for their conduct and disposition of corporate funds is subject to the general rules of pleading.<sup>13</sup> An action under statutory authority brought by the Attorney-General in the name of the People for removal or suspension of a director

<sup>10</sup> Gen. Corp. L. § 302 (L. 1909, c. 28).

<sup>11</sup> Gen. Corp. L. § 303 (L. 1909, c. 28).

<sup>12</sup> Gen. Corp. L. § 303 (L. 1909, c. 28).

<sup>13</sup> *People v. Equitable Life Assurance Society*, 124 A. D. 714, 109 N. Y. Supp. 453 (1908); C. C. P. §§ 1781, 1782; now Gen. Corp. L. §§ 90, 91.

must be in equity because of the nature of the relief demanded, and doubtless may be joined with a cause of action against the same director for an accounting.<sup>14</sup> In decreeing that directors may be brought to account in action by the People the Legislature did not intend that they be required when sued to account as trustees of an express trust, without need of specifying anything more than the fact that they are directors; because, while directors who have gone out of office as well as those in office may be compelled to account, it is incumbent on the plaintiff to allege the facts constituting the negligence, misconduct, mal- or non-feasance for which the directors are sought to be held.<sup>15</sup> A judgment creditor unknown to his corporate debtor at the time of a transfer of all its assets, amounting in effect to its dissolution, may hold its directors for the value of the property transferred by them equal to the amount of his claim and is not bound to go against the transferee which agreed to assume the debts of the transferer.<sup>16</sup> While it is doubtless true that an action cannot be maintained under the statute by a creditor individually to compel the officers, etc., of the debtor corporation to account for their acts and to pay anything they have acquired or transferred to others in violation of their duties, but must be brought as a representative action, if it is made to appear that the rights of other creditors are involved or should be provided for, yet such a point must be raised by the answer, and cannot be considered if not put in issue until the appeal is taken.<sup>17</sup> One seeking to hold a stockholder and president of a corporation for a claim against it under the statute cannot do so by seeking only to recover the exact balance due on his claim, irrespective of the rights of other creditors or of the proportion which his claim may bear to the total corporate indebtedness, but must bring a representative action, describing himself in his representative capacity.<sup>18</sup> In attempting to join causes of action against directors in a statutory action to

<sup>14</sup> *People v. Equitable Life Assurance Society*, 124 A. D. 714, 109 N. Y. Supp. 453 (1908); C. C. P. §§ 1781, 1782; now Gen. Corp. L. §§ 90, 91.

<sup>15</sup> *People v. Equitable Life Assurance Society*, 124 A. D. 714, 109 N. Y. Supp. 453 (1908); C. C. P. §§ 1781, 1782; now Gen. Corp. L. §§ 90, 91.

<sup>16</sup> *Darcy v. Brooklyn and New York Ferry Co.*, 127 A. D. 167, 111

N. Y. Supp. 514 (1908); *aff'd* 196 N. Y. 99, 26 L.R.A.(N.S.) 267, 89 N. E. 461; C. C. P. § 1781 *et seq.*; now Gen. Corp. L. § 90 *et seq.*

<sup>17</sup> *Buckley v. Stansfield*, 155 A. D. 735, 140 N. Y. Supp. 953 (1913); *aff'd* 214 N. Y. 679, 108 N. E. 1090; Gen. Corp. L. §§ 90, 91.

<sup>18</sup> *Davis v. Wilson*, 150 A. D. 704, 135 N. Y. Supp. 825 (1912); Gen. Corp. L. § 90, subd. 2, and § 91.

compel them to account for their conduct it must be borne in mind that a cause of action against all the members of the board for their individual acts during a particular period would not affect defendants who were members of a preceding or succeeding board and that official acts of directors, whether of mal- or non-feasance, separate and disconnected, cannot be said either to have arisen out of the same transaction or out of transactions connected with the same subject of action, the subject of each cause of action being the particular loss or damage sustained by the official misconduct of the directors in office at a given time, who may be jointly and severally, or only severally, liable and accountable to the corporation.<sup>19</sup> The statutory liability of corporate directors to account for their acts and pay anything they have acquired or transferred in violation of their duties is several, and a creditor may proceed against one or more of them who are liable without joining them all.<sup>20</sup> The statute authorizes an action against a single guilty director, without joining his co-directors.<sup>1</sup> In an action by the Attorney-General under the statute all officers or directors who have, by their acts or omissions, caused a loss to result, although at different times, may not be joined and the separate instances of loss are to be treated as separate causes of action, not as necessary allegations of fact to support one cause of action for an accounting.<sup>2</sup> A reference cannot be ordered in an action to compel corporate officers to account for official misconduct until some proof of such misconduct has been adduced and a determination to that effect is reached by the trial judge and put in the form of an interlocutory judgment directing the account.<sup>3</sup>

**§ 364. Id.: Relief Obtainable In Actions, In General.—**  
 “ . . . the directors of a corporation are charged with

<sup>19</sup> *People v. Equitable Life Assurance Society*, 124 A. D. 714, 109 N. Y. Supp. 453 (1908); C. C. P. §§ 1781, 1782, 484. “The rule is, I think, well settled by decisions in analogous cases that whether the action be at law or in equity, the causes of action must affect all of the defendants, although it is not essential in equity that they shall all be affected alike; and those affected by all of the causes of action, as well as those affected only by one or more, may properly demur upon this ground.”

<sup>20</sup> *Buckley v. Stansfield*, 155 A. D.

735, 140 N. Y. Supp. 953 (1913); aff'd 214 N. Y. 679, 108 N. E. 1090; Gen. Corp. L. §§ 90, 91.

<sup>1</sup> *German-American Coffee Co. v. Diehl*, 86 Misc. 547, 149 N. Y. Supp. 413 (1914); aff'd 168 A. D. 913, 152 N. Y. Supp. 1113; Gen. Corp. L. § 91-a (L. 1913, c. 633).

<sup>2</sup> *People v. Equitable Life Assurance Society*, 51 Misc. 339, 101 N. Y. Supp. 354 (1906); rev'd 124 A. D. 714. See Gen. Corp. L. §§ 90, 91.

<sup>3</sup> *Stokes v. Stokes*, 87 Hun. 152, 33 N. Y. Supp. 1024 (1895); C. C. P. § 1781, now Gen. Corp. L. §§ 90, 1013, 1015.

the duties of trustees and bound to care for its property and manage its affairs in good faith, and for a violation of that duty resulting in waste of its assets, injury to its property, or unlawful gain to themselves, they are liable to account in equity the same as ordinary trustees.”<sup>4</sup> “A court of equity has power, at the instance of the proper party, through its flexible and comprehensive action for an accounting, to inquire into every official act of the officers and directors, and testing them by the standard of good faith and the absence of gross negligence, to compel restitution of property withheld, with compensation for assets wasted, and to award damages for the natural consequences of official misconduct, when such damages are claimed, in connection with equitable relief, on account of a general course of injurious action or a conspiracy to despoil the corporation. Even if part of the relief could be had in actions at law, still, when it is sought in connection with strictly equitable relief, such as the discovery of trust property and the recovery thereof, and the right to all relief springs from a common cause, such as a conspiracy, all may be included in the sweeping action for an accounting.”<sup>5</sup> A prayer for judgment in an action by a corporation or its receivers against its directors for recovery of money lost to it through their negligence, mis- or mal-feasance, cannot be said to be for equitable relief if no accounting or discovery is demanded, and the relief asked is that the damages be ascertained and when ascertained that the plaintiff have judgment against the defendants therefor.<sup>6</sup> “. . . while . . . a receiver should not be appointed to take possession of the property of a corporation on the application of a stockholder charging fraud against some of the trustees or directors, . . . such directors may . . . be restrained by injunction, from committing any such fraudulent acts, on the application of a stockholder; but such injunction should not apply to the general business of the corporation, but to the particular acts complained of.”<sup>7</sup> A receivership of a corporation and an injunction against creditors prosecuting their claims should not be continued in an action for waste of its assets and mismanagement and accounting by its directors after they have

<sup>4</sup> *Bosworth v. Allen*, 168 N. Y. 157, 55 L.R.A. 751, 61 N. E. 163 (1901).

<sup>5</sup> *Bosworth v. Allen*, 168 N. Y. 157, 55 L.R.A. 751, 61 N. E. 163 (1901).

<sup>6</sup> *Higgins v. Tefft*, 4 A. D. 62, 38 N. Y. Supp. 716 (1896).

<sup>7</sup> *Howe v. Deuel*, 43 Barb. 504 (1865); R. S. 2d vol. pp. 462-3, §§ 35-6.

retired and others have been elected in their places.<sup>8</sup> An order, made in an action by one director to compel his co-directors to account for mismanagement and waste, which prevents collection from stockholders and directors personally by corporate creditors, in that it restrain any action against the corporation and so prevents the judgment and execution against it which are conditions precedent to holding the stockholders and directors to their statutory personal liability, is legally invalid.<sup>9</sup>

**§ 365. Id.: Under Statute.**—The statutes permit judgment that the corporate trustees, directors, managers or other officers account for their official conduct, including any neglect of or failure to perform their duties, in the management and disposition of the funds and property, committed to their charge; that they pay the corporation or its creditors any money and the value of any property they have acquired to themselves or transferred to others or lost or wasted, by or through any neglect of, a failure to perform, or by other violation of, their duties; that an alienation of property made by them be set aside if made contrary to a provision of law or for a purpose foreign to the lawful business and objects of the corporation, when the alienee knew the purpose of the alienation; that such an alienation be restrained and prevented, when it is threatened or there is good reason to apprehend that it will be made; and that they be compelled to account for injury to or losses of the funds, assets or property of the corporation caused by or through any neglect or failure of the defendants to perform, or for violation of, their duties—depending in each case upon who brings the suit.<sup>10</sup> “The *suspension or removal* of the directors [of a corporation can] . . . only be had in an action brought by the Attorney-General . . . , but it is competent for a court of equity at the suit of a stockholder to enjoin threatened acts of mismanagement or waste or to appoint a receiver of the corporate property to hold and manage it until a new election of directors, where it satisfactorily appears that the directors are acting fraudulently or in bad faith and in their own interest and contrary to the plain interests of the corporation and that such relief is necessary to the protection of the rights of stockholders in the interim (*citations*); but it is manifest that the appointment of a receiver for such purpose, as dis-

<sup>8</sup> Halpin v. Mutual Brewing Co., 91 Hun, 220, 36 N. Y. Supp. 151 (1895); app. dism'd 148 N. Y. 744, 42 N. E. 1093.

<sup>9</sup> Mason v. New York Silk Mfg. Co., 27 Hun, 307 (1882).

<sup>10</sup> Gen. Corp. L. § 90 (L. 1909, c. 28); § 91 (L. 1913, c. 633).

tinguished from a receiver of the corporation itself in a proceeding for its dissolution, would be justified only in an extreme case very satisfactorily shown. . . . it is competent for stockholders to bring an action against directors both for an accounting and for the appointment of a receiver and . . . any allegations of fact bearing upon the right to relief in either respect is relevant.”<sup>11</sup> A corporate creditor suing corporate directors under the statute for an accounting of their acts and payment of anything they have acquired or transferred to others in violation of their duties is entitled to recover not the full amount of his judgment against the corporation but such proportion of the value of the property transferred as his claim as a creditor, in connection with other creditors existing at that time, bears to the value of the property transferred.<sup>12</sup> In the absence of fraud or bad faith or evidence of sacrifice or loss of assets a stockholder cannot compel a majority of corporate directors to close out the corporation by statutory dissolution instead of sale in course of business, even though the by-laws require unanimous vote by the directors for selling out.<sup>13</sup>

**§ 366. Agents: Employment and Compensation.**—The courts will not review the propriety of compensation to be paid by a corporation to a manager under a contract made by stockholders.<sup>14</sup> One made general manager of a corporation immediately before passage of a resolution of its board that “the salary of the general manager for the ensuing year is fixed at \$2,000, payable in monthly installments” is engaged for a year, if a general manager is not provided for in the by-laws, and is not employed for a period terminable at the board’s pleasure.<sup>15</sup> In the absence of being able to ascertain from the language of the contract itself what the intent of the parties was, it is a question of fact for the jury to decide whether or not, after one has entered into a contract of employment with a corporation by the terms of which he is to receive by way of compensation a certain share of its profits, it can, without his consent, increase its capital stock and thereby deprive him of a certain proportion of the profits which he would have been entitled to receive had the capital

<sup>11</sup> Welcke v. Trageser, No. 1, 131 A. D. 731, 116 N. Y. Supp. 166 (1909); C. C. P. §§ 1781, 1782, now Gen. Corp. L. §§ 90, 91, 1811.

<sup>12</sup> Buckley v. Stansfield, 155 A. D. 735, 140 N. Y. Supp. 953 (1913); aff’d 214 N. Y. 679, 108 N. E. 1090; Gen. Corp. L. §§ 90, 91.

<sup>13</sup> Levin v. Mayer, 86 Misc. 116, 149 N. Y. Supp. 112 (1914); Gen. Corp. L. art. xi, §§ 34, 11, subd. 5.

<sup>14</sup> Warner v. Morgan, 81 Misc. 685, 143 N. Y. Supp. 516 (1913).

<sup>15</sup> Houghtaling v. Upper Kittanning Brick Co., 92 Misc. 228, 155 N. Y. Supp. 540 (App. T. 1915).

remained at the same amount as when the contract was entered into.<sup>16</sup> "Where a person is employed for a corporation by persons assuming to act in its behalf, and renders services, with the knowledge of its officers, and without objection on their part, and without notice that the contract is not recognized, and the corporation accepts the benefits of the services, the corporation will be held to have sanctioned the contract and will be compelled to pay for the services (*citations*). Even if the corporation were not in existence at the time of the employment, and the . . . persons were not the agents of an existing corporation, but only promoters of a prospective corporation, the . . . corporation would seem to be liable, as it has been held that a preliminary agreement made by promoters, the promoters and incorporators being the same persons and the only stockholders of the corporation, is binding on the corporation."<sup>17</sup> ". . . where a person is employed for a corporation, by one assuming to act in its behalf, and goes on and renders the services according to the agreement, with the knowledge of its officers, and without notice that the contract is not recognized as valid and binding, such corporation will be held to have sanctioned and ratified the contract, and be compelled to pay for the services, according to the agreement."<sup>18</sup>

**§ 367. Id.: Proof of Authority.**—"Every one knows that corporations are artificial creations existing by virtue of law, and organized for purposes defined in their charters; and he who deals with one of them is chargeable with notice of the purpose for which it was formed; and when he deals with agents or officers of one of them, he is bound to know their powers and the extent of their authority. Corporations, like natural persons, are bound only by the acts and contracts of their agents done and made within the scope of their authority (*citation*). . . . It can never be presumed that an agent of a corporation had authority to transact business which the corporation itself was not, by its charter, authorized to engage in."<sup>19</sup> ". . . where a person enters the business place of a corporation, and is referred by the person found in

<sup>16</sup> *Bradburn v. Solvay Process Co.*, 18 A. D. 542, 46 N. Y. Supp. 161 (1897).

<sup>17</sup> *Bernstein v. Lisenard Realty Co.*, 53 Misc. 273, 103 N. Y. Supp. 210 (1907). The services were those of a lawyer. The case referred to is *Burden v. Burden*, 8 A. D. 160, 40 N. Y. Supp. 499.

<sup>18</sup> *Fister v. La Rue*, 15 Barb. 323 (1853).

<sup>19</sup> *Alexander v. Cauldwell*, 83 N. Y. 480 (1881). The corporation was organized to mine coal on leased property outside the State, bring it to market and sell it—in fact only to its stockholders according to the amount of their sub-

charge of the office to some particular party as a proper person for the transaction of the particular business in hand, the presumption must be that such person is authorized to bind the corporation.”<sup>20</sup> Applying the familiar doctrine of agency (to a claim that an act done in a corporation’s name and under corporate seal by its subordinate agents is void because without due authority from it) that a principal cannot dispute an agent’s power if he approve it or ratify the act done, “the ratification need not be declared in express terms. Mere silence and acquiescence will in many cases be sufficient. So it may be inferred from the acts and proceedings of the principal *in pais*. When he receives and appropriates the proceeds of a transaction done in his name and by his assumed authority, there exists the highest possible evidence of his approval. These rules . . . are also as plainly applicable to corporate as to other transactions where the dealing is *within the powers of the corporation*.”<sup>21</sup> “. . . in order to bind a corporation it is necessary to prove that the one who it is claimed acted for the corporation had authority, either express or implied, to do so; and where it is sought to hold a corporation in any transaction, it is incumbent upon the one alleging the fact to show that the person who claimed to act for it had authority, express or implied, to represent and bind it.”<sup>22</sup> One suing a corporation on a contract on the ground that it was made by its authorized agent may prove the latter’s authority by circumstances and conditions which would lead a reasonable man to conclude that he was acting within the authority apparently recognized by the corporation.<sup>3</sup> An approval by a corporation of a special contract arranged by a manager of one of its departments with one of its employees results from payment by it of the expenses of exhibiting the goods agreed to be made by such contract.<sup>4</sup>

scriptions, on a mutual plan. The treasurer got plaintiff to sell coal to various non-stockholders without the knowledge of other officers of the corporation. Held, the plaintiff could not hold the corporation for the price of the coal.

<sup>20</sup> *Noll v. Archer-Panocoast Co.*, 60 A. D. 414, 69 N. Y. Supp. 1007 (1901). An undertaker was sent for by an officer of a corporation to take charge of the body of its employee killed in its plant; was engaged by such officer and referred to another who agreed to his price,

and did part of his work under the supervision of another of its employees. Held, the corporation could not get out of paying the undertaker’s bill by pleading *ultra vires*.

<sup>21</sup> *Curtis v. Leavitt*, 15 N. Y. 2 (1857).

<sup>22</sup> *Coney Island Automobile Co. v. Boyton*, 87 A. D. 251, 84 N. Y. Supp. 347 (1903).

<sup>3</sup> *Goldstein v. Godfrey Co.*, 70 Misc. 235, 126 N. Y. Supp. 622 (1911).

<sup>4</sup> *Manne v. Siegel-Cooper Co.*, 20

“ . . . it is not to be inferred as a matter of law that an agent who was a mere general manager of a business, by which term is meant one charged with the executive administration of the current business of the corporation, has the authority to bind his principal to any contract [of employment] to run for a series of years, in the absence of proof of authority to make such a contract;” and “ while such an authority may be inferred from evidence of acts of the general manager, known to and acquiesced in by the officers of the corporation,” yet proof that its president was in and out and saw the employed person rendering services and that the letter of the manager containing the contract was copied in the corporation’s letter-book is insufficient to show ratification by it.<sup>5</sup> A resolution by a corporate board of directors ratifying an act of its agent is competent evidence of his authority; and although it may never have been communicated to the other party to the transaction, yet an acquiescence by the corporation in the transaction results from its acting under it on the terms proposed by the other party.<sup>6</sup> “ The recognition by a corporation of acts on the part of an agent, similar in character to those which may be in dispute, tends strongly to establish the agent’s authority.”<sup>7</sup> “ The powers of the agent of a corporation are such as he is allowed by the directors or managers of the corporation to exercise within the limits of the charter; and the silent acquiescence of the directors or managers may be as effectual to clothe the agent with power as an express letter of attorney.”<sup>8</sup> “ The authority of the agent could be properly proved only by the production of the power of attorney issued to him by the company upon his appointment, or by a resolution of the defendant’s board of directors, under which agents were employed by them and prescribing their powers and duties.”<sup>9</sup>

**§ 368. Id.: Powers in General.**—The liability of a corporation for its agents’ contracts in its behalf is later discussed.<sup>10</sup> The verification of pleadings in corporate actions is generally discussed in the four hundred and forty-first section of this

Misc. 592, 46 N. Y. Supp. 352 (1897).

<sup>5</sup> *Cemacho v. Hamilton Bank Note & Engraving Co.*, 2 A. D. 369, 37 N. Y. Supp. 725 (1896); *dism’d* 158 N. Y. 663, 52 N. E. 1123.

<sup>6</sup> *Dent v. North American Steamship Co.*, 49 N. Y. 390 (1872).

<sup>7</sup> *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546 (1863).

<sup>8</sup> *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546 (1863).

<sup>9</sup> *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495 (1883). The question was of the authority of an insurance company to issue a policy.

<sup>10</sup> See §§ 434, 436, 438, *infra*.

book. Every corporation has power to make by-laws not inconsistent with any existing law prescribing the powers and duties of its agents and employees.<sup>11</sup> "There is no difference in principle or precedent between the powers, duties and liabilities of the agents of corporations and those of natural persons, unless expressly made by the act of incorporation or by-laws."<sup>12</sup> "The declarations of an agent or officer of a corporation are not admissible, except when made as a part of the *res gestae*, or in the performance of his duties as agent or officer."<sup>13</sup> "It cannot . . . be maintained that the bare appointment of an agent by words *in praesenti*, but having reference to a business to be entered upon at some future time, confers any authority on the agent in the interim to bind the principal, although the appointment does not state that the agency is not to become effective until a future time."<sup>14</sup> To justify reliance by one dealing with a corporation on the implied authority of an individual to make a contract with him for the corporation, the making of the contract must be practically indispensable to the execution of the duties delegated to such individual by the corporation.<sup>15</sup> "Third persons dealing with the agent of a mining or similar company, who has been constituted its general resident manager, and who is engaged in carrying on the business of the foreign principal in a distant land, would have a right to assume, in the absence of notice, that the manager's authority extends to all such usual dealings as were necessary to carry on the business from day to day, such as procuring the necessary supplies or ordinary implements for the work, and to pledge the credit of the principal for the payment of debts contracted for these purposes."<sup>16</sup> Under a statute permitting a trustee of an express trust to sue without joining with him the person

<sup>11</sup> St. Corp. L. § 30 (L. 1909, c. 61).

<sup>12</sup> New York, Providence & Boston R. R. Co. v. Dixon, 114 N. Y. 80, 21 N. E. 110 (1889).

<sup>13</sup> Cosgray v. New England Piano Co., 22 A. D. 455, 48 N. Y. Supp. 7 (1897). In an action for improper discharge plaintiff tries to prove admissions by his corporate employer's treasurer to other persons.

<sup>14</sup> Rathbun v. Snow, 123 N. Y. 343, 10 L.R.A. 355, 25 N. E. 379 (1890). A corporate resolution appointed a man in foreign parts its resident manager there. A by-law

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prevented his making the contract in question. The man was to sell out his property to the corporation after he had done certain work which was a condition to his owning it. Before this happened he orally represented to a vendor that he was such corporate manager. The suit was for the purchase price.

<sup>15</sup> Miner v. Edison Electric Illuminating Co., 22 Misc. 543, 50 N. Y. Supp. 218 (1898); aff'd 26 Misc. 712, 56 N. Y. Supp. 801.

<sup>16</sup> Rathbun v. Snow, 123 N. Y. 343, 10 L.R.A. 355, 25 N. E. 379 (1890).

for whose benefit the action is prosecuted, the executive agent of a corporation may sue in his own name to recover on subscription notes purporting on their face to be made with him as executive agent of a corporation whereby the defendant promised to pay money in exchange for stock.<sup>17</sup> An auditor of a corporation authorized by its president to settle an alleged cause of action against it for a stated sum acts within the scope of his apparent authority so as to bind it when he agrees also to pay the expenses of the claimant's recovery from injuries suffered by the alleged negligence of the company on which the action is based.<sup>18</sup> Authority from a corporation to an agent to negotiate its bonds at not less than par and accrued interest for the purpose of raising money to pay its floating debts empowers him only to sell them for money or to dispose of them so as to pay the company's debts, and does not permit him to pledge them to secure its prior debts; and if such pledge is made, the pledgee cannot share in the proceeds of the mortgage sale, as the bonds pledged are not the company's legal obligations.<sup>19</sup> It seems that the position of salesman for a corporation gives the incumbent no implied authority to make a contract by the year for the advertisement of its goods by another.<sup>20</sup>

**§ 369. *Id.*: Dealing with Corporation.**—The power of a corporate agent to deal with his corporation and the validity of such dealings has been considered earlier in this book in connection with the right of directors and officers to derive personal profit and advantage from their dealings with their corporation.<sup>1</sup> “The doctrine that when a person in the employ of another in a certain line of work devises an improved method or instrument for doing that work and uses the property of his employer and the service of other employees to develop and put in practicable form his invention, and explicitly assents to the use by the employer of such invention, a jury or court trying the facts is warranted in finding that he has so far recognized the obligations of service flowing from his employment and the benefits resulting from his use of the property as to have given to such employer an irrevocable license to use such invention (*citations*) is not

<sup>17</sup> *Considerant v. Brisbane*, 22 N. Y. 389 (1860); Code, § 113.

<sup>18</sup> *Maloney v. Hudson River Water Power Co.*, 133 A. D. 499, 17 N. Y. Supp. 601 (1909).

<sup>19</sup> *Shaw v. Saranac Horse Nail Co.*, 144 N. Y. 220, 39 N. E. 73 (1894).

<sup>20</sup> *Cook & Bernheimer Co. v. Haan*, 21 Misc. 346, 47 N. Y. Supp. 131 (1897).

On power of agent of corporation to indorse negotiable paper, see note in 27 L.R.A. 401.

<sup>1</sup> See § 280, *supra*, as to Directors, and § 316, *supra*, as to Officers.

applicable . . . where the acts of the parties preclude any such finding.”<sup>2</sup>

**§ 370. Id.: Service of Process Upon To Bind Corporation, Governing Statutes.**—The service of process in actions against corporations is generally discussed in the four hundred and forty-third section of this book. Personal service of a summons upon a defendant domestic stock corporation must be made by delivering a copy of it within New York State to the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer, or a director or managing agent.<sup>3</sup>

**§ 371. Id.: In General.**—The court has no power, in an action initiated by service of process upon an individual as sole defendant, to substitute a corporation as defendant and order that the service on the individual stand as personal service on the corporation of which he is president and principal stockholder.<sup>4</sup>

**§ 372. Id.: As Managing Agent.**—Personal service of a summons on a defendant domestic corporation may be made by delivering a copy thereof within the state to its managing agent.<sup>5</sup> A general superintendent of the work of operating the lines of a corporation, given that title to distinguish him from superintendents of divisions of its lines and from superintendents of other departments of business, is a managing agent of the company within the meaning of the code provision permitting service of process on a domestic corporation upon its managing agent.<sup>6</sup> “ . . . when the corporation has an office in this State where a substantial portion of its business is transacted by a person designated by itself as a general agent, although followed by words indicating some one department,” the corporation is properly served with process by service thereof upon him as a “managing agent.”<sup>7</sup> One designated as a domestic corporation’s “Assistant Superintendent,” who has no general authority

<sup>2</sup> *Doscher v. Phelps Guardant Time Lock Co.*, 89 Misc. 561, 153 N. Y. Supp. 710 (1915); *aff’d* 172 A. D. 954, 157 Supp. 1123.

<sup>3</sup> C. C. P. § 431.

<sup>4</sup> *Licausi v. Ashworth*, 78 A. D. 486, 79 N. Y. Supp. 631 (1903); C. C. P. § 723. The effect of the refusal to permit the change was to make the Statute of Limitations an effective bar to suing the corporation.

Service of process on servant or

agent of lessee of railroad corporation, see note in 4 L.R.A.(N.S.) 272.

<sup>5</sup> C. C. P. § 431, subd. 3.

<sup>6</sup> *Barrett v. American Telephone & Telegraph Co.*, 138 N. Y. 491, 34 N. E. 289 (1893); C. C. P. § 431.

<sup>7</sup> *Tuchband v. Chicago & Alton R. R. Co.*, 115 N. Y. 437, 22 N. E. 360 (1889); C. C. P. § 432. The railroad’s time-table, etc, described him as its “general agent, passenger department.”

in the conduct of its business but whose authority is limited by such orders as the general superintendent gives him, is not a "managing agent" on whom service of process against the corporation may be made.<sup>8</sup> One introduced by a treasurer and director of a corporation as the person in charge of the company's affairs or its superintendent in a certain locality is properly served with process against it as its managing agent.<sup>9</sup> One is not a managing agent of a corporation upon whom process against it may legally be served who was employed for no stated time by its president to superintend the running of its cars on part of its road not yet completed, makes no contracts for it save for horses and feed for such portion, hired two men by such president's direction, never sells tickets or takes fares, has no control over or knowledge of the corporation or its books or affairs.<sup>10</sup> One who is foreman at a milk station or cheese factory maintained in one of the counties of the State by a domestic corporation, in charge when no one else was there, contracts with farmers for their milk, employs needed help, verifies the answer in the action as "agent" of the corporation, is a "managing agent" on whom process against the corporation may be legally served, though acting under general directions from headquarters.<sup>11</sup> An injunction against a railroad corporation binds it if served on its division superintendent within whose division and under whose direction the work is being done which is sought to be enjoined.<sup>12</sup> The division superintendent of a large and important division of a railway company's road, remote from its general offices, is a managing agent upon whom process against it may be legally served.<sup>13</sup> A person held out by a domestic corporation as its manager and who occupies the relation of a managing agent within this State, or any other State where it may have business to transact, may be bindingly served with process against the corporation as its "managing agent" while within New York.<sup>14</sup>

<sup>8</sup> *Kramer v. Buffalo Union Furnace Co.*, 132 A. D. 415, 116 N. Y. Supp. 1101 (1909); app. dism'd 196 N. Y. 532, 89 N. E. 1103; C. C. P. § 431, subd. 3.

<sup>9</sup> *Behan v. Phelps*, 27 Misc. 718, 59 N. Y. Supp. 713 (1899); C. C. P. § 2879, and § 431, subd. 3.

<sup>10</sup> *Emerson v. Auburn & Owaseo Lake R. R.*, 13 Hun, 150 (1878).

<sup>11</sup> *Wesley v. Beakes Dairy Co.*, 72 Misc. 260, 131 N. Y. Supp. 212 (1911); C. C. P. § 431.

<sup>12</sup> *Rochester, Hornellsville & Lackawanna R. R. Co. v. New York, Lake Erie & Western R. R. Co.*, 48 Hun, 190 (1888); C. C. P. § 431.

<sup>13</sup> *Brayton v. New York, Lake Erie & Western R. R. Co.*, 72 Hun, 602, 25 N. Y. Supp. 264 (1893); C. C. P. § 431, subd. 3.

<sup>14</sup> *Young & Fletcher Co. v. Welsbach Light Co.*, 55 A. D. 16, 66 N. Y. Supp. 1024 (1900); C. C. P. § 432.

**§ 373. Id.: As Officer.**—One employed in this State as manager of a corporation at an annual salary of six thousand dollars, with authority to act as its treasurer, and who has so acted for a long time, will not be held a person on whom process against it may not be served, simply because he swears he has had no connection with the company for several months.<sup>15</sup> “ . . . where the officer served is the general manager of a corporation, and as such manager is in attendance in the State where service is made on the business of the corporation, no matter to what extent that business may be, service upon the manager would confer jurisdiction.”<sup>16</sup>

**§ 374. Id.: When Corporation in Receivership.**—Actions against receivers are fully discussed hereinafter.<sup>17</sup> Service of process against a corporation upon a managing agent after the appointment of receivers who had retained him is good enough to bind the company.<sup>18</sup>

**§ 375. Id.: Liabilities, In General.**—In the absence of a personal promise or covenant, one signing a contract, who therein represents himself to be the agent of a disclosed principal and assumes to contract for such principal only; cannot be held personally liable upon the covenants contained in such contract; so that if individuals sign their names to a contract without any indication added thereto of their official character they are nevertheless not individually liable thereon if it appears on the face of the contract that they contracted with reference to corporate business and that they had authority to make such contract on behalf of the corporation, even though the contract is sealed with their individual seals.<sup>19</sup> A corporation acting as agent of an undisclosed foreign principal to issue in this country certificates which could be transferred abroad into certificates of stock of a foreign company is liable for failure to deliver in due course to the purchaser valid certificates of such foreign company's stock when the transfer agent corporation had opportunities for knowing

<sup>15</sup> *Persons v. Buffalo City Mills*, 29 A. D. 45, 51 N. Y. Supp. 645 (1898).

<sup>16</sup> *Rudd v. McLean Arms & Ordnance Co.*, 54 Misc. 49, 105 N. Y. Supp. 387 (1907).

<sup>17</sup> See § 562, *infra*.

<sup>18</sup> *Faltiska v. New York, Lake Erie & Western R. R. Co.*, 12 Misc. 478, 33 N. Y. Supp. 679, *aff'd* 151 N. Y. 650, 46 N. E. 1146; C. C. P. § 431.

Admission or waiver of service by statutory agent of corporation appointed to receive service see note in 2 L.R.A.(N.S.) 389.

Service of process after appointment of receiver, upon person designated by statute to receive service for corporation see note in 47 L.R.A.(N.S.) 179.

<sup>19</sup> *Whitford v. Laidler*, 94 N. Y. 145 (1883).

facts unknowable to the purchaser.<sup>20</sup> In attempting to hold one for criminal libel as manager of a corporation issuing a newspaper under a penal statute charging such a manager with the publication of any matter contained in such newspaper, criminal intent is an essential element, the statute must be construed strictly in the accused's favor, and the mere fact that such an one held the office of president, treasurer or secretary is not sufficient to constitute him manager within the statute.<sup>1</sup>

**§ 376. Id.: Liabilities Common to Officers and Agents, For Fraud in Procuring Organization of Corporation.**—An officer, agent or clerk of a corporation, or of persons proposing to organize a corporation, or to increase the capital stock of a corporation, who knowingly exhibits a false, forged or altered book, paper, voucher, security or other instrument of evidence to any public officer or board authorized by law to examine the organization of such corporation, or to investigate its affairs, or to allow an increase of its capital, with intent to deceive such officer or board in respect thereto, is punishable by imprisonment in a state prison not exceeding ten years.<sup>2</sup>

**§ 377. Id.: Liabilities Common to Directors, Officers and Agents, For Political Contributions and Practising Law.**—Any director, officer, stockholder, attorney or agent of any corporation which violates the statutory provision forbidding any non-political stock corporation doing business in New York from directly or indirectly paying or using or offering, consenting or agreeing to paying or using any money or property for or in aid of any political party, committee or organization, or for or in aid of any corporation, joint-stock or other association organized or maintained for political purposes, or for or in aid of any candidate for political office or for nomination for such office, or for any political purpose whatever, or for reimbursement or indemnification of any person for moneys or property so used; or who participate in, aids, abets or advises or consents to any such violation; and any person who solicits or knowingly receives any money or property in violation of such provisions — each and every one of them is guilty of a misdemeanor and is punishable by imprisonment in a penitentiary or county

<sup>20</sup> McClure v. Central Trust Co., 165 N. Y. 108, 53 L.R.A. 153, 58 N. E. 777 (1900).

<sup>1</sup> People *ex rel.* Carvalho v. Warden of City Prison, 144 A. D. 24,

128 N. Y. Supp. 837 (1911); *aff'd* 212 N. Y. 612, 106 N. E. 1036; Penal Code, § 246.

<sup>2</sup> Penal L. § 661 (L. 1909, c. 88).

jail for not more than one year and by a fine of not more than one thousand dollars.<sup>3</sup> Every officer, trustee, director, agent or employee of any corporation (except one lawfully engaged in a business authorized by the provisions of any existing statute or one lawfully engaged in the examination and insuring of titles to real property or one employing an attorney or attorneys solely in and about its own immediate affairs or in any litigation to which it is or may be a party, or one organized for benevolent or charitable purposes or for the purpose of assisting persons without means in the pursuit of any civil remedy the incorporation of which may be approved by the Appellate Division of the Supreme Court of the department in which its principal office may be located) who directly or indirectly engages in any of the acts prohibited for a corporation on the ground that they savour of the practice of law, or who assists such corporation to do such prohibited acts is guilty of a misdemeanor, and the fact that he is a duly and regularly admitted attorney-at-law does not permit or allow such fact as a defense upon his trial for violation of the statutory prohibitions.<sup>4</sup>

**§ 378. Id.: For Omitting to Disclose Service On Himself of Injunction Against Corporation.**—A director, officer, agent or employee of any corporation is guilty of a misdemeanor who, if a notice of an application for an injunction affecting the property or business of such corporation is served upon him, omits to disclose the fact of such service and the time and place of such application to the other directors, officers and managers thereof.<sup>5</sup> A director of a corporation, *i. e.*, any person having by law the direction or management of the affairs of a corporation by whatever name described, is deemed to have such a knowledge of the affairs of the corporation as to enable him to determine whether any act, pro-

<sup>3</sup> Gen. Corp. L. § 44 (L. 1909, c. 28). "No person shall be excused from attending and testifying, or producing any books, papers or other documents before any court or magistrate, upon any investigation, proceeding or trial, for a violation of any of the provisions of this section, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture; but

no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding.

<sup>4</sup> Penal L., § 280 (L. 1916, c. 246). See § 433, *infra*, for more detailed discussion.

<sup>5</sup> Penal L., § 665 (L. 1909, c. 88).

ceeding or omission of its directors is a violation of the provision of the law just stated.<sup>6</sup>

**§ 379. Id.: For Fraud in Issue and Sale of Stocks and Bonds.**

— An officer, agent or other person in the service of any corporation formed or existing under the laws of New York State or of the United States or of any state or territory thereof or of any foreign government or country, who wilfully and knowingly, with intent to defraud: 1. Sells, pledges or issues, or causes to be sold, pledged or issued, or signs or executes, or causes to be signed or executed with intent to sell, pledge or issue, or causes to be sold, pledged or issued, any certificate or instrument purporting to be a certificate or evidence of the ownership of any share or shares of such corporation, or any bond or evidence of debt, or writing purporting to be a bond or evidence of debt of such corporation, without being first thereto duly authorized by such corporation, or contrary to the charter or laws under which such corporation exists, or in excess of the power of such corporation or of the limit imposed by law or otherwise upon its power to create or issue stock or evidences of debt; or (2) reissues, sells, pledges or disposes of, or causes to be reissued, sold, pledged or disposed of, any surrendered or canceled certificates, or other evidence of the transfer or ownership of any such share or shares, is punishable by imprisonment for a term not exceeding seven years, or by a fine not exceeding three thousand dollars, or by both.<sup>7</sup> The false making or forging of an instrument or writing, purporting to have been issued by or in behalf of a corporation or association, state or government, and bearing the pretended signature of any person, therein falsely indicated as an agent or officer of such corporation, is forgery in the same degree as if that person were in truth such officer or agent of the corporation or association, state or government.<sup>8</sup> An officer, agent or other person employed by any domestic or foreign corporation who wilfully and with a design to defraud sells, pledges or issues or causes to be sold, pledged or issued, or signs or procures to be signed with intent to sell, pledge or issue, or to be sold, pledged or issued, a false, forged or fraudulent paper, writing or instrument, being or purporting to be a script, certificate or other evidence of the ownership or transfer of any share or shares of the capital stock of such corporation, or a bond or other evidence of debt of such corporation, or a certificate or other evidence of the ownership or of

<sup>6</sup> Penal L. § 667 (L. 1909, c. 88).

<sup>8</sup> Penal L. § 882 (L. 1909, c. 88).

<sup>7</sup> Penal L. § 662 (L. 1909, c. 88).

the transfer of any such bond or other evidence of debt, is guilty of forgery in the third degree and upon conviction, in addition to the punishment prescribed in section eight hundred and ninety-three of the Penal Law for that offense, may also be sentenced to pay a fine not exceeding three thousand dollars.<sup>9</sup> Corporate officers who have issued "false certificates of stock authenticated by them as genuine, and cast them upon the market with fraudulent intent, are liable to every holder to whose hands they may come by fair purchase."<sup>10</sup>

The subject of fraud and deceit in the purchase and sale of stock has been previously considered.<sup>11</sup>

There is no basis for an action against an officer of a corporation in his individual capacity for the recovery of damages sustained by a subscriber to the corporation's stock through his fraud and deceit in inducing purchase of the stock when he but made a written statement of its indebtedness for the purchaser even though he omitted therefrom the amount involved in a pending action against the company for the reason that he opined it would not be held in final judgment; because the mere presentation of such a statement does not amount to an affirmation that it is true to his knowledge.<sup>12</sup> "The mere fact of being a director and stockholder is not *per se* sufficient to hold a party liable for the frauds and misrepresentations of the active managers of a corporation. Some knowledge of and participation in the act claimed to be fraudulent must be brought home to the person charged. . . . It is only when a director lends his name and influence to promote a fraud upon the community, or is guilty of some violation of law or other mismanagement, that he is personally liable."<sup>13</sup> The rule that the mere fact of being a director is not *per se* sufficient to render a party liable for the fraud and misrepresentation of the active managers of a corporation or the fraudulent representations of an agent employed to market its stock has no application when the inference is not permissible from the evidence that the managers or agents in question were those of the corporation rather than of those promoting it.<sup>14</sup> "It is hardly necessary to say that a director of a company who knowingly

<sup>9</sup> Penal L. § 890 (L. 1909, c. 88).

<sup>10</sup> Bruff v. Mali, 36 N. Y. 200 (1867).

<sup>11</sup> See § 141 *et seq.*, *supra*.

<sup>12</sup> Kountze v. Kennedy, 147 N. Y. 124, 29 L.R.A. 360, 41 N. E. 414 (1895).

<sup>13</sup> Arthur v. Griswold, 55 N. Y. 400 (1874).

<sup>14</sup> Downey v. Finucane, 205 N. Y. 251, 40 L.R.A.(N.S.) 307, 98 N. E. 391 (1912).

issues or sanctions the circulation of a false prospectus, containing untrue statements of material facts, the natural tendency of which is to mislead and deceive the community, and to induce the public to purchase its stock, is responsible to those who are injured thereby. Mere exaggerated statements of the prospectus of a new enterprise will not subject those who make them to liability . . . that . . . trustees . . . allowed their names and credit to be used to float, what afterwards turned out to be a worthless stock . . . alone does not constitute actionable fraud;" but if a trustee is an originator and promoter of the company who had examined its title to the property spoken of in the prospectus, he stands in a different position.<sup>15</sup> One induced to sell his stock in a corporation at one price which brings him less, because of fraudulent representations by the corporate officers and directors as to the corporation's solvency, than he would have received had he sold at another price offered him, may hold his informants liable by an action for the difference.<sup>16</sup> Corporate directors not members of an executive committee of their number appointed by them which employed an agent to sell stock in an enterprise described in a pamphlet prepared by it are not liable to suit based on false statements in such pamphlet if they are not shown to have had any knowledge of or any hand in preparing the booklet.<sup>17</sup> " . . . a director who knowingly issues or sanctions the circulation of a false prospectus containing untrue statements of material facts, the natural tendency of which is to deceive and mislead the community and induce the public to purchase the stock, is responsible to those who are injured thereby."<sup>18</sup> A director of a corporation may be held liable to one subscribing to its stock if he became a director knowing it to be insolvent, in order to facilitate sale of its stock by lending his name to it, and if he was so negligent in permitting an

<sup>15</sup> *Morgan v. Skiddy*, 62 N. Y. 319 (1875).

<sup>16</sup> *Rothmiller v. Stein*, 143 N. Y. 581, 26 L.R.A. 148, 38 N. E. 718 (1894). It does not follow that "if a person simply refrains from acting, induced thereto by the fraud of another, he can in no case recover damages sustained by him on account of such fraud."

<sup>17</sup> *Ottmann v. Blaugas Co.*, 171 A. D. 197, 157 N. Y. Supp. 413 (1916).

<sup>18</sup> *Lehman-Cherley v. Bartlett*, 135

A. D. 674, 120 N. Y. Supp. 501 (1909); *aff'd* 202 N. Y. 524, 95 N. E. 1125. The circular in part said: "the Company has purchased [described land] . . . net cost of land \$550,000;" but nowhere said the company had acquired title or paid said net cost. "I think any one reading such a statement would be justified in assuming that the defendant company had paid that cost of \$550,000 and owned the land . . ."

agent to run the corporation that the sale of the stock was accomplished by false statements, as the obligation of a director applies to prospective as well as existing stockholders.<sup>19</sup> One purchasing the stock control of a corporation through negotiations with its directors who in turn obtained the consent of the stockholders individually to sell their holdings at the agreed price cannot hold one of the directors who took no active part in the management of the corporation and no part at all in such negotiations and consent purely as an individual to sell him stock for fraudulent representations made in such negotiations.<sup>20</sup> Neglect of duty, misconduct and indifference in their position as directors may subject those who are directors to any statutory penalty and to liability to one who became stockholder by reason of fraud perpetrated under color of their names for any losses sustained by him; but to admit of such directors being compelled to return to him not only his damages but his entire investment and to assume his holdings, the law requires that he should establish he was the intentional and not merely the incidental victim of such directors' delinquency.<sup>1</sup>

**§ 380. Id.: For Omission of, or Making False Entry in Books.**

— A director, officer, agent or employee of any corporation either domestic or foreign and carrying on business or keeping an office therefor in New York State is guilty of a misdemeanor who (1) knowingly receives or possesses himself of any of its property otherwise than in payment for a just demand, and with intent to defraud omits to make or to cause or to direct to be made a full and true entry thereof in its books and accounts, or (2) makes or concurs in making any false entry, or concurs in omitting to make any material entry in its books and accounts.<sup>2</sup> A director of a corporation, *i. e.*, any person having by law the direction or management of the affairs of a corporation by whatever name described, is deemed to have such a knowledge of the affairs of the corporation as to enable him to determine whether any act, proceeding or omission of its directors is a violation of the provision of law just stated.<sup>3</sup>

<sup>19</sup> Childs v. White, 158 A. D. 1, 142 N. Y. Supp. 732 (1913).

<sup>20</sup> Garrett Co. v. McComb, 58 A. D. 419, 68 N. Y. Supp. 996 (1901).

<sup>1</sup> Lyon v. James, 97 A. D. 385, 90 N. Y. Supp. 28 (1904); *aff'd* 181 N. Y. 512, 73 N. E. 1126.

<sup>2</sup> Penal L., § 665 (L. 1907, c. 88).

<sup>3</sup> Penal L. § 667 (L. 1909, c. 88).

Injunction to enforce stockholder's right to inspect corporate books, see note in 45 L.R.A. 458.

**§ 381. Id.: For Refusal or Neglect to Make Entries in and Allow Inspection of Stock Book.**—If any officer or agent of a stock corporation wilfully neglects or refuses to make any proper entry in its stock book or neglects or refuses to exhibit it or allow it to be inspected and extracts taken therefrom as permitted by statute, he and the corporation must each forfeit and pay to the party injured a penalty of fifty dollars for every such neglect or refusal and all damages resulting to him therefrom.<sup>4</sup> A director, officer, agent or employee of any corporation is guilty of a misdemeanor who, having the custody or control of its books, wilfully refuses or neglects to make any proper entry in the stock book of such corporation as required by law, or to exhibit or allow the same to be inspected, and extracts to be taken therefrom by any person entitled by law to inspect the same, or take extracts therefrom.<sup>5</sup>

**§ 382. Id.: For Refusal or Neglect to Make Report or Statement.**—A director, officer, agent or employee of any corporation is guilty of a misdemeanor who refuses or neglects to make any report or statement lawfully required by a public officer.<sup>6</sup>

**§ 383. Id.: For Falsity of or Omission in Statement of Corporate Affairs.**—If any certificate or report made or public notice given by the officers or directors of a stock corporation is false in any material representation, the officers and directors signing it are jointly and severally personally liable to any person who has become a creditor or stockholder of the corporation upon the faith of any such certificate, report, notice or any material representation therein, to the amount of the debt contracted upon the faith thereof, and such liability exists in all cases where the contents of any such certificate, report or notice or of any material representation therein has been communicated either directly or indirectly to the person so becoming a creditor or stockholder and he became such creditor or stockholder upon the faith thereof; but no action can be maintained for a cause of action arising

<sup>4</sup> St. Corp. L. § 32 (L. 1916, c. 127). "It shall be a defense to any action for penalties under this section that the person suing therefor has within two years sold or offered for sale any list of stockholders of such corporation or of any other corporation, or has aided or abetted any person in procuring

any stock list for any such purpose. Nothing herein impairs the power of the courts to compel by mandamus or judgment the production for examination by any stockholder of the stock books of a corporation."

<sup>5</sup> Penal L. § 665 (L. 1909, c. 88).

<sup>6</sup> Penal L. § 665 (L. 1909, c. 88).

from such representation unless brought within two years from the time the certificate, report or public notice has been made or given by the officers or directors of such corporation.<sup>7</sup> A director, officer, agent or employee of any corporation is guilty of a misdemeanor who knowingly (a) concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition containing any material statement which is false, or (b) omits or concurs in omitting any statement required by law to be contained therein.<sup>8</sup> A director of a corporation, *i. e.*, any person having by law the direction or management of the affairs of a corporation by whatever name described, is deemed to have such a knowledge of the affairs of the corporation as to enable him to determine whether any act, proceeding or omission of its directors is a violation of the provision of law just stated.<sup>9</sup>

<sup>7</sup> St. Corp. L. § 35 (L. 1909, c. 61).

<sup>9</sup> Penal L. § 667 (L. 1909, c. 88).

<sup>8</sup> Penal L. § 665 (L. 1909, c. 88).

## CHAPTER VIII.

### POWERS, DUTIES AND LIABILITIES OF CORPORATIONS.

#### XIII. *Powers, Duties and Liabilities of Corporations.*

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**§ 384. Powers, Duties and Liabilities of Corporations, In General.**—No corporation can possess or exercise any corporate powers not given by law or not necessary to the exercise of the powers so given; but the certificate of incorporation of any corporation may contain any provision for the

regulation of the business and the conduct of the affairs of the corporation, and any limitation upon its powers or the powers of its directors and stockholders which does not exempt them from the performance of any obligation or the performance of any duty imposed by law.<sup>1</sup> An injunction order suspending the general and ordinary business of a corporation can be granted only by the court upon notice of the application therefor to the proper officer of the corporation; and if such an injunction order is made otherwise than this way it is void.<sup>2</sup> No corporation engaged in carrying on public work under contract with the State or with any municipal corporation of the State, either as a contractor or subcontractor therewith, can directly or indirectly conduct or carry on what is commonly known as a company store if there is at the time any store selling supplies within two miles of the place where such contract is being executed; and any corporation violating the prohibitions recited is guilty of a misdemeanor.<sup>3</sup> The powers and contracts of a corporation incorporated in this State are to be determined by New York law.<sup>4</sup> "Acts done by a corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter."<sup>5</sup> The acts of corporations may be proved in the same manner as the acts of individuals; and if there be no record evidence they may be proved by the testimony of witnesses, and even by facts and circumstances from which the acts may be inferred, when no direct evidence of them can be given.<sup>6</sup> "The powers of corporations are those enumerated in the statutes under which they are incorporated, in general statutes, in the articles of association, and like instruments executed in pursuance of the statutes . . . , and also such powers as flow from or are incidental and necessary to the exercise of the enumerated powers."<sup>7</sup> " . . . corporations, in the absence of restrictions imposed by statute, have the power necessary to enable them

<sup>1</sup> Gen. Corp. L. § 10 (L. 1909, c. 28).

<sup>2</sup> Gen. Corp. L. § 305 (L. 1909, c. 28). This statute applies not only to a domestic corporation but to a foreign one which does business in New York or has within New York a business or fiscal agency or an agency for the transfer of its stock; see Gen. Corp. L. § 308.

<sup>3</sup> Labor L. § 10 (L. 1909, c. 36).

<sup>4</sup> *Hauk v. Consumers' Park Brew-*

*ing Co.*, 150 A. D. 582, 135 N. Y. Supp. 900 (1912); app. *dism'd* 211 N. Y. 578, 105 N. E. 1086.

<sup>5</sup> *Demings v. Supreme Lodge, K. of P.*, 131 N. Y. 522, 30 N. E. 572 (1892).

<sup>6</sup> *Trustees of St. Mary's Church v. Cagger*, 6 Barb. 576 (1849).

<sup>7</sup> *National Park B'k v. German-American Mutual W. & S. Co.*, 116 N. Y. 281, 5 L.R.A. 673, 22 N. E. 567 (1889).

to transact the business authorized by their charter.”<sup>8</sup> “When we speak of the powers of a corporation, the term only expresses the privileges and franchises which are bestowed in the charter; and when we say it cannot exercise other powers, the just meaning of the language is, that as an attempt to do so is without authority of law, the performance of unauthorized acts is a usurpation which may be a wrong to the State; or, perhaps, to the shareholders. But the usurpation is possible.”<sup>9</sup> “Corporations, together with the express and substantive powers conferred by their charters, take by implication all the reasonable modes of executing such powers which a natural person may adopt in the exercise of similar powers.”<sup>10</sup> “Corporations possess only such powers as are expressly granted by legislative enactment, together with such others as are necessarily or fairly implied in or are incidental to the powers thus granted or essential to the declared objects and purposes of the corporation. The only exception to this rule is furnished by private corporations, which may exercise many extraordinary powers, provided all its stockholders assent and none of its creditors are injured. Under these circumstances there is no one to complain except the State, and the business being entirely private the State does not interfere.”<sup>11</sup> A stock corporation may guarantee the purchases made under a trust by which vendors sell equipment to a trustee which leases it to such corporation and other corporations controlled by it which pay the trustee such rentals as eventually to pay off certificates issued by the trusts to purchase the equipment.<sup>12</sup> Corporations may agree to arbitrate and their submissions to arbitration need not be under their corporate seals.<sup>13</sup> It is unlawful for a corporation to make a lease of all its property for a period of over one year to an individual so as to suspend its business for the term of the lease and make itself a mere instrument in the hands of the lessee.<sup>14</sup> “Bills confiscating the property

<sup>8</sup> Hope Mutual Life Ins. Co. v. Perkins, 38 N. Y. 404 (1868). The company sued on a note it had received from an individual for the purpose of creating a fund to secure the payment of losses incurred upon policies issued by it.

<sup>9</sup> Bissell v. Michigan Southern & Northern Indiana R. R. Co., 22 N. Y. 258 (1860).

<sup>10</sup> Snow, Church & Co. v. Hall, 19 Misc. 655, 44 N. Y. Supp. 427 (1897).

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<sup>11</sup> Fifth Ave. Coach Co. v. City of New York, 58 Misc. 401, 111 N. Y. Supp. 759 (1908); aff'd 126 A. D. 657, 110 N. Y. Supp. 1037.

<sup>12</sup> Venner v. New York Central & H. R. R. Co., 160 A. D. 127, 145 N. Y. Supp. 725 (1914); aff'd 217 N. Y. 615, 617, 111 N. E. 487; St. Corp. L. § 6.

<sup>13</sup> Brady v. The Mayor, etc., of Brooklyn, 1 Barb. 584 (1847).

<sup>14</sup> Conro v. Port Henry Iron Co., 12 Barb. 27 (1851).

of citizens, or of associations, without judicial process are forbidden by the Constitution; and no person, corporation or association authorized to acquire and hold property, can be divested of, it by the fiat of any organization, nor in any way without its consent, or by due process of law.”<sup>15</sup>

§ 385. **Id.: Under Charter.**—No corporation possesses or can exercise any corporate powers not given by law or not necessary to the exercise of the powers so given; but the certificate of incorporation of any corporation may contain any provision for the regulation of the business and the conduct of the affairs of the corporation and any limitation upon its powers or the powers of its directors and stockholders which does not exempt them from the performance of any obligation or the performance of any duty imposed by law.<sup>16</sup> “Where privileges are granted or exemptions conferred by the legislature, in the shape of charters or grants to third parties, the grantees are to take only what is clearly granted, and they shall take nothing by implication which is not necessary for the full and fair enjoyment of the thing granted.”<sup>17</sup> “When we speak of what a corporation may, or may not, do within its grant of powers, we have in mind the reasonable intendments of its charter, as well as its clear expressions of authority. We search, in a doubtful case of an exercise of power, not in terms conferred, for what may be deemed to be reasonably implied as a means of carrying out the powers specifically given and so as to permit of the amplest exercise thereof, which is consistent with the object and purpose of the public grant.”<sup>18</sup> “Corporations are artificial creations existing by virtue of some statute and organized for the purpose defined in their charters. A person dealing with a corporation is chargeable with notice of its powers and the purposes for which it is formed, and when dealing with its agents or officers is bound to know the extent of their power and authority. A corporation necessarily carries its charter wherever it goes, for that is the law of its existence.”<sup>19</sup> The legislature cannot legally incorporate a body of individuals and convey to the corporation for private purposes land under all the tide waters within the jurisdiction

<sup>15</sup> *Wicks v. Monihan*, 130 N. Y. 232, 14 L.R.A. 243, 29 N. E. 139 (1891).

<sup>16</sup> *Gen. Corp. L.* § 10 (L. 1909, c. 28).

<sup>17</sup> *Mayor, etc., of New York v. Manhattan Rv. Co.*, 143 N. Y. 1, 37 N. E. 494 (1894).

<sup>18</sup> *Brooklyn Heights R. R. Co. v. City of Brooklyn*, 152 N. Y. 244, 46 N. E. 509 (1897).

<sup>19</sup> *Jennison v. Citizens' Savings Bank of Jefferson*, 122 N. Y. 135, 9 L.R.A. 708, 25 N. E. 264 (1890).

of the State, as the State holds title thereto as part of its sovereignty and cannot alienate it except for some public purpose or some reasonable use which can fairly be said to be for the public benefit.<sup>20</sup> A corporation accepting its charter at a time when it is subjected to a burden cannot be heard to object to its legality.<sup>1</sup>

§ 386. *Id.*: **Under Statute.**—No corporation possesses or can exercise any corporate powers not given by law or not necessary to the exercise of the powers so given; but the certificate of incorporation of any corporation may contain any provision for the regulation of the business and the conduct of the affairs of the corporation and any limitation upon its powers or the powers of its directors and stockholders which does not exempt them from the performance of any obligation or the performance of any duty imposed by law.<sup>2</sup> Any provision in any corporate law in conflict with any provision in the General, or Stock Corporation Law prevails, and such provision relating to a matter embraced in the General, or Stock Corporation Law, but not in conflict with it, is deemed to be an addition to the provision in the General, or Stock Corporation Law, and both provisions are in such case applicable.<sup>3</sup> Nothing in the General Corporation Law is to be construed to impair any right or liability which any existing corporation, its officers, directors, stockholders or creditors may have or be subject to, or which any such corporation has or was subject to on the date when the General Corporation Law took effect, by virtue of any special act of the Legislature creating such corporation, or creating or defining any such right or liability, unless such special act is repealed by such General Corporation Law or the other general laws mentioned.<sup>4</sup> “Any one who knows how statutes are passed must be aware that the intention of the legislature would be extremely difficult to ascertain, if, indeed, in the minds of many of the legislators any such thing existed at all.”<sup>5</sup> An enactment that “words in the singular number include the plural, and in the plural number include the singular” does not mean that always and under all circumstances a word in the singular has a plural

<sup>20</sup> *Coxe v. State*, 144 N. Y. 396, 39 N. E. 400 (1895).

<sup>1</sup> *Mayor v. Broadway & Seventh Ave. R. R. Co.*, 17 Hun, 242 (1879); L. 1860, c. 513, § 2, subjecting corporation to license fee.

<sup>2</sup> Gen. Corp. L. § 10 (L. 1909, c. 28).

<sup>3</sup> Gen. Corp. L. § 321 (L. 1909, c. 28).

<sup>4</sup> Gen. Corp. L. § 331 (L. 1909, c. 28).

<sup>5</sup> *People v. Delaware & Hudson Canal Co.*, 54 Hun, 598, 7 N. Y. Supp. 890 (1869); *aff'd* 121 N. Y. 666, 24 N. E. 1093; L. 1881, c. 361.

meaning, as rules of construction are invoked only when the language used leaves its purpose and intent uncertain or questionable; and they cannot be resorted to for the purpose of enabling the courts to enlarge or extend the legislative design or intent.<sup>6</sup> The word "person" or "persons," when used in a statute, includes corporations.<sup>7</sup> A corporation is a "person" entitled to file a lien.<sup>8</sup> "Where the Legislature has once provided a special rule for a particular case, a general statute thereafter enacted, though broad enough in its terms to be applicable to the case, will not, from that fact alone, alter the special rule (*citation*); though, if there be a general clause in the same statute with a special clause, the latter shall not restrain the signification of the former (*citation*). It is still more reasonable, that where there has been a general enactment covering the subject in general, in terms which include the particular case, and there is a subsequent enactment which makes a rule for that particular, that the latter shall be held to be all that the legislature, at least, meant for the regulation of that case."<sup>9</sup> "When a statute amends a former statute 'so as to read as follows' it operates as a repeal by implication of inconsistent provisions therein omitted in the latter. When the amendatory act re-enacts provisions of the former law either *ipsissimis verbis* or by the use of equivalent though different words, the law will be regarded as having been continuous, and the new enactment, as to such parts, will not operate as a repeal, so as to affect a duty accrued under a prior law, although, as to all new transactions, the later law will be referred to as the ground of the obligation. The effect upon a prior statute of a subsequent amendment 'so as to read as follows' is not to be determined in all cases by any fixed and absolute rule, but frequently becomes a question of legislative intent to be determined from the nature and language of the amendment, from other acts passed at or about the same time and from all the circumstances of the case. The duty of the courts is to give effect to the legislative intent rather than the literal

<sup>6</sup> People *ex rel.* New York Central & Hudson River R. R. Co. v. Woodbury, 208 N. Y. 421, 102 N. E. 565, 566 (1913); Gen. Construct. L. § 35.

<sup>7</sup> United States Telegraph Co. v. Western Union Telegraph Co., 56 Barb. 46 (1865).

<sup>8</sup> Gaskell v. Beard, 58 Hun, 101, 11 N. Y. Supp. 399 (1890); L. 1882, c. 410, § 1824.

<sup>9</sup> Excelsior Petroleum Co. v. Lacey, 63 N. Y. 422 (1875); Gen. Mfg. Act, L. 1848, c. 40, § 13; 1 R. S. 601, § 2. The penalty imposed by the former but later statute for declaring dividends diminishing capital stock was held to overrule the penalty prescribed by the latter but earlier act.

terms of the act.”<sup>10</sup> Broad words in a statute conferring powers and privileges on “a corporation” or on “any corporation” apply only to corporations organized under the laws of this State.<sup>11</sup> “As a corporation can act only in the mode and within the limitations prescribed by the law creating it, the same law may impose upon parties dealing with the corporation such restrictions as the enacting power deems proper, in preserving, applying, or subjecting its assets to the discharge of its obligations, and may, among other things, provide that any one, or more, of the usual remedies of creditors against a debtor, shall in certain cases be withheld.”<sup>12</sup> A corporation organized to print, publish and sell newspapers under statutes prohibiting the exercise of any power not necessary to the exercise of powers given it by its charter is not bound by its published agreement to pay the heir of anyone found dead, with a copy of the advertised agreement in his pocket, a stated sum, as the agreement is *ultra vires*.<sup>13</sup> A stock corporation organized under the Business Corporation Law cannot have the rights of a cemetery corporation.<sup>14</sup>

**§ 387. Id.: Ultra Vires, In General.**—“The term *ultra vires* is the modern legal nomenclature for acts of a corporation through any of its instrumentalities which are beyond the powers conferred by law upon the legal entity.”<sup>15</sup> “When acts of corporations are spoken of as *ultra vires*, it is not intended that they are unlawful or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed and the funds applied solely for carrying out the objects for which the corporation was created.”<sup>16</sup> “The

<sup>10</sup> *Bank of Metropolis v. Faber*, 150 N. Y. 200, 44 N. E. 779 (1896). Determining the liability of a director of a corporation which failed to file its annual report under L. 1890, c. 564, § 30, as amended L. 1892, c. 2, which in turn was repealed by L. 1892, c. 687, § 34, which in turn became effective the same day as L. 1892, c. 688, amending § 30 above.

<sup>11</sup> *Muck v. Hitchcock*, 212 N. Y. 283, 106 N. E. 75 (1914).

<sup>12</sup> *Nat. Shoe & Leather B'k v. Mechanics' Nat. B'k*, 89 N. Y. 467 (1882). The question was of an

attachment by a State court against a national bank. U. S. R. S. § 5798.

<sup>13</sup> *Brisay v. Star Co.*, 13 Misc. 349, 35 N. Y. Supp. 99 (1895).

<sup>14</sup> *Grace v. Repose Mausoleums, Inc.*, 78 Misc. 213, 139 N. Y. Supp. 300 (1912).

<sup>15</sup> *Fifth Ave. Coach Co. v. City of New York*, 58 Misc. 401, 111 N. Y. Supp. 759 (1908); *aff'd* 126 A. D. 657, 110 N. Y. Supp. 1037.

<sup>16</sup> *Whitney Arms Co. v. Barlow*, 63 N. Y. 62 (1875); *Gen. Mfg. Act*, L. 1848, c. 40, § 12, as amended L. 1853, c. 333.

contracts of corporations are said to be *ultra vires* when they involve some adventure or undertaking not within the scope of their charter, which is their rule of corporate action.”<sup>17</sup> “The term *ultra vires* is used in more than one sense. In the first place an act of a corporation is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances, or for any purpose. An act is also said to be *ultra vires*, with reference to the rights of certain parties, when the corporation is not authorized to do the act without their consent, and the third, with reference to some specific purpose, when the corporation is not authorized to perform the act for that particular purpose, although the act itself may be for some purposes fully within the scope of the general powers of the corporation. In the last two cases, one who deals in good faith with a corporation having the apparent right to do the act, and who parts with anything of value to the corporation as a consideration for its promise, is permitted to say that the corporation is estopped from insisting that the act which was done for its benefit was beyond its power, and he will be at liberty to recover the value of the articles furnished or the work done for the corporation (*citations*). But every one who deals with a corporation is bound to take notice of its corporate powers, and if a reference to its charter shows that the act is not within the scope of its corporate authority, he must know that such act is void and that it cannot be made the basis of any claim against the corporation (*citation*), for . . . no sort of a ratification can make good the act which is without the scope of corporate authority.”<sup>18</sup>

“The words *ultra vires* and illegality represent totally different and distinct ideas. It is true a contract may have both those defects, but it may also have one without the other. . . . A corporation is not an agent of the State, or, in any strict sense, of the shareholders. But it derives its powers from the State, and it may transcend those powers for purposes which, in themselves considered, involve no public wrong. Contracts so made may be defective in point of authority, and may contemplate a private wrong to the shareholders; but they are not illegal, because they violate no public interest or policy . . . the *illegality* of an act is determined in its quality and does not depend on the person or being who performs it.”<sup>19</sup>

<sup>17</sup> *Leslie v. Lorillard*, 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363 (1888).

<sup>18</sup> *Brisay v. Star Co.*, 13 Misc. 349, 35 N. Y. Supp. 99 (1895).

<sup>19</sup> *Bissell v. Michigan Southern &*

“ It is the undoubted right of stockholders to complain of any diversion of the funds to purposes unauthorized in the charter. . . . The original subscribers contribute the capital invested, and they and those who succeed to their shares are always, in equity, the owners of that capital. But, legally, the ownership is vested in the corporate body, impressed with the trusts and duties prescribed in the charter. In these relations we have the only true foundation of the plea of *ultra vires*. . . . It is not to be understood as an absolute and peremptory defence in all cases of excess of power, without regard to other circumstances and considerations. . . . If the person dealing with a corporation knows of the wrong done or contemplated, and he cannot show the acquiescence of the shareholders, he ought not to complain if he cannot enforce the contract.”<sup>20</sup>

“ The real ground upon which the defence of *ultra vires* rests, and the only one upon which it has ever, to any extent, been judicially based is, that the contracts of corporations which are unauthorized by their charters are to be regarded as illegal, and, therefore, void. There are three classes of illegal contracts, viz.: those which are *malum in se*, i. e., which embrace something which the law deems in and of itself criminal or immoral; second, those which violate the provisions of some statute, and are hence called *mala prohibita*; and, third, those which contravene some principle of public policy. Corporations may make contracts falling within either of the two first of these classes, and such contracts are no doubt subject to the same rules as if made by individuals. . . . But the contracts of corporations which are not authorized by their charters are illegal, because they are made in contravention of public policy.”<sup>1</sup> “ In suits between the corporation and strangers dealing with it, the question is whether the act is one the corporation is not authorized to perform under any circumstances; or one that it may perform for some purposes or under certain conditions. In the first case it is *ultra vires* and there can be no recovery; because the party dealing with the corporation is bound to know, from the law of its existence, that it has no power to perform it. In the second case, the issue will turn upon whether the party dealing with it is aware of the intention to perform the act for some unauthor-

Northern Indiana R. R. Co., 22 N. Y. 258 (1860).

<sup>20</sup> Bissell v. Michigan Southern & Northern Indiana R. R. Co., 22 N. Y. 258 (1860).

<sup>1</sup> Bissell v. Michigan Southern & Northern Indiana R. R. Co., 22 N. Y. 258 (1860).

ized purpose, or whether the attendant circumstances justify its performance. In actions by stockholders, which assail the acts of their directors or trustees, courts will not interfere unless the powers have been illegally or unconscientiously executed, or unless it be made to appear that the acts were fraudulent or collusive and destructive of the rights of the stockholders. Mere errors of judgment are not sufficient as grounds for equity interference; for the powers of those entrusted with corporate management are largely discretionary.”<sup>2</sup> “It has been pointed out that the doctrine of *ultra vires* originated at a time when nearly all corporations were created for public purposes, and that there is slight reason why it should ever have been applied to private corporations — more than to individuals in a copartnership.”<sup>3</sup>

§ 388. *Id.*: **Specific Examples, In General.**—The use by a subway company of part of the subway property for weighing and candy and chewing gum vending machines is not *ultra vires* or in violation of a general lease of such property by a municipality to it for a term of years.<sup>4</sup> A school, established to promote the sale by a corporation organized to manufacture and sell a novel instrument (a clavier), is not *ultra vires* the corporation.<sup>5</sup> The fact that a moneyed, railroad or transportation corporation is empowered to issue an identical or similar instrument as that issued by a business corporation is not proof that its issuance by the latter is *ultra vires*.<sup>6</sup> A corporation organized “for the purpose of raising and smelting lead ore” which for a time did only the raising may legally later do the smelting, buying out, if need be, the agency through which it formerly did the latter; and may do what is necessary to transport their lead to market.<sup>7</sup> A purchase by a corporation of a contract by which it becomes the exclusive agent of another corporation to sell in certain states electrical supplies manufactured by the latter, in consideration wherefor it issues four-fifths of its stock, is *ultra vires* to

<sup>2</sup> *Leslie v. Lorillard*, 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363 (1888).

<sup>3</sup> *Virgil v. Virgil Practice Clavier Co.*, 33 Misc. 200, 68 N. Y. Supp. 335 (1900).

As to whether competition with one's business which results from the *ultra vires* act of a corporation entitles him to challenge the power of the corporation to engage therein, is discussed in a note in 12 L.R.A. (N.S.) 757.

<sup>4</sup> *City of New York v. Interborough Rapid Transit Co.*, 53 Misc. 126, 104 N. Y. Supp. 157 (1907).

<sup>5</sup> *Virgil v. Virgil Practice Clavier Co.*, 33 Misc. 201, 68 N. Y. Supp. 335 (1900).

<sup>6</sup> *Jacobs v. Monaton R. I. Corp.*, 212 N. Y. 48, 105 N. E. 968 (1914).

<sup>7</sup> *Moss v. Averell*, 10 N. Y. 449 (1853).

manufacture electric machinery, and the issue of such stock is unlawful.<sup>8</sup> A fair construction of a certificate of incorporation which gives the company's objects as being "to manufacture soaps and oils and to sell the same" permits it to sell soaps other than those of its own manufacture.<sup>9</sup> It is not *ultra vires* a corporation which has power to acquire plays, opera, theatrical houses and costumes and other property incidental to theatrical productions to purchase the good will of an operatic or theatrical business.<sup>10</sup> A discussion of what acts of a manufacturing corporation of musical instruments are *ultra vires* is found in the case cited in the note.<sup>11</sup> A corporation empowered by its charter only to produce its own coal by mining and to sell that which was so obtained is liable for the price of coal delivered by an outsider to its customers by order of its officers but not of its directors in order to fill such customers' orders because of its own inability to obtain the necessary coal from its own mines, especially if a great part of the money owing by its customers for such coal has been collected by it and applied to its own use.<sup>12</sup> A conveyance of realty to a corporation incompetent by its charter to take title to real estate is not void, but only voidable; and it is good until assailed by the sovereign in a direct proceeding for that purpose.<sup>13</sup> "The right to take and grant property, was and is of the essence of every corporation, whether created by license, or prescription, or by legislative act, and in the absence of any statutory prohibition, they may take by all the usual modes of acquiring property. They always had the right at common law to take personal property by *bequest* (*citations*); and . . . they have that right under our statutes."<sup>14</sup> A corporation which has become party with other corporations to an illegal trust and pursuant to the trust agreement has assigned to the trustee a contract by it to supply goods which it manufactures to a third party cannot, after the goods have been delivered and accepted pursuant to the trust agreement and it has repudiated such trust, itself

<sup>8</sup> Powell v. Murray, 3 A. D. 273, 38 N. Y. Supp. 233 (1896); aff'd 157 N. Y. 717, 53 N. E. 1130.

<sup>9</sup> Petrolia Mfg. Co. v. Jenkins, 29 A. D. 403, 51 N. Y. Supp. 1028 (1898).

<sup>10</sup> Metropolitan Co. v. Hammerstein, 162 A. D. 691, 147 N. Y. Supp. 532 (1914).

<sup>11</sup> Steinway v. Steinway & Sons,

17 Misc. 43, 40 N. Y. Supp. 718 (1896).

<sup>12</sup> Alexander v. Brown, 9 Hun, 641 (1877).

<sup>13</sup> Burden v. Burden, 159 N. Y. 289, 54 N. E. 117 (1899).

<sup>14</sup> Sherwood v. American Bible Society, 40 N. Y. (1 Keyes), 561 (1864).

receive the purchase price paid by the third party on the ground that the trust was void.<sup>15</sup>

§ 389. **Id.: Helping Customers.**—"A corporation dealing in manufactured goods and needing them for sale, may, as a proper incident to its business, extend financial aid to a manufacturer by advancing him money to enable him to furnish the goods. This aid may be extended by a loan of its own money, or it may take his notes and by its credit raise money thereon, and advance such money looking for reimbursement out of the goods to be manufactured and delivered to it."<sup>16</sup> A corporation formed to manufacture and sell malt liquors is bound by its guaranty of payment by a customer of the rent of his saloon, even though the guaranty be not under seal.<sup>17</sup> A corporation in the business of manufacturing and selling beer has power to enter into a contract to indemnify a lessor of premises to a saloon-keeper who has not been its customer but agrees to become so if the indemnity be given.<sup>18</sup> A corporation organized to make and sell merchandise is within its incidental powers in advancing a customer to whom it has sold goods upon the understanding that they should remain its property till paid for, money to prevent the customer from failing in business or to enable the customer to carry on business, or to secure the payment of any advances made to enable the customer to carry on such business.<sup>19</sup>

<sup>15</sup> *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 7 L.R.A. 46, 23 N. E. 530 (1890).

<sup>16</sup> *Holmes v. Willard*, 125 N. Y. 75, 11 L.R.A. 170, 25 N. E. 1083 (1890).

<sup>17</sup> *Holm v. Claus Lipsius Brewing Co.*, 21 A. D. 204, 47 N. Y. Supp. 518 (1897).

<sup>18</sup> *Koehler & Co. v. Reinheimer*, 26 A. D. 1, 49 N. Y. Supp. 755 (1898). "The doctrine of *ultra vires* took its rise at a very early day in the history of corporations, at a time when they were not common and were created for *quasi* public purposes and regarded to a certain extent as public in their nature. . . . Corporations are now organized to carry on every kind of business which may be performed by individuals. The purposes of trading corporations are in no way public in their nature. So far as the people are concerned, whether a

corporation shall make one contract or another, so long as it advances the purposes for which the corporation was organized, is absolutely unimportant; and so the rule has come to be laid down that, except as restrained by law, trading corporations have the implied power to make all such contracts as will further the objects of their creation, and their dealings in this regard may be likened to those of an individual seeking to accomplish the same ends."

<sup>19</sup> *Hess v. Sloane*, 66 A. D. 522, 73 N. Y. Supp. 313 (1901); *aff'd* 173 N. Y. 616, 66 N. E. 1110. ". . . a manufacturing corporation, engaged in the manufacture of goods on credit, has, as an incident to that business, a power to take such measures as are reasonably proper to protect its debtors so as to enable it to realize the amount of their indebtedness."

**§ 390. Id.: Plea of, No Defense to Corporation if Not Subserve Justice or if Benefits Have Been Received, In General.—**

“ . . . the plea of *ultra vires* cannot be availed of to defend against an obligation incurred, when the contract has been in good faith performed by the other contracting party and the corporation has had the benefit of it. . . . That a corporation has engaged in a business foreign to its chartered powers, might afford ground for complaint and action by its stockholders; but not for a defense to its liability to others, who have acted . . . in good faith in their dealings with its agents ” under circumstances warranting their belief in the right of the agents to act for the corporation.<sup>20</sup> “ The courts will not permit the plea of *ultra vires* to prevail whether interposed for or against a corporation, where it would not advance justice, but would accomplish a legal wrong.”<sup>1</sup> “ . . . the plea of *ultra vires* should not prevail when it would not advance justice, but, on the contrary, would accomplish legal wrong.”<sup>2</sup> “ The rule is well settled that the plea of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong.”<sup>3</sup> “ The plea of *ultra vires* should not as a general rule prevail, whether interposed for or against a corporation, when it would not advance justice, but on the contrary would accomplish a legal wrong.”<sup>4</sup>

**§ 391. Id.: When Corporation Estopped.—**“ When the officers of a corporation engage in an *ultra vires* business for the benefit of a corporation, and the corporation has the actual benefit thereof, and when the business is so carried on with the acquiescence of the stockholders that it actually, although illegally becomes the business of the corporation, it cannot maintain an action against such officers for any damages it

<sup>20</sup> Linkhauf v. Lombard, 137 N. Y. 417, 20 L.R.A. 48, 33 N. E. 472 (1893).

<sup>1</sup> Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 27 N. E. 831 (1891). A company sold out to a new corporation and took the latter's stock in payment, which it sold and sued on the note for the purchase price. The purchaser said his vendor had no power to buy the stock.

<sup>2</sup> Leslie v. Lorillard, 110 N. Y.

519, 1 L.R.A. 456, 18 N. E. 363 (1888).

<sup>3</sup> The Rider Life Raft Co. v. Roach, 97 N. Y. 378 (1884). “ Some of the decisions also hold that this plea can only be interposed by a corporation and not by an individual dealing with such corporation.”

<sup>4</sup> Whitney Arms Co. v. Barlow, 63 N. Y. 62 (1875); Gen. Mfg. Act, L. 1848, c. 40, § 12, as amend'd L. 1853, c. 333.

has suffered in such business.”<sup>5</sup> A contract *ultra vires* a corporation is not so executed as to prevent it from setting up its lack of power, in order to avoid it, if delivery of the goods contracted for has never been made to it but they have been bought and held in the name of the other party though for the corporation’s account.<sup>6</sup> “It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract.”<sup>7</sup> “. . . when a sale of a chattel, made to a corporation, is executed and complete in all things, except the performance of its own promise to pay the price, a plea that it ought not to have made the purchase is not to be entertained, especially so long as it retains, and insists upon retaining, all the benefit of the contract. . . . Contracts with corporations, made in excess of their powers, which are purely executory on both sides, and where no wrong will be done if the parties are left in their previous situation . . . should not be enforced, because such contracts contemplate an unauthorized diversion of corporate funds, and, therefore, a breach of private trust. But the executed dealings of corporations must be allowed to stand for and against both the parties, when the plainest rules of good faith so require.”<sup>8</sup> A corporation cannot plead a defense of *ultra vires* against liability on a contract by it with another who has done his part so that it has received the entire benefit contracted for.<sup>9</sup> “The company contracted, it obtained that for which it contracted, and no person or corporation then in existence, or which subsequently came into existence as an interested party, can be heard in complaint of a transaction by which no person was defrauded, and each obtained what it contracted to obtain;” and particularly a stockholder who does not offer to return to the one contracting with the corporation what he supplied to the corporation under the contract and what it has enjoyed and used.<sup>10</sup> A corporation cannot be allowed to repudiate its obligation to an

<sup>5</sup> Holmes v. Willard, 125 N. Y. 75, 11 L.R.A. 170, 25 N. E. 1083 (1890). The manager and treasurer financed a concern the output of which his corporation *ultra vires* sold.

<sup>6</sup> Jennison v. Citizens’ Savings Bank of Jefferson, 122 N. Y. 135, 9 L.R.A. 708, 25 N. E. 264 (1890).

<sup>7</sup> Whitney Arms Co. v. Barlow, 63

N. Y. 62 (1875); Gen. Mfg. Act, L. 1848, c. 40, § 12, as amended L. 1853, c. 333.

<sup>8</sup> Parish v. Wheeler, 22 N. Y. 494 (1860).

<sup>9</sup> De Groff v. American Linen Thread Co., 21 N. Y. 124 (1860).

<sup>10</sup> Drake v. New York Suburban Water Co., 26 A. D. 499, 50 N. Y. Supp. 826 (1898).

individual, *e. g.*, its guaranty of payment of dividends on its stock, upon the ground that such obligation was *ultra vires*, and at the same time retain the consideration, *e. g.*, its promissory note to him, that it had received for giving the guaranty.<sup>11</sup> A corporation the principal officers of which agreed with an individual to sell realty and accepted part of the purchase price, just as it had done in other transactions with other persons, may be compelled by him specifically to perform the agreement even though it may claim the contract was *ultra vires*.<sup>12</sup> A corporation, the property of which is in effect all owned by an individual, cannot repudiate a transaction of which the benefits have already accrued to the individual and the nature of which he fully comprehended when he acquired the stock, even though the transaction was *ultra vires*.<sup>13</sup> A corporation which has entered into a contract, with the consent of all who were its stockholders at the time, to deliver to another portions of its stock and bonds for work to be done, etc., cannot, after full performance by the other party and acceptance thereof by it, procure a cancellation of the contract in equity while retaining all benefits received under it, both because he who seeks must do equity and because it is equitably estopped.<sup>14</sup> If a contractor has in good faith performed a contract with a corporation and the result of his performance has gone into its possession, it cannot defeat his claim for compensation by the plea of *ultra vires*, however true the plea may be.<sup>15</sup>

**§ 392. Id.: When Other Party Estopped.**—One who has retained the benefit of a contract with a corporation cannot raise the question that the contract is *ultra vires* the corporation's powers.<sup>16</sup> "A purchaser who acquired by contract, and under an agreement to pay for it, the property of a corporation, cannot defeat the claim for the purchase price by impeaching the right of the corporation to become the owner of the property. One who has received from a corporation the full consideration of his engagement to pay money, either

<sup>11</sup> *McVity v. Albro Co.*, 90 A. D. 109, 86 N. Y. Supp. 144 (1904); *aff'd* 180 N. Y. 554, 73 N. E. 1126.

<sup>12</sup> *Davidson v. Cannabis Mfg. Co.*, 113 A. D. 664, 99 N. Y. Supp. 1018 (1906); *app. dism'd* 187 N. Y. 576, 80 N. E. 1121.

<sup>13</sup> *Remington & Son Pulp & Paper Co. v. Casewell*, 126 A. D. 142, 110 N. Y. Supp. 556 (1908).

<sup>14</sup> *Pocantico Water Works v. Low*,

20 Misc. 484, 46 N. Y. Supp. 633 (1897).

<sup>15</sup> *Cunningham v. Massena Springs & Fort Covington R. R. Co.*, 63 Hun, 439, 18 N. Y. Supp. 600 (1892); *aff'd* 138 N. Y. 614, 33 N. E. 1082.

Estoppel to deny validity of preferred stock, see note in 27 L.R.A. 139.

<sup>16</sup> *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419 (1887).

in services or property, cannot avail himself of the objection that the contract thus fully performed by the corporation was *ultra vires*, or not within its chartered privileges and powers."<sup>17</sup> After performance by a corporation of an *ultra vires* contract and receipt by another of the benefit thereof, the latter is estopped from raising this question.<sup>18</sup> After full performance of a contract by a corporation with the other party to it and acceptance by the latter of the contract's benefits the latter cannot put up the claim that the contract was *ultra vires* the corporation.<sup>19</sup>

**§ 393. Id.: Defense of, Must Be Plead.**—The question whether a contract is *ultra vires* a corporation is not raised unless by the pleadings.<sup>20</sup> The claim by a corporation that an act for which it is sued was *ultra vires* is an affirmative defense which must be plead to be taken advantage of.<sup>1</sup>

**§ 394. Id.: Dealing With Creditors, Governing Statutes.**—No business corporation can incur any debts until the amount of capital specified in its certificate of incorporation, as the amount of capital with which it will begin business, has been paid in money or property.<sup>1a</sup> No corporation formed with provision in its certificate for the issuance of the shares of its stock (other than preferred stock having a preference as to principal) without any nominal or par value can begin to carry on business or incur any debts until the amount of capital stated in its certificate of incorporation has been fully paid in money, or in property taken at its actual value; and, in case the amount of capital stated in such certificate is increased as provided by statute, such corporation must not

<sup>17</sup> *Whitney Arms Co. v. Barlow*, 63 N. Y. 62 (1875); *Gen. Mfg. Act*, L. 1848, c. 40, § 12, as amend'd L. 1853, c. 333.

<sup>18</sup> *Booth Brothers v. Baird*, 83 A. D. 495, 82 N. Y. Supp. 432 (1903).

<sup>19</sup> *Bowers v. Ocean Accident & Guarantee Corp., Ltd.*, 110 A. D. 691, 97 N. Y. Supp. 485 (1906); aff'd 187 N. Y. 561, 80 N. E. 1105.

Estoppel to deny validity of contract of foreign corporation because of failure to comply with statute, see note in 24 L.R.A. 320.

On estoppel of building association to assert illegality of its by-law or stipulation in stock that stock will mature at a fixed time, see note in 15 L.R.A.(N.S.) 503.

<sup>20</sup> *Stanton v. Erie R. R. Co.*, 131 A. D. 879, 116 N. Y. Supp. 375 (1909); app. dism'd 199 N. Y. 529, 92 N. E. 1100.

<sup>1</sup> *Keating v. American Brewing Co.*, 62 A. D. 501, 71 N. Y. Supp. 95 (1901). "The defense of *ultra vires*, when interposed by a business corporation, is never looked upon with favor, and indeed in these days when corporations are organized for so many and various purposes, and their business extends in so many directions, it would be difficult to say that any business act is not within the power of a business corporation."

<sup>1a</sup> *Bus. Corps. L. § 3* (L. 1909, c. 12).

increase the amount of its indebtedness then existing until it has received in money or property the amount of such increase of its stated capital.<sup>1b</sup> No corporation reorganized under the statute permitting reorganization of a stock corporation organized under any general law so that it may acquire and enjoy the rights, privileges, powers and exemptions of a corporation having stock without nominal or par value must incur any debts subsequent to the filing of the certificate of reorganization until it has assets of an actual value at least equal to the amount of capital stated in its certificate of reorganization as that with which it will carry on business;<sup>1c</sup> and the liability of the corporation for corporate debts contracted or obligations incurred prior to the filing of such certificate of reorganization is unaffected thereby, but for the purpose of enforcing and recovering upon such claims creditors have the same right of recourse against the corporation that they would have had if the corporation had not been reorganized, and all of the rights and benefits conferred by sections fifty-six to fifty-nine, inclusive, of the Stock Corporation Law are especially reserved and saved to such creditors, subject to the limitations and restrictions imposed by those sections.<sup>1d</sup>

Upon proof by affidavit or other competent written evidence to the satisfaction of the judge that an execution against property has been issued as prescribed by statute and either has not been returned or has been returned unsatisfied at least in part, and that any corporation has personal property of the judgment debtor exceeding ten dollars in value or is indebted to him in a sum exceeding ten dollars, the judgment creditor is entitled to an order requiring the corporation to attend and be examined concerning the debt or other property at a time and place specified in the order.<sup>2</sup> Upon an examination of a corporation having property of a judgment debtor at the instance of the latter's judgment creditor each answer of a party or witness examined must be under oath, and the corporation must attend by and answer under the oath of an officer thereof, and the judge may in his discretion specify the officer.<sup>3</sup> At any time after the commencement of a proceeding to compel an examination of a corporate debtor of a judgment debtor and before the appointment of a receiver

<sup>1b</sup> St. Corp. L. § 20 (L. 1912, c. 351).

<sup>1c</sup> St. Corp. L. § 24-b (L. 1917, c. 484).

<sup>1d</sup> St. Corp. L. § 24-c (L. 1917, c. 484).

<sup>2</sup> C. C. P. § 2441.

<sup>3</sup> C. C. P. § 2444.

therein or the extension of a receivership thereto the judge by whom the order or warrant was granted or to whom it is returnable may in his discretion upon proof by affidavit to his satisfaction that a corporation is indebted to the judgment debtor and upon such a notice given to such persons as he deems just or without notice make an order permitting the corporation to pay to a sheriff designated in the order a sum on account of the alleged indebtedness not exceeding the sum which will satisfy the execution, and a payment so made is to the extent thereof a discharge of the indebtedness except as against a transferee from the judgment debtor in good faith and for a valuable consideration of whose rights the corporation had actual or constructive notice when the payment was made.<sup>4</sup> Service of an injunction order or an order requiring attendance and examination in proceedings to compel an examination of a corporate debtor of a judgment debtor upon the corporation is sufficient if made upon an officer to whom a copy of the summons must be delivered when a summons is personally served upon the corporation unless the officer is specially designated by the judge as prescribed by statute.<sup>5</sup> If the officer of a corporation required to attend in its behalf in proceedings to examine it as a debtor of a judgment debtor is at the time of the service of the order upon him a resident of New York State or then has an office within New York State for the regular transaction of business in person, he cannot be compelled to attend pursuant to the order or to any adjournment at a place without the county wherein his residence or place of business is situated.<sup>6</sup>

Every manufacturing, mining, quarrying, mercantile, railroad, street railway, canal, steamboat, telegraph and telephone company, every express company, every corporation engaged in harvesting and storing ice, and every non-municipal water-company, and every corporation engaged in or upon any public work for the State or municipal corporation thereof, either as a contractor or a subcontractor therewith, must pay to each employee engaged in its business the wages earned by such employee in cash and no such corporation can pay such employees in scrip, commonly known as store money-orders; and any corporation violating the prohibitions recited is guilty of a misdemeanor.<sup>7</sup> Every corporation must pay weekly to each employee the wages earned by him to a day not more than six days prior to the date of

<sup>4</sup> C. C. P. § 2446.

<sup>5</sup> C. C. P. § 2452.

<sup>6</sup> C. C. P. § 2459.

<sup>7</sup> Labor L. § 10 (L. 1909, c. 36).

such payment.<sup>8</sup> Under a statute requiring corporations to "pay weekly to each employee the wages earned by him to a day not more than six days prior to the date of such payment," and defining "employee" to mean "a mechanic, workingman or laborer who works for another for hire," a chauffeur, matron, office-boy and blue-printer are employees, while a stenographer, accountant, typist, chainman, levelman, civil engineer, bookkeeper, draftsman, structural engineer, and rodman who assist the civil engineer are not; and a civil engineer may therefore be paid by cheque instead of in cash.<sup>9</sup>

§ 394-a. *Id.*: **In General.**—It is an essential and inherent characteristic of a corporation that it alone is primarily liable for its debts, because it alone contracts them, except as that natural and necessary consequence of its creation is modified in the act of its creation by some explicit command of the statute which either imposes an express liability upon the corporators in the nature of a penalty, or affirmatively retains and preserves what would have been the common-law liability of the members from the destruction involved in the corporate creation. . . . Exactly the opposite is true of joint-stock companies. Their formation destroys no part or portion of their common-law liability for the debts contracted."<sup>10</sup> One receiving with notice and without consideration property of a judgment debtor corporation is liable to the judgment creditor to account and pay so much of the claim as may be satisfied by the amount he received.<sup>11</sup> If the officers of a corporation, while it is in debt, agree to transfer substantially all its assets to another corporation which is thereafter to continue the business and which issues in payment some of its capital stock, not to the selling corporation but to the latter's principal stockholder individually, subsequently, however, on assertion by a creditor of the selling corporation of his claim, reissuing it to the late treasurer of the selling corporation (who has become president of the purchasing corporation) for distribution without regard to the claims of creditors, an accounting will be compelled by the purchasing corporation as to the assets received by it from the selling corporation so that a

<sup>8</sup> Labor L. § 11 (L. 1909, c. 36).

<sup>9</sup> *People v. Interborough Rapid Transit Co.*, 169 A. D. 32, 154 N. Y. Supp. 627 (1915); Labor L. art. 2, §§ 10, 11.

<sup>10</sup> *People ex rel. Winchester v. Coleman*, 133 N. Y. 279, 16 L.R.A. 183, 31 N. E. 96 (1892).

<sup>11</sup> *Cullen v. Friedland*, 152 A. D. 124, 136 N. Y. Supp. 659 (1912).

money judgment may be recovered.<sup>12</sup> One who is a creditor of one corporation the property of which is bought out on foreclosure by its creditors under an agreement to which neither the corporation nor its stockholders were parties cannot claim to follow such property after its transfer to another corporation, organized by such creditors to hold it, on the theory that such property is in equity a trust fund for the payment of its debts, because the purchasing creditors occupy no relation of trust toward the corporation bought out or its other creditors.<sup>13</sup> An injunction restraining creditors from proceeding against a corporation to enforce their demands cannot be granted at the same time that an order to show cause why an application for its voluntary dissolution is granted.<sup>14</sup> A trustee in bankruptcy cannot sue the officers of the bankrupt corporation to nullify an alienation of its property at a time when there were no corporate creditors unless his pleadings allege the transfer was made with a design to defraud persons subsequently becoming creditors.<sup>15</sup>

**§ 395. Id.: Borrowing Money, In General.**—The power of a corporation to borrow money by means of its bonds and mortgages is treated in the sixth chapter of this work, beginning with section two hundred and twenty-seven. In addition to the powers conferred by the General Corporation Law every stock corporation has the power to borrow money and contract debts, when necessary for the transaction of its business or for the exercise of its corporate rights, privileges or franchises or for any other lawful purpose of its incorporation, and it may issue and dispose of its obligations for any amount so borrowed and may mortgage its property and franchises to secure the payment of such obligations, or of any debt contracted for such purposes.<sup>16</sup> The power of a corporation to borrow money, and more particularly to give its obligation to evidence the loan and its mortgage to secure it, has already been fully discussed.<sup>17</sup> It seems that “whenever a corporation can lawfully contract a debt for borrowed money, or otherwise, in the course of its business, it can give a time

<sup>12</sup> *Hurd v. N. Y. & C. Steam Laundry Co.*, 167 N. Y. 89, 60 N. E. 327 (1901).

<sup>13</sup> *Vose v. Cowdrey*, 49 N. Y. 336 (1872).

<sup>14</sup> *Matter of French Manufacturing Co.*, 12 Hun, 488 (1878); 2 R. S. 466, §§ 56, 65.

<sup>15</sup> *Lummis v. Crosby*, 176 A. D. 315, 162 N. Y. Supp. 444 (1916).

On right of creditor to complain of purchase by corporation of its own shares of stock, see notes in 61 L.R.A. 621, 25 L.R.A.(N.S.) 50, 30 L.R.R.(N.S.) 694, 44 L.R.A.(N.S.) 156.

<sup>16</sup> St. Corp. L. § 6 (L. 1909, c. 61).

<sup>17</sup> See chapter sixth on “Bonds and Mortgages,” § 227 *et seq.*, *supra*.

engagement to pay the debt, and such engagement may be in any form which does not come within the prohibition of some particular statute.”<sup>18</sup> “The right of corporations in general to give a note, bond or other engagement to pay a debt is so nearly identical or so inseparably connected with the right to contract the debt that no doubt upon the question ought to be admitted. When a corporation can lawfully purchase property or procure money on loan in the course of its business, the seller or the lender may exact, and the purchaser or borrower must have the power to give, any known assurance which does not fall within the prohibition, express or implied, of some statute.”<sup>19</sup> “The word ‘obligation’ has many meanings and when used in a statute its significance must be gathered from and governed by the purpose and context of the enactment. In this statute [the sixth section of the Stock Corporation Law] it embraces all instruments in writing, however informal, and with or without seal, whereby the borrowing corporation contracts with a lender for the repayment of the sum borrowed. To borrow is the reciprocal action with to lend, and the idea of a borrowing is not filled out unless there is in the transaction a promise or understanding that what is borrowed will be repaid or returned, with or without compensation for the use of it in the meantime (*citations*). The right to borrow money given by the statute is a power to create an indebtedness and procure for its payment funds from others to be paid at a future date, with the power to issue obligations for the payment of the funds procured or borrowed. In substance, the money is borrowed from the purchasers of the obligations.”<sup>20</sup> A corporation has the implied power to borrow money from its stockholders as well as others if necessary to the conduct of its business.<sup>1</sup> It cannot be held as part of the implied power of a corporation to borrow money for the conduct of its business that it may give annually to such of its stockholders as advance money to it a fixed compensation, if there be no right to the stockholder ever to be repaid his advance.<sup>2</sup> A corporation cannot escape liability for a loan secured for it by an officer acting on behalf of it within the general scope of his powers of which it has received the benefit upon the ground that it had but two trustees whereas

<sup>18</sup> *Smith v. Law*, 21 N. Y. 296 (1860). A bond. The quotation is from Bacon, J.’s, interpretation of a holding in *Curtis v. Leavitt*, 15 N. Y. 9, 62.

<sup>19</sup> *Curtis v. Leavitt*, 15 N. Y. 2 (1857).

<sup>20</sup> *Jacobs v. Monaton R. I. Corp.*, 212 N. Y. 48, 105 N. E. 968 (1914).

<sup>1</sup> *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159 (1879).

<sup>2</sup> *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159 (1879).

the statute regarding like corporations provides that there shall be at least three.<sup>3</sup> It is for the jury to say if a loan made in the presence of the secretary of a corporation who was intrusted with its general management to an individual for the corporation's use which was so used by it was secured by rents from its property which such individual in such secretary's presence undisputedly said were to be such security.<sup>4</sup>

§ 396. *Id.*: **Usury.**—The validity of a contract, questioned as usurious, depends on the institutions of the place where it is made, unless the loan is made by a corporation, when, if it be found that the contract is one it is forbidden by its act of incorporation to make, the loan and all the securities taken to enforce its reimbursement are necessarily void.<sup>5</sup> No corporation can interpose the defense of usury in any action.<sup>6</sup> It seems that the statute providing that "no corporation shall hereafter interpose the defense of usury" must be construed "as a repeal of the statutes of usury as to all contracts of corporations stipulating to pay interest, thus leaving the contracts in full force according to their terms;" and the statute is constitutional.<sup>7</sup> The statute forbidding a corporation to interpose the defense of usury also denies it the right to maintain an action to set aside any of its obligations as usurious.<sup>8</sup> The effect of the statute prohibiting the interposition by corporations of the defense of usury is "to prevent the avoidance by a corporation of its own contract, for the reason that it was made in contravention of the laws against usury;" and not merely that it cannot set up usury as a defense in an action against it.<sup>9</sup> A corporation is precluded from resisting payment of its own obligations on account of the fact that they have been discounted at a larger rate of interest than that authorized by law.<sup>10</sup> The statute providing that "no corpo-

<sup>3</sup> *Castle v. Lewis*, 78 N. Y. 131 (1879); L. 1848, as amend'd L. 1860, c. 269, § 1.

<sup>4</sup> *Barkin Construction Co. v. Goodman*, 221 N. Y. 156, 116 N. E. 770 (1917).

<sup>5</sup> *Bard v. Poole*, 12 N. Y. 495 (1855).

<sup>6</sup> Gen. Bus. L. § 374 (L. 1909, c. 25): "The term corporation, as used in this section, shall be construed to include all associations and joint-stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships."

<sup>7</sup> *Curtis v. Leavitt*, 15 N. Y. 2 (1857); L. 1850, c. 172, see now Gen. Bus. L. § 374.

<sup>8</sup> *MacQuoid v. Queens Estates*, 143 A. D. 134, 127 N. Y. Supp. 867 (1911); Gen. Bus. L. § 374.

<sup>9</sup> *Merchants Exchange National Bank v. Commercial Warehouse Co.*, 49 N. Y. 635 (1872); L. 1850, c. 172; now Gen. Bus. L. § 374.

<sup>10</sup> *Frazier v. Trow's Printing & Bookbinding Co.*, 24 Hun, 281 (1881); aff'd 90 N. Y. 678; L. 1850, c. 172; now Gen. Bus. L. § 374. A cheque.

ration shall hereafter interpose the defense of usury in any action " is retroactive.<sup>11</sup> The fact that a corporation is doing business as administrator and trustee under special legislative enactment does not release it from the prohibition against pleading usury as a defense to a transaction in which it is involved.<sup>12</sup> The statute prohibiting corporations from interposing the defense of usury includes collateral contracts of individuals as sureties, guarantors or indorsers for a corporation.<sup>13</sup> Neither a corporation nor its receiver can by action recover the excess paid upon a usurious transaction by it; because the statute prohibiting a corporation from interposing the defense of usury takes away from the corporation altogether all benefit or advantage resulting from the statute of usury.<sup>14</sup> Neither a corporation-maker nor an individual-indorser of a usurious note can avail itself or himself of the defense of usury.<sup>15</sup> An agreement by a corporation guaranteed by an individual to pay six per cent interest to a given date when the principal is due and seventeen per cent more thereafter on so much as remains unpaid until paid binds the corporation and also the individual within the obligations of his guaranty.<sup>16</sup> Assuming that bills of exchange are a New York contract on which a corporate maker cannot plead usury, then the indorsers thereon, it would seem, are also precluded from pleading usury.<sup>17</sup> A statute prohibiting any corporation from interposing the defense of usury in any action likewise prevents guarantors of a note of a corporation from setting up usury as a defense to an action against them or their guaranty.<sup>18</sup> The effect of a statute permitting any compensation agreed upon in writing to be received for an advance payable on demand and made on certificates of stock, etc., is to remove from the operation of the usury laws all such loans, whether the agreement be oral or written, " though it would seem that a contract in writing is necessary

<sup>11</sup> *Southern Life Insurance & Trust Co. v. Packer & Prentice*, 17 N. Y. 51 (1858); L. 1850, c. 172; now Gen. Bus. L. § 374.

<sup>12</sup> *De-Moltke-Huifeldt v. Garner & Co.*, 145 A. D. 766, 130 N. Y. Supp. 558 (1911).

<sup>13</sup> *Stewart v. Bramhall*, 74 N. Y. 85 (1878); L. 1850, c. 172; now Gen. Bus. L. § 374.

<sup>14</sup> *Butterworth v. O'Brien*, 23 N. Y. 275 (1861); L. 1850, c. 172; now Gen. Bus. L. § 374.

<sup>15</sup> *Stewart v. Bramhall*, 11 Hun, 139 (1877); *aff'd* 74 N. Y. 85.

<sup>16</sup> *Union Estate Co. v. Adlow Construction Co.*, 221 N. Y. 183, 116 N. E. 984 (1917); Gen. Bus. L. § 370 *et seq.* (L. 1909, c. 20).

<sup>17</sup> *Union National Bank v. Wheeler*, 60 N. Y. 612 (1875).

<sup>18</sup> *Rosa v. Butterfield*, 33 N. Y. 665 (1865); L. 1850, c. 172, § 10; Gen. Bus. L. § 374.

in order to enable the lender to collect more than six per cent." <sup>19</sup>

**§ 397. Id.: Assigning and Distributing For Benefit Of.**—Transfers by corporations while insolvent or after failing to pay their liabilities are shortly considered.<sup>20</sup> It seems that a corporation may make a valid general assignment for benefit of creditors.<sup>1</sup> "The power of a corporation to assign its property in trust for the payment of its debts cannot at this day be doubted."<sup>2</sup> ". . . at common law an insolvent corporation could make a general assignment for the benefit of creditors; and under the laws of this State . . . a general assignment made by any debtor, whether a natural person or the creature of a statute having its domicile in a sister state, should and would be recognized here as valid if made without preference and without imposing conditions upon the creditor."<sup>3</sup> A stock corporation may make a general assignment for benefit of creditors without preferences; but if made while insolvent to defraud creditors the assignment is void.<sup>4</sup> "The only statutory restriction now existing upon the common-law right of a corporation to make an assignment is, that it shall be without preferences."<sup>5</sup> A corporation has a right to make an assignment for the benefit of creditors without preferences; and no receiver in sequestration proceedings should be appointed while the assignee acts, unless for cause shown.<sup>6</sup> One claiming under an alleged assignment by a corporation signed by an individual who was treasurer of the corporation when he signed it must prove that the assignment was the corporate act if it is undated, mentions no specific consideration, has not the corporate seal affixed, and is not attested or acknowledged.<sup>7</sup> An agreement by a solvent corporation to distribute the proceeds from disposition of its

<sup>19</sup> *Hawley v. Kountze*, 6 A. D. 217, 39 N. Y. Supp. 897 (1896); L. 1882, c. 237. A gave his note to the firm of B & C for a loan of \$15,000 at 6 per cent., secured by certificates of stock; and an option to B to sell such stock at less than their value. Held, not void for usury.

On effect of statute forbidding corporation to plead usury, see note in 62 L.R.A. 79.

<sup>20</sup> See § 402 *et seq.*, *infra*.

<sup>1</sup> *Hurlbut v. Carter*, 21 Barb. 221 (1855).

<sup>2</sup> *De Ruyter v. St. Peter's Church*, 3 N. Y. 238 (1850).

<sup>3</sup> *Workum v. Caldwell*, 27 Misc. 72, 58 N. Y. Supp. 175 (1899).

<sup>4</sup> *Home Bank v. Brewster & Co.*, 17 Misc. 442, 41 N. Y. Supp. 203 (1896); St. Corp. L. § 48 (L. 1892); now § 66.

<sup>5</sup> *People v. United States Law Blank & Stationery Co.*, 24 Misc. 535, 53 N. Y. Supp. 852 (1898).

<sup>6</sup> *Croll v. Empire State Knitting Co.*, 17 A. D. 282, 45 N. Y. Supp. 680 (1897).

<sup>7</sup> *Maroney v. Cole*, 52 Misc. 451, 103 N. Y. Supp. 560 (1907).

assets equitably among its creditors is merely what the law requires and is not a sufficient consideration to support an agreement by a creditor to "forbear forcing collection" of his claim.<sup>8</sup> As a general rule the assets of a corporation should upon its insolvency be distributed *pro rata* among all the shareholders; but the rule has no application when there is an express contract between the holders of one class of stock and the corporation that they should not share equally with the other shareholders.<sup>9</sup>

**§ 398. Id.: Debtors, In General.**—The same law in general governs the rights, powers and liabilities of a corporation toward its debtors as controls the rights, powers and liabilities of an individual toward its debtors.

**§ 399. Id.: Loaning Money.**—A corporation's power to loan money should be limited to and for the appropriate business of the company and is possessed as an incidental, and not as a principal power.<sup>10</sup> It may be that a business corporation may legally loan money from its surplus to one not holding its stock, as "there is a distinction between a temporary loan of the surplus funds of a corporation when not otherwise required, and the practice of lending the moneys of the corporation as if the corporation were a bank."<sup>11</sup> If, through all the facts, irrespective of the form, it appears that a corporation's money was used with the knowledge of an individual to settle private stock dealings between himself and so-called third parties, he is liable for the return of the money.<sup>12</sup> An individual endorsing notes of a corporation given for his benefit is bound by his endorsement though the notes be invalid as against the corporation.<sup>13</sup> No loan of money can be made by any stock corporation (except a moneyed corporation) or by any officer thereof out of its funds to any stock-

<sup>8</sup> Mount Vernon Rattan Co. v. Joachimson, 119 A. D. 71, 103 N. Y. Supp. 1045 (1907).

<sup>9</sup> People v. New York Building-Loan Banking Co., 119 A. D. 830, 104 N. Y. Supp. 892 (1907); *aff'd* 189 N. Y. 547, 82 N. E. 1131. The class of stock was issued under a resolution: "Whereas it is desirable that this Company shall have a permanent capital that shall serve as a guarantee of the performance of its obligations;" such stock should have further dividends "in consideration of the guarantee to the other classes of shares arising

from the creation of these shares;" the sums paid for such stock should not be withdrawable, "but shall constitute the Guaranty Fund of the said Company and shall be and stand as a guarantee for the payment of all the obligations of the Company."

<sup>10</sup> Beers v. Phoenix Glass Co., 14 Barb. 358 (1852).

<sup>11</sup> Murray v. Smith, 166 A. D. 528, 152 N. Y. Supp. 102 (1915).

<sup>12</sup> Erie Railway Co. v. Vanderbilt, 5 Hun, 123 (1875).

<sup>13</sup> Donohoe v. Meeker, 35 A. D. 43, 54 N. Y. Supp. 286 (1898).

holder therein.<sup>14</sup> The liability of officers and directors of corporations for a corporate loan to a stockholder and for discounting any evidence of debt or receiving it in payment of any amount due on stock in the corporation and for receiving or discounting any evidence of debt to enable any stockholder to withdraw any money paid in by him on his stock, has already been treated.<sup>15</sup> A loan of money by a corporation to its stockholder is *malum prohibitum*; but to others is neither *malum prohibitum* nor *malum in se*, though it may be *ultra vires*.<sup>16</sup> A loan by a business corporation of its money to one of its stockholders cannot be ratified because it is *malum prohibitum*.<sup>17</sup>

**§ 400. Id.: Execution, Attachment and Garnishment, as to Creditors.**—The sheriff may satisfy an execution by selling rights or shares of the defendant in the stock of a corporation, or a bond or other instrument for the payment of money executed and issued, with the interest coupons annexed, if any, by any corporation, which is in terms negotiable, or otherwise, whether past due or yet to become due.<sup>18</sup> To entitle the plaintiff in an action brought before a justice of the peace to a warrant of attachment when the defendant is a domestic corporation he must show by affidavit to the satisfaction of the justice that the defendant has removed or is about to remove property from the county where it last kept its principal office or from the county in which the action is brought with intent to defraud its creditors, or has assigned, disposed of or secreted or is about to assign, dispose of or secrete property with like intent.<sup>19</sup> “ . . . a domestic corporation at all times has its exclusive residence and domicile in the jurisdiction of origin, and . . . it cannot be garnished in another jurisdiction for debts owing by it to home creditors, so as to make the attachment effectual against its creditors in the absence of jurisdiction acquired over the person of such creditor.”<sup>20</sup> Mere averment of facts as upon personal knowledge in an affidavit made to procure an attachment against a corporation is not sufficient unless circumstances are stated from which the inference can be fairly drawn that the affiant has personal knowledge of the facts which he avers.<sup>1</sup> In

<sup>14</sup> St. Corp. L. § 29 (L. 1909, c. 61).

<sup>15</sup> See § 349, *supra*.

<sup>16</sup> *Murray v. Smith*, 166 A. D. 528, 152 N. Y. Supp. 102 (1915); St. Corp. L. § 29.

<sup>17</sup> *Murray v. Smith*, 166 A. D. 528, 152 N. Y. Supp. 102 (1915).

<sup>18</sup> C. C. P. § 708.

<sup>19</sup> C. C. P. § 906.

<sup>20</sup> *Douglas v. Phoenix Insurance Co.*, 138 N. Y. 209, 20 L.R.A. 118, 33 N. E. 938 (1893).

<sup>1</sup> *Shuler v. Birdsall Mfg. Co.*, 17 A. D. 228, 45 N. Y. Supp. 725 (1897).

attachment proceedings involving a trading corporation, the affidavit of its president is insufficient to show that he has any personal knowledge of the transactions at issue if it simply shows that he is president: he must set out the sources of his information.<sup>2</sup> Evidence that a domestic corporation is boxing up its stock in hand, correspondence, records, etc., and has rented its office in New York, all with a view to moving its business to another state, may serve to prove it is about to move its property outside the State, but is no proof at all that this is done with a view to defrauding its creditors, and is, therefore, not sufficient for a resident creditor to obtain an attachment against its property.<sup>3</sup>

**§ 401. Id.: As to Debtors.**—An affidavit by one stating that he is an officer of a plaintiff corporation and has personal knowledge of all the facts necessary to the statement of a cause of action is sufficient to support a warrant of attachment issued against the defendant, even though it do not unequivocally show he was officer of the plaintiff at the time defendant became indebted to it.<sup>4</sup> An affidavit warrants an attachment in favor of a corporation if it alleges the unpaid balance due it “over and above all counterclaims existing in favor of the defendant against the plaintiff, known to the deponent,” is made by the person who had been secretary of the corporation when the transaction with the defendant arose, and if its present secretary makes a similar statement.<sup>5</sup> An attachment may be granted in favor of a corporation on an affidavit by its assistant cashier positively stating that it is entitled to recover the sum mentioned, with interest, over and above all counterclaims known to it.<sup>6</sup>

**§ 402. Id.: Transfer While Insolvent or After Failure to Pay Liabilities, Governing Statutes.**—Every transfer, assignment, conveyance or other act by a corporation of any of its property is void (1) if made (a) after it has refused to pay any of its notes or other obligations when due in lawful money of

<sup>2</sup> *Manufacturers' National Bank v. Hall*, 60 Hun, 466, 15 N. Y. Supp. 208 (1891); *aff'd* 129 N. Y. 663, 30 N. E. 65. In the case of a banking corporation, however, the affidavit of the cashier need not state the source of his information.

<sup>3</sup> *Dickey v. Findeisen & Kropf Mfg. Co.*, 177 A. D. 861, 164 N. Y. Supp. 989 (1917).

On garnishment of officer or agent of corporation by creditor of corporation, see note in 36 L.R.A. 561.

<sup>4</sup> *Barstow Stove Co. v. Darling*, 81 Hun, 564, 30 N. Y. Supp. 1033 (1894).

<sup>5</sup> *E. W. Bliss Company v. Opera Glass Supply Co.*, 60 Hun, 438, 15 N. Y. Supp. 6 (1891); C. C. P. § 636, subd. 1.

<sup>6</sup> *National Park Bank v. Whitmore*, 40 Hun, 499 (1886); *dism'd* 104 N. Y. 297, 10 N. E. 524.

the United States, (b) directly or indirectly to any of its officers, directors or stockholders, (c) for payment of any debt or upon any consideration other than the full value of the property paid in cash; or (2) if made (a) when the corporation is insolvent or its insolvency is imminent, (b) with the intent of giving a preference to any particular creditor over other creditors of the corporation (except that laborers' wages for services are preferred claims and are entitled to payment before any other creditors out of the corporation's assets in excess of valid prior liens or encumbrances).<sup>7</sup> Such a transfer after the corporation has refused to pay its obligations though made by the corporation's officers or directors instead of by it is equally void; and such a conveyance, assignment or transfer made when the corporation is insolvent or its insolvency is imminent though made by an officer, director or stockholder thereof instead of by the corporation itself is equally void, as well as any payment made, judgment suffered, lien created or security given, whether by the corporation or an officer, director or stockholder thereof.<sup>8</sup> Every person receiving by means of any such prohibited act or deed any property of the corporation is bound to account therefor to its creditors or stockholders or other trustees; but no such conveyance, assignment or transfer is void in the hands of a purchaser for valuable consideration without notice.<sup>9</sup>

**§ 403. Id.: Transfer While Insolvent or After Failure to Pay Liabilities, In General.**—An assignment by a corporation made in contemplation of insolvency is void.<sup>10</sup> An assignment made by a corporation while insolvent to give the assignee a preference over its other creditors is void.<sup>11</sup> The statute of New York State avoiding any transfer of a corporation's property while its insolvency is imminent applies only to domestic and not to foreign corporations.<sup>12</sup> The statutory inhibition against an assignment by a corporation of its property in contemplation of insolvency refers solely to domestic corporations; and the courts of this State will therefore recognize as valid, so far as respects property within their jurisdiction, a general assignment, valid at common law and by the law of its domicile, made by an insolvent foreign corpo-

<sup>7</sup> St. Corp. L. § 66 (L. 1909, c. 61).

<sup>8</sup> St. Corp. L. § 60 (L. 1909, c. 61).

<sup>9</sup> St. Corp. L. § 66 (L. 1909, c. 61).

<sup>10</sup> *Sibell v. Remsen*, 33 N. Y. 95 (1865); 1 R. S. 603, § 24; see now St. Corp. L. § 66.

<sup>11</sup> *Dudensing v. Jones*, 27 Misc. 69, 58 N. Y. Supp. 178 (1899).

<sup>12</sup> *Standard National Bank v. Garfield National Bank*, 56 A. D. 43, 67 N. Y. Supp. 472 (1900); St. Corp. L. § 48 (L. 1892, c. 688); now § 66.

ration for the benefit of its creditors.<sup>13</sup> The statute forbidding transfer of a corporation's property to its officers, directors or stockholders except for full value after it has refused to pay any of its obligations relates only to corporations which are financially embarrassed or in danger of so becoming.<sup>14</sup> In order that an act by a corporation may come within the prohibition imposed by statute upon it of a transfer by it of property in contemplation of insolvency, "the prohibited act must itself accomplish or at least enter into the actual transfer or assignment of the property."<sup>15</sup> "Now the scheme of this [sixty-sixth] section [of the Stock Corporation Law] is to protect the creditor from the misconduct of the officers, directors and stockholders of a corporation; to insure those who trust either to the solvency of the corporation, to the honor of its officers, or to the liability of stockholders, from being defrauded by the officers, the directors or stockholders of such corporation. There are corporate situations in which the stockholders are liable, within certain limitations, for the debts of the corporation, and there have been instances in the past where stockholders, realizing that the insolvency of the corporation is imminent, and that they are likely to lose not only the amount already invested in the shares, but possibly much more besides, have secured for the shares an apparent purchaser, who, being himself in a state of insolvency, was willing for a very trifling, temporary consideration, to add to his obligations. Transfers of such a character, made for the purpose of relieving the shareholder from his statutory or contractual liability, are aimed at by this provision of the statute . . . there was nothing to prevent the defendant [director] from making absolute disposition of his shares . . . It matters not that he may have been of the opinion that ultimately the corporation would fail and that the effect of the sale of his stock would be to relieve himself from liability as a director. It was his right, if he saw fit, to get rid of the office of director for the purpose of avoiding liability for debts thereafter to be contracted, and he could accomplish that result either by resigning or by an absolute sale and transfer of his stock."<sup>16</sup> The two essentials which vitiate an assignment by an alleged insolvent corporation

<sup>13</sup> *Vanderpoel v. Gorman*, 140 N. Y. 563, 24 L.R.A. 548, 35 N. E. 932 (1894); L. 1890, c. 564, § 48; now § 66 of St. Corp. L.

<sup>14</sup> *Shaw v. Ansaldo Co., Inc.*, 178 A. D. 589, 165 N. Y. Supp. 872 (1917); St. Corp. L. § 66.

<sup>15</sup> *French v. Andrews*, 81 Hun, 272, 30 N. Y. Supp. 796 (1894); aff'd 145 N. Y. 441, 40 N. E. 214; St. Corp. L. § 48 (L. 1890, c. 564); now § 66.

<sup>16</sup> *Sinclair v. Fuller*, 158 N. Y. 607, 53 N. E. 510 (1899).

“are the insolvency or pending insolvency of the corporation and the intent to create a preference.”<sup>17</sup> The statute prohibiting the giving of a preference to any creditor by an insolvent corporation, its officers, directors or stockholders has this effect: “(1) It prohibits officers and directors of an insolvent corporation, or of one about to become insolvent, from using their knowledge of its condition and their dominant position for their individual benefit in collecting their own claims, either through a voluntary payment or through collusive and preferential liens to the prejudice of other creditors, not so favorably situated. (2) It prohibits a preferential general assignment by a corporation, though it does not forbid assignments without preferences. (3) It prohibits a transfer of any of the corporate assets to an officer, director or stockholder upon any other consideration than the payment of the full value of the property in cash.”<sup>18</sup> The rule of strict construction applicable to highly penal statutes should not be applied to the statute making officers and directors of a corporation personally liable for loss accruing to its stockholders and creditors by reason of a transfer of its property while insolvency is imminent or existing.<sup>19</sup> In considering the effects of the statute making invalid a transfer of corporate property pending insolvency “the rule is that in cases where the creditor innocently receives payment from the principal debtor, which he is afterwards required to repay because it constituted an unlawful preference, the debt will not, therefore, be considered as having been paid so as to release the surety, but the creditor may pursue his remedy against the surety as if no payment had been made.”<sup>20</sup>

**§ 404. Id.: What Constitutes Preferential Transfer, In General.**—If a creditor of an insolvent corporation makes an agreement by which it sells its goods to a third person and turns over to him such third person’s obligation to pay in satis-

<sup>17</sup> *Matter of Rogers Construction Co.*, 79 A. D. 419, 79 N. Y. Supp. 444; *aff’d* 175 N. Y. 509, 67 N. E. 1089; *St. Corp. L.* § 48 (L. 1892, c. 688); now § 66.

<sup>18</sup> *O’Brien v. East River Bridge Co.*, 161 N. Y. 539, 48 L.R.A. 122, 56 N. E. 74 (1900); *St. Corp. L.* § 48; now § 66.

<sup>19</sup> *Caesar v. Bernard*, 156 A. D. 724, 141 N. Y. Supp. 659 (1913); *aff’d* 209 N. Y. 570, 103 N. E. 1122; *St. Corp. L.* § 66.

<sup>20</sup> *Wright v. Gansevoort Bank*, 118 A. D. 281, 103 N. Y. Supp. 548 (1907); *St. Corp. L.* § 48 (L. 1901, c. 354); now § 66.

On liability of corporation to assignee of true owner for unauthorized transfer of stock on its books, see note in 45 L.R.A. (N.S.) 1076.

On duty of corporation as to transfer of stock held in trust, generally, see note in 15 L.R.A. 643.

faction of its indebtedness to him, this is as much a preference to him as if the goods were given to him direct.<sup>1</sup> A *prima facie* case to set aside an assignment by a corporation as made while insolvent and for an injunction against the assignee's collection of the property assigned is made out if such property consisted of good accounts due in eleven days and worth more than the amount paid therefor and the assignment was made after recovery of a judgment against the assignor for more than was received for the accounts.<sup>2</sup> A transfer of a claim by a corporation to an officer thereof — though after it has refused to pay its obligations — made simply to permit a more effective enforcement of the claim and not to vest the property in the officer, who sues solely on behalf and for the benefit of the corporation, is not void.<sup>3</sup> In the absence of fraud, the act of a corporation in paying a contract debt by transferring some of its property on which there were large prior incumbrances cannot be said to prejudice one who later becomes a judgment creditor, on the ground that the transfer was made when corporate insolvency existed or was imminent, particularly if the property encumbered would hardly have brought the amount of the encumbrances if sold.<sup>4</sup> A payment made by officers of a corporation in violation of the statute prohibiting a corporation and its officers from giving a preference does not invalidate an assignment without preferences subsequently made by the corporation for the benefit of creditors.<sup>5</sup> A company having notes made by a corporation later adjudged bankrupt, endorsed by a good endorser, without knowledge forbidding it so to do, which gives up such notes, in consideration of the transfer of certain property to it by the corporate maker of the notes, and thus loses the security of its endorsement, cannot be asked to return such property on the ground that such transfer of property is a preference within the ban of the statute.<sup>6</sup> A transfer by a corporation to one of its stockholders of all of its property, with the right in him to collect all accounts and run the company until its indebtedness to him should have been paid, continuing while

<sup>1</sup> *Salt v. Ensign*, 79 Hun, 107, 29 N. Y. Supp. 659 (1894).

<sup>2</sup> *Kemp v. Able Realty Maintenance Co., Inc.*, 174 A. D. 242, 160 N. Y. Supp. 1055 (1916); St. Corp. L. § 66 (L. 1909, c. 61).

<sup>3</sup> *Sanders v. Barnaby*, 173 A. D. 244, 159 N. Y. Supp. 579 (1916); St. Corp. L. § 66 (L. 1909, c. 61).

<sup>4</sup> *Gordon v. Southgate Building*

Co., 109 A. D. 838, 96 N. Y. Supp. 717 (1905); St. Corp. L. § 48 (L. 1901, c. 354); now § 66.

<sup>5</sup> *Creteau v. Foote & Thorne Glass Co.*, 54 A. D. 168, 66 N. Y. Supp. 370 (1900); St. Corp. L. § 48 (L. 1890, c. 564); now § 66.

<sup>6</sup> *Perry v. Van Norden Trust Co.*, 192 N. Y. 189, 84 N. E. 804 (1908); St. Corp. L. § 48; now § 66.

it was insolvent to his knowledge, is void though he had transferred his stock to employees with the understanding that they should derive from it only what might accrue from it after repayment to him of all indebtedness owing him from the company.<sup>7</sup> “ . . . the action of a corporation, by which payment in part of a note by the maker, and the surrender and cancellation by him of the corresponding contract of the corporation, were received by it in satisfaction and extinguishment of the note ” cannot be considered a “ transfer ” within a statute making all transfers of any of a corporation’s estate, after the filing of a petition for its dissolution, in payment of or as security for any existing or prior debt, or for any other consideration, void as against receivers appointed on such petition, or as against corporate creditors.<sup>8</sup>

§ 405. *Id.*: **Mortgage.**—“ The claims of general creditors of a mortgagor are in general postponed to the mortgage, even when their debts were contracted prior to its execution. . . . expenses incurred by receivers in the management and preservation of the property which is the subject of the receivership may, by order of the court, be made a primary charge and displace the priority of lien which, in ordinary cases, attaches to a mortgage security existing at the time of the insolvency. The courts have assumed to go still further, and to adjudge priority of payment of debts contracted by a failing corporation within a few months prior to its adjudged insolvency for labor, supplies and necessary current expenses incurred in the struggle to keep itself alive. There is a sound equity which supports the doctrine that when the nature of the property is such that the business to which it has been devoted cannot be discontinued without great probable loss, the court may authorize it to be continued by its officer and receiver, pending the closing up of the affairs of the insolvent corporation. Expenses incurred by a receiver under such circumstances may be justly said to be expenses of preservation for the benefit of bondholders or other persons entitled to share in the final distribution, which ought to be first paid. . . . The right of a creditor of an insolvent corporation in the hands of a receiver to have a preference over bondholders under a first mortgage is *strictissimi juris*.”<sup>9</sup> The prohibition against the transfer by a corpo-

<sup>7</sup> *Olney v. Baird*, 7 A. D. 95, 40 N. Y. Supp. 202 (1896); *St. Corp. L.* § 48 (L. 1890, c. 564); see now § 66.

<sup>8</sup> *Sands v. Hill*, 55 N. Y. 18 (1873); 2 R. S. 469, § 71.

<sup>9</sup> *Farmers’ Loan & Trust Co. v. Bankers’ & Merchants’ Telegraph Co.*, 148 N. Y. 315, 31 L.R.A. 403, 42 N. E. 707 (1896).

ration of its property to its officers or stockholders is founded upon its refusal to pay its debts or upon its existing or pending insolvency and an intent to give a preference; so that a chattel mortgage given by the directors to one loaning the corporation money, under the *bona fide* belief that the loan will enable the corporation to swim is not void.<sup>10</sup> A preference by a corporation to any particular creditor over other creditors is not to be inferred from its execution three months before a petition against it in bankruptcy is filed of a mortgage for a term of years to a trustee to secure bonds issued to some creditors, unless it is shown that it was given in view of insolvency.<sup>11</sup> An order requiring a temporary receiver of a corporation, appointed on a showing by its directors of insolvency, and empowered to continue the corporate business, to hold the rents and profits of premises in his hands, which the corporation had mortgaged and which had been foreclosed before his appointment, subject to the further direction of the court, does not create a lien prohibited by the statute against preferences by an insolvent corporation.<sup>12</sup> In an action by a judgment creditor of a corporation to require a stockholder to account for personality of the corporation conveyed to him by chattel mortgage on the ground that when mortgaged the personality constituted the sole assets of the corporation and its liabilities exceeded its assets, it must be alleged that the mortgage was given upon inadequate or non-existent consideration or for an antecedent debt due the stockholder, as well as that at the date of the transfer the plaintiff was a creditor of the corporation or held a claim against it.<sup>13</sup> A mortgage given by a corporation does not violate the statutory prohibition against corporate transfers in contemplation of its insolvency when its execution, though while the corporation was concededly insolvent, was but the observance of contractual obligations entered into when there was no question as to its absolute soundness.<sup>14</sup> When, under a con-

<sup>10</sup> *Swan v. Stiles*, 94 A. D. 117, 87 N. Y. Supp. 1089 (1904); St. Corp. L. § 48 (L. 1892, c. 688); now § 66.

<sup>11</sup> *Wills v. Venus Silk Glove Mfg. Co., Inc.*, 170 A. D. 352, 156 N. Y. Supp. 115 (1915); St. Corp. L. § 66.

<sup>12</sup> *Matter of Busch Brewing Co.*, 41 A. D. 204, 58 N. Y. Supp. 812 (1899); St. Corp. L. § 48 (L. 1890, c. 564); now § 66.

<sup>13</sup> *Ginsberg v. Automobile Coaching Co.*, 151 A. D. 627, 136 N. Y.

Supp. 354 (1912); St. Corp. L. § 66. The judgment was by a personal representative for damages for his decedent's death through the corporation's negligence and it was not shown by the complaint that decedent's death happened before the transfer.

<sup>14</sup> *Black v. Ellis*, 197 N. Y. 402, 90 N. E. 958 (1910); St. Corp. L. § 48; now § 66.

tract made with a corporation prior to the appointment of a temporary receiver in proceedings for its dissolution, a mortgage is given by it to a trustee to secure bondholders and the trustee has started foreclosure, the court has no power on appointing the temporary receiver to enjoin the prosecution of the foreclosure proceedings.<sup>15</sup> In order that a mortgage by a corporation violate the statute making "any transfer or assignment in contemplation of the insolvency of such company" void, the fact of insolvency is not conclusive that the mortgage was made in contemplation thereof, but the act must be in anticipation or in view of insolvency.<sup>16</sup>

§ 406. *Id.*: **Judgment.**—The statute making void all sales, transfers, mortgages, etc., of a corporation's property in payment for its debts, etc., and all judgments confessed by it, after the filing of a petition for its dissolution "was aimed, not at the disposition of the corporate property made under the order of the court by its receiver, or even by the corporation, but at the voluntary disposition of its property by the insolvent corporation; and the confession of judgment prohibited was one made by the corporation as its voluntary act without the interference of the court, and not a judgment . . . which rests upon no confession, nor even consent, but upon the action and order of the court . . ."<sup>17</sup> The meaning of the statute prohibiting corporate officers from suffering a judgment against the corporation is that "when a corporation is insolvent or its insolvency is imminent, no judgment shall be valid which is suffered by any of its officers, directors or stockholders with the intent of giving a preference to any particular creditor over other creditors. . . . But where a creditor has a just claim to which the corporation has no defense, and he adopts the ordinary process and procedure of the court to enforce it, which results in a judgment by default, it cannot be properly held to be within the condemnation of the statute."<sup>18</sup> The purpose of the statute making void any transfer of a corporation's property in contemplation of its insolvency is to prevent unjust discrimination among creditors of an insolvent company, but "only in one way, to wit.: by restraint upon the action of the corporation and its officers; so that mere silence or omission on their part, such as

<sup>15</sup> *Matter of Hamilton Park Co.*, 1 A. D. 375, 37 N. Y. Supp. 310 (1896); C. C. P. § 2423.

<sup>16</sup> *Paulding v. The Chrome Steel Co.*, 94 N. Y. 334 (1884); 1 R. S., part 1, c. 18, tit. 4, § 4, p. 603; see now St. Corp. L. § 66.

<sup>17</sup> *Herring v. N. Y., Lake Erie & Western R. R. Co.*, 105 N. Y. 340, 12 N. E. 763 (1887).

<sup>18</sup> *Lopez v. Campbell*, 163 N. Y. 340, 57 N. E. 501 (1900); St. Corp. L. § 48; now § 66.

letting creditors take judgments by default against the corporation on claims to which there are no just defenses, does not offend against the statute, although if discrimination results from affirmative action of the corporation taken for the express purpose of giving certain creditors some advantage in its property the statute might apply."<sup>19</sup> A judgment obtained by a creditor of a corporation against it is not avoided as preferential by "the mere fact that the officers of the corporation do not oppose the creditor in his effort to get the judgment, but remain passive"; though if the corporation suffered the creditor to take the judgment with the intent of giving him a preference, the judgment is void.<sup>20</sup> "Merely permitting a creditor [not a stockholder or officer] to obtain a judgment in the regular course of legal proceedings is not on the part of the officers of the corporation a transfer or assignment of the property of the corporation within the meaning of the statute" prohibiting the assignment of the property of a corporation which has refused to pay its obligations when due or in contemplation of insolvency; nor the fact that the indebtedness was changed from one note for the full amount to several notes for smaller amounts so that judgments might be had thereon in a shorter time in a court which would have no jurisdiction of a single suit for the whole amount of the indebtedness.<sup>1</sup> Whether insolvency be defined as a present inability to pay current obligations as they mature or inadequacy of property to pay debts, a corporation which is unable to meet a note and permits the payee to obtain judgment thereon under such circumstances as to conceal its entry from other creditors is guilty of the statutory wrong of giving a preference to one creditor over another and the judgment will be set aside.<sup>2</sup> The facts of each case must be examined to determine whether a judgment against a corporation is void as having been suffered by an officer, director or stockholder with the intent to prefer a creditor.<sup>3</sup> In determining whether or not judgments against an insolvent corporation are void, as being equivalent to assignments or transfers by it of its property in contemplation of insolvency, the judg-

<sup>19</sup> *Varnum v. Hart*, 119 N. Y. 101, 23 N. E. 183 (1890).

<sup>20</sup> *Milbank v. de Riesthal*, 82 Hun, 537, 31 N. Y. Supp. 522 (1894); St. Corp. L. § 48 (L. 1892, c. 688); now § 66.

<sup>1</sup> *French v. Andrews*, 145 N. Y. 441, 40 N. E. 214 (1895); St. Corp. L. § 48; now § 66.

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<sup>2</sup> *Lodi Chemical Co. v. Chas. H. Pleasants Co.*, 25 Misc. 97, 51 N. Y. Supp. 668 (1898); St. Corp. L. § 48 (L. 1890, c. 564, as amended); now § 66.

<sup>3</sup> *Spellman v. Looschen*, 162 N. Y. 268, 56 N. E. 741 (1900); St. Corp. L. § 48; now § 66.

ments will be held void if entered upon offers therefor by the corporation, made when it knew it was insolvent; the judgments will be held void if in favor of an officer and director of the corporation while it was insolvent; but the judgments will be held valid if recovered by a *bona fide* creditor in regular, legal course, in an action to which there was no defense and in which judgment could be had before a receiver could have been appointed in any proceedings which the directors of the corporation might seek to take for its voluntary dissolution.<sup>4</sup> A judgment is "suffered" by a corporation with intent to prefer a particular creditor while it is insolvent, so as to invalidate it, if a new loan is obtained for the corporation with intent to give such creditor security not only for such loan but for loans previously made when the corporation to its knowledge was insolvent; the obligations given by it for such loan were split up in such amounts as to enable the creditor to sue in the City Court of New York without waiting the time necessary for an action in the Supreme Court; and the president prevented proceedings for a receiver of the corporation by seizing process and pleadings to be used therefor and holding them till such creditor got judgment, issued execution and levied on the corporate property.<sup>5</sup>

**§ 407. *Id.*: Intent to Prefer.**—"An assignment or transfer with intent to delay the collection of a debt is condemned by the statute and the common law, no less than a transfer or assignment into which the element of actual fraud enters."<sup>6</sup> A corporation has the right to transfer its property as security for its debts and to make pledges of it for the same object, when such transfers and pledges are not made with the intent of hindering and delaying its other creditors; and in order that fraud should be established, there must be evidence from which no inference of an honest purpose can be drawn.<sup>7</sup> Under the statute making void any transfer by a corporation "when insolvent or in contemplation of insolvency, with the intent to give a preference to any particular creditor over other creditors of the company", the intent to give a preference is fundamental and must be proven and alleged like any other fact; and "so long as the debtor corpo-

<sup>4</sup> *Kingsley v. First National Bank of Bath*, 31 Hun, 329 (1884); § 4, tit. 4, c. 18, pt. 1, R. S. See now St. Corp. L. § 66.

<sup>5</sup> *Rossman v. Seaver*, 41 A. D. 603, 58 N. Y. Supp. 677 (1899); St. Corp. L. § 48 (L. 1892, c. 688); now § 66.

<sup>6</sup> *Buell v. Rope*, 6 A. D. 113, 39 N. Y. Supp. 475 (1896).

<sup>7</sup> *Merriam v. Wood & Parker Lithographing Co.*, 19 A. D. 329, 46 N. Y. Supp. 484 (1897).

ration, notwithstanding the pressure of great embarrassment, entertains an honest expectation, in the exercise of a reasonable intelligence, of going on with its business and paying all its debts, its acts cannot be brought within the operation of this statute.”<sup>8</sup> A transfer of corporate property is not void as made in contemplation of insolvency if when made the corporation’s officers, its creditors and the trustee-transferees believed the company solvent, though this belief was found later to be erroneous.<sup>9</sup> An assignment of property by a corporation which is subsequently found to have been insolvent when the assignment was made and continued so, is not preferred: it must further be proven that the assignment was made with the intent of giving a preference; and if the evidence “is capable of an interpretation which makes it equally consistent with the absence as with the presence of a wrongful act, that meaning must be ascribed to it which accords with its absence.”<sup>10</sup> The statute making invalid a transfer of corporate property pending insolvency “applies whenever a corporation is insolvent or its insolvency is imminent, if the payment or transfer is made with intent on the part of the debtor to give a preference, without regard to the creditor’s intent or even his knowledge as to the actual or imminent insolvency of the debtor.”<sup>11</sup> The intent to create a preference in favor of one creditor over another must be present and proven to enable a creditor to take advantage of the statute making invalid any transfer of a corporation’s property while its insolvency is imminent or exists.<sup>12</sup> To avoid an assignment of corporate property under the statute making it void

<sup>8</sup> *Curtis v. Leavitt*, 15 N. Y. 2 (1857); 1 R. S. 588, § 9. See now St. Corp. L. § 66. “The term insolvency can mean nothing less than the inability of the company and the inadequacy of its property to pay its debts, and not a present inability to pay in cash or its equivalent. . . . If the property is sufficient to pay all, the payment to one does not prejudice the others. The assets may be presently unavailable, because presently inconvertible. That is not insolvency which furnishes sufficient means for the ultimate liquidation of all the debts. An undue preference amongst creditors means the giving to some that which the debtor withholds from and has not the ability to give to others.”

<sup>9</sup> *New Britain National Bank v. Cleveland Co.*, 91 Hun, 447, 36 N. Y. Supp. 387 (1895); *aff’d* 158 N. Y. 722, 53 N. E. 1128.

<sup>10</sup> *Van Slyck v. Warner*, 118 A. D. 40, 103 N. Y. Supp. 1 (1907); *aff’d* 192 N. Y. 547, 84 N. E. 724; St. Corp. L. § 48 (L. 1892, c. 688); now § 66.

<sup>11</sup> *Wright v. Gansevoort Bank*, 118 A. D. 281, 103 N. Y. Supp. 548 (1907); St. Corp. L. § 48 (L. 1901, c. 354); now § 66.

<sup>12</sup> *Abrams v. Manhattan Consumers Brewing Co.*, 142 A. D. 392, 126 N. Y. Supp. 844 (1911); St. Corp. L. § 66.

if given while the corporation is insolvent, unless the assignee is "an officer or director or stockholder of the corporation making the assignment, it must be alleged and proved that when the assignment was made the corporation was insolvent or its insolvency was imminent, and that the assignment was made with the intent of giving a preference to a particular creditor over other creditors of the corporation."<sup>13</sup>

" . . . where a corporation merely fails to put in a defense to a just debt it is not to be inferred from that fact alone that the judgment was suffered with intent to give a preference, and the judgment thus entered is not invalid."<sup>14</sup>

"The transfer by an insolvent firm of all their tangible property to a corporation formed by the members of the partnership for the purpose of acquiring such firm assets, without giving any consideration save the issue of stock therefor, and without assuming any of the debts of the firm, is about as suspicious a circumstance and as indicative of an intent to hinder the firm creditors as anything that can readily be imagined. It requires a satisfactory explanation, to say the least . . . ."<sup>15</sup> An intent by a corporation to prefer a creditor while insolvent is shown by proof that he was paid while it knew it could not with the moneys it then had meet its obligations in the ordinary course of business as they became due, that two days after such payment a suit against it was brought by a friendly creditor at its instigation and that four days after such payment another suit against it was brought by its secretary on its demand note held by him.<sup>16</sup>

**§ 408. Id.: When Does Insolvency Exist.**— In order to invalidate the title of an assignee of personal property of a corporation under an assignment by it to him made before the commencement of an action for its dissolution, the insolvency must be proven.<sup>17</sup> The word "insolvent" in the statute avoiding a transfer of property by a corporation in contemplation of insolvency means "a general inability to pay obligations as they become due in the regular course of business."<sup>18</sup> The statutory liability imposed upon corporate

<sup>13</sup> *Dill & Collins Co. v. Morison*, 159 A. D. 583, 144 N. Y. Supp. 894 (1913); St. Corp. L. § 66.

<sup>14</sup> *Matter of Muehlfeld & Haynes Piano Co.*, 12 A. D. 492, 42 N. Y. Supp. 802 (1896); St. Corp. L. § 48 (L. 1892, c. 688); now § 66.

<sup>15</sup> *Buell v. Rope*, 6 A. D. 113, 39 N. Y. Supp. 475 (1896).

<sup>16</sup> *Baker v. Emerson*, 4 A. D. 348, 38 N. Y. Supp. 576 (1896); L. 1892,

c. 688, § 48; see now St. Corp. L. § 66.

<sup>17</sup> *Higgins v. Worthington*, 90 Hun, 436, 35 N. Y. Supp. 815 (1895).

<sup>18</sup> *French v. Andrews*, 81 Hun, 272, 30 N. Y. Supp. 796 (1894); aff'd 145 N. Y. 441, 40 N. E. 214; St. Corp. L. § 48 (L. 1890, c. 564); now § 66.

directors and officers personally for losses sustained by its creditors or stockholders by reason of a transfer of its property while insolvency exists or is imminent to its officers, directors or stockholders, is not limited to corporations which have defaulted in the payment of notes or other obligations.<sup>19</sup> Payments and transfers by a stock corporation to a creditor will be set aside as constituting an illegal preference when made while the corporation was indebted to its other creditors in an amount which it was unable to pay and never did pay.<sup>20</sup> That its assets are less than its liabilities does not make a corporation insolvent: the test is its general inability to pay its obligations as they become due, because a going corporation may have an honest expectation, in the exercise of reasonable intelligence, entertained sincerely and in good faith, of going on with its business and paying all its debts; but if it has abandoned its business, this test no longer holds good.<sup>1</sup> Accounts based on written agreements fixing the rate of payment for certain services rendered a corporation are not its "obligations" in the sense in which that word is used in the statute avoiding the transfer of any of its property by a corporation to its officers, and others, which has refused to pay any of its obligations.<sup>2</sup> "A corporation cannot be said to have committed an act of bankruptcy or insolvency, or to have neglected or refused to pay and discharge its obligations, because its demand notes remain outstanding and unpaid, until payment has been demanded."<sup>3</sup> A corporation owing overdue claims of \$30,000 on express contract obligations upon which suits to which it had no defense had been brought or were pending, not to mention other matured or maturing obligations on which suits were threatening, and having assets of but a few thousand dollars save for a very heavily mortgaged apartment house is insolvent, in the sense that its "stock, effects and other property . . . are insufficient to pay all just demands for which it is liable or to afford a reasonable security to those who may deal with it", so as to warrant the appointment of a temporary receiver in a proceeding for its voluntary dissolution; and the entry *nunc pro*

<sup>19</sup> *Caesar v. Bernard*, 156 A. D. 724, 141 N. Y. Supp. 659 (1913); *aff'd* 209 N. Y. 570, 103 N. E. 1122; St. Corp. L. § 66.

<sup>20</sup> *Montague v. Hotel Gotham Co.*, 208 N. Y. 442, 102 N. E. 513 (1913); St. Corp. L. § 66.

<sup>1</sup> *Abrams v. Manhattan Consumers Brewing Co.*, 142 A. D. 392, 126

N. Y. Supp. 844 (1911); St. Corp. L. § 66.

<sup>2</sup> *Munzinger v. United Press*, 52 A. D. 338, 65 N. Y. Supp. 194 (1900); St. Corp. L. § 48 (2 R. S., 9th ed., 1022); now § 66.

<sup>3</sup> *Denike v. New York and Rosendale Lime and Cement Co.*, 80 N. Y. 599 (1880).

*tunc* by the court of an order correcting the defect in its original order appointing the receiver in omitting to recite that insolvency had been satisfactorily shown.<sup>4</sup>

**§ 409. Id.: Transfer By What Persons Prohibited.**—Neither a corporation nor any of its officers, stockholders or directors must transfer its property.<sup>5</sup> The statute prohibits an assignment by the corporation as well as by its officers and stockholders of corporate property and stock in contemplation of insolvency.<sup>6</sup> An assignment by an officer of a corporation of his claim against it to secure or pay his *bona fide* creditors, in good faith, is no violation of a statute making it unlawful for a corporation situated as the one in question to transfer its property to any officer or stockholder for payment of its debts or to make any transfer in contemplation of its insolvency.<sup>7</sup> The statute prohibiting the transfer by a corporation, or its officers, directors and stockholders, of its property, during its insolvency, in order to prefer any creditor, does not mean that a depositor in a bank who has withdrawn the deposit on learning that the bank was about to close is liable to be sued for the money whenever it can be shown that he acted upon information given to him by a director of the bank, even though the latter be the president of the depositor and signed the latter's corporate check withdrawing the money in question.<sup>8</sup>

**§ 410. Id.: Transfer to What Persons Prohibited.**—The transfer of the corporate property must be made neither to the corporate officers nor to its directors nor to its stockholders.<sup>9</sup> “The general object of the statute [against transfers of its property by an insolvent corporation] is plain, viz., to secure equality among creditors and to prevent fraudulent transfers in fraud of their rights. The statute provides

<sup>4</sup> Matter of Lenox Corporation, 57 A. D. 515, 68 N. Y. Supp. 103 (1901); *aff'd* 167 N. Y. 623, 60 N. E. 1115; C. C. P. §§ 2423, 2419, 2429.

<sup>5</sup> St. Corp. L. § 66 (L. 1909, c. 61).

<sup>6</sup> Troy Waste Mfg. Co. v. Harrison, 73 Hun, 528, 26 N. Y. Supp. 109 (1893); St. Corp. L. § 48 (L. 1890, c. 564); now § 66.

<sup>7</sup> Jefferson County Bank v. Townley, 159 N. Y. 490, 54 N. E. 74 (1899); 1 R. S. 603, § 4. See now St. Corp. L. § 66. The assignment was by husband to wife. The statute was: “Whenever any incorporated company shall have refused the payment of any of its notes, or other

evidences of debt, in specie, or lawful money of the United States, it shall not be lawful for such company, or any of its officers, to assign or transfer any of the property or choses in action of such company to any officer or stockholder of such company, directly or indirectly for the payment of any debt; and it shall not be lawful to make any transfer or assignment in contemplation of insolvency.”

<sup>8</sup> O'Brien v. East River Bridge Co., 161 N. Y. 539, 48 L.R.A. 122, 56 N. E. 74 (1900); St. Corp. L. § 48; now § 66.

<sup>9</sup> St. Corp. L. § 66 (L. 1909, c. 61).

for two cases, *first*, where the corporation has refused payment of its notes, or other evidence of debt, and is in default, it prohibits any subsequent assignment or transfer by the corporation or any of its officers, directly or indirectly, of any of its property, to any officer or stockholder, in payment of a debt, and, *second*, it prohibits any transfer or assignment whatever on any consideration, to an officer, stockholder or other person in contemplation of insolvency."<sup>10</sup> Both an assignment by a corporation or its officers to its stockholders or officers after it has refused to pay its debts and an assignment to anyone in contemplation of its insolvency are void.<sup>11</sup> "To a stockholder or director a transfer of corporate property is forbidden, if the corporation shall have refused to pay any of its notes or obligations when due, but to other creditors a transfer of corporate property in payment of its debts is only prohibited, 'when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation.'"<sup>12</sup> ". . . the true construction of the statute [making it illegal for a corporation which has refused payment of any evidence of its debt to transfer its property to its officers, etc., or to anyone in contemplation of insolvency] prohibits the acquisition by a director of an insolvent corporation, who is also a creditor, through the process of attachment, of a preferential lien on the corporate assets."<sup>13</sup> An assignment by a corporation to its directors for the benefit of creditors without preference is not invalid

<sup>10</sup> Throop v. Hatch Lithographic Co., 125 N. Y. 530, 26 N. E. 742 (1891); 1 R. S. 603, § 4. See now St. Corp. L. § 66.

<sup>11</sup> Harris v. Thompson, 15 Barb. 62 (1853); 1 R. S. 603, § 4, 4th ed., p. 1175, says: "Whenever any incorporated company shall have refused the payment of any of its . . . evidences of debt . . . it shall not be lawful . . . to assign or transfer any of the property . . . to any officer or stockholder . . . for the payment of any debt; and it shall not be lawful to make any transfer . . . in contemplation of the insolvency of such company, to any person . . . ; and every such transfer and assignment to such officer, stockholder, or other person . . . shall be utterly void." Held:

"Every 'such' transfer and assignment, that is, every transfer and assignment coming within either prohibition, is declared to be utterly void." See now St. Corp. L. § 66.

<sup>12</sup> Milbank v. Welch, 74 Hun, 497, 26 N. Y. Supp. 705 (1893); St. Corp. L. § 48; L. 1892, c. 688; now § 66. "In the latter case the plaintiff does not sustain the burden of proof resting upon him by merely showing a transfer of property to a creditor in payment of a just debt after the corporation has failed to meet at maturity one or more of its obligations."

<sup>13</sup> Throop v. Hatch Lithographic Co., 125 N. Y. 530, 26 N. E. 742 (1891); 1 R. S. 603, § 4. See now St. Corp. L. § 66.

under the statute prohibiting a transfer by a corporation of its property to its directors, and others, if it has refused to pay any of its obligations.<sup>14</sup> An assignment by a corporation for the benefit of creditors is not void under the statute prohibiting preferences to a corporation's officers by itself when insolvent if the assignee was neither a director nor stockholder at the time of the assignment.<sup>15</sup> The statute prohibiting a corporation which has refused payment of its evidences of debt from transferring its property to any of its officers or stockholders is intended to protect general corporate creditors and to prevent officers and stockholders who happen also to be corporate creditors from securing a preference to themselves; and a stockholder cannot be shielded from the penalty of the statute because he happens to be a member of a co-partnership to which the corporation is indebted.<sup>16</sup> The legislature intends that a trustee of a insolvent corporation's property on its being wound up shall be selected by the court; so that an assignment by it of all its property for the benefit of creditors in contemplation of insolvency to an individual selected by its directors is void.<sup>17</sup> " . . . . When the corporation becomes insolvent, or when it is known or apparent to the directors that it is unable to continue business, so that suspension is imminent or inevitable, the assets become a trust fund for equal distribution among the creditors, and the directors must hold the assets for that purpose and have no right to appropriate the same in payment of their individual claims"; so that a trustee in bankruptcy of the corporation may in equity cancel an agreement whereby it gave moneys to its president and direct and compel him to account therefor.<sup>18</sup>

**§ 411. Id.: Who May Question Transfer.**—Persons who while not judgment creditors are yet tort creditors of a corporation at the time of conveyance and assignment of its property are creditors within the purview of the statute making its

<sup>14</sup> *Munzinger v. United Press*, 52 A. D. 338, 65 N. Y. Supp. 194 (1900); St. Corp. L. § 48 (2 R. S., 9th ed., 1022); now § 66.

<sup>15</sup> *Linderman v. Hastings Card & Paper Co.*, 38 A. D. 488, 56 N. Y. Supp. 456 (1899); St. Corp. L. § 48 (L. 1892, c. 688); now § 66. "If he had been, and had not resigned, the assignment would still be valid, because it is not such a transfer as is intended to be prohibited by

the statute. . . . The vice aimed at is evidently a transfer for the benefit of the director or stockholder."

<sup>16</sup> *Jones v. Blun*, 145 N. Y. 333, 39 N. E. 954 (1895); 1 R. S. 603, § 4. See now St. Corp. L. § 66.

<sup>17</sup> *Harris v. Thompson*, 15 Barb. 62 (1853).

<sup>18</sup> *Joseph v. Raff*, 82 A. D. 47, 81 N. Y. Supp. 546 (1903); aff'd 176 N. Y. 611, 68 N. E. 1118.

officers and directors personally liable for any loss sustained by its creditors and stockholders through a transfer of its property to any of its officers, directors or stockholders while insolvency exists or is imminent.<sup>19</sup> One who has obtained a judgment against a corporation for personal injuries sustained through its negligence, after various mortgages by it in contemplation of insolvency have been made, may sue to set such mortgages aside, as the statute prohibiting preferential assignments by a corporation in contemplation of its insolvency relates as well to a transfer by the corporation itself as to a transfer by its officers, directors or stockholders.<sup>20</sup> One who has recovered a judgment against a corporation after it has made an assignment for the benefit of creditors, but in an action begun before that time, is a creditor "to the extent at least that he could bring an action to set aside the assignment on the ground of fraud."<sup>1</sup> A creditor assenting to a transfer of property of a corporation by its president's signature, subject to its directors' approval, is estopped from claiming it was made in contemplation of insolvency if its directors remained passive, knowing of the transfer, even though they never ratified the consent.<sup>2</sup> One judgment creditor of a corporation cannot, it seems, set aside for his own sole benefit a transfer by it as being made with intent to give a preference.<sup>3</sup> A judgment creditor of a corporation whose execution has been returned unsatisfied may, pending the trial of his action brought, before sale by its assignee for the benefit of creditors of its assets, to hold the assignment void as a preference given while it was insolvent, enjoin the assignee from disposing of so much of the corporate assets as may be sufficient to satisfy his judgment should he prove the preference given during insolvency.<sup>4</sup> In an action in equity by a judgment creditor of a corporation who has executions in the hands of the sheriff not returned unsatisfied in whole or in part, to set aside various transfers and a

<sup>19</sup> *Caesar v. Bernard*, 156 A. D. 724, 141 N. Y. Supp. 659 (1913); *aff'd* 209 N. Y. 570, 103 N. E. 1122; *St. Corp. L.* § 66.

<sup>20</sup> *Munson v. Genesee Iron & Brass Works*, 37 A. D. 203, 56 N. Y. Supp. 139 (1899); *St. Corp. L.* § 48 (L. 1890, c. 564); now § 66.

<sup>1</sup> *Munzinger v. United Press*, 52 A. D. 338, 65 N. Y. Supp. 194 (1900).

<sup>2</sup> *New Britain National Bank v.*

*Cleveland Co.*, 91 Hun, 447, 36 N. Y. Supp. 387 (1895); *aff'd* 158 N. Y. 722, 53 N. E. 1128.

<sup>4</sup> *Koehl v. Leibinger & Oehm Brewing Co.*, 24 Misc. 298, 52 N. Y. Supp. 982 (1898); *St. Corp. L.* § 48 (L. 1892, c. 688); now § 66.

<sup>4</sup> *Koehl v. Leibinger & Oehm Brewing Co.*, 26 A. D. 573, 50 N. Y. Supp. 568 (1898); *St. Corp. L.* § 48 (L. 1890, c. 564); now § 66.

general assignment made by the corporation on the ground that they were made with intent to hinder and defraud its creditors, the court can set them aside as to plaintiff's claim so far as they affected specific property of the corporation in the city and county where the executions were issued and the action commenced; but it cannot set them aside as against other parties or other property, or appoint a receiver of *all* the corporation's property.<sup>5</sup> A creditor of a corporation suing to set aside a preference made by such corporation in contemplation of insolvency, contrary to the statute avoiding such an act, is not entitled, upon setting aside such preference as void under the statute, to secure to himself priority of payment over other creditors, even though the action be brought on behalf of all other creditors of such corporation, some of whom are unknown, and none of whom appeared in the action.<sup>6</sup> An action by a receiver of a corporation to set aside transfers made by it while insolvent with intent to prefer creditors and in fraud of creditors which asks judgment avoiding the transfers, for an accounting of the property transferred and delivery thereof to the receiver, and for injunctions against disposition by the transferees of the property, is equitable in its nature and the complaint may not be dismissed simply because the only relief practicable is the award of a money judgment.<sup>7</sup>

**§ 412. Id.: Who Liable to Account for Property Transferred.**

— Every person receiving by means of any prohibited transfer, act or deed any property of the corporation is bound to account therefor to its creditors or stockholders or other trustees, and every transfer, assignment or other such act is void; and every director or officer of a corporation who violates or is concerned in the violation of the statute prohibiting such act or deed is personally liable to the creditors and stockholders of the corporation to the full extent of any loss they may respectively sustain by such violation.<sup>8</sup> The liability of directors, officers and stockholders under the statute prohibiting transfers of the property of corporations which have failed to pay their liabilities has been heretofore discussed.<sup>9</sup>

<sup>5</sup> Home Bank v. Brewster & Co., 15 A. D. 338, 44 N. Y. Supp. 54 (1897).

<sup>6</sup> Lodi Chemical Co. v. National Lead Co., 41 A. D. 535, 58 N. Y. Supp. 717 (1899); St. Corp. L. § 48 (L. 1892, c. 688); now § 66.

<sup>7</sup> Stiefel v. New York Novelty Co.,

14 A. D. 371, 43 N. Y. Supp. 1012 (1897); St. Corp. L. § 48 (L. 1892, c. 688); now § 66. The point should be raised by answer or demurrer instead of motion to dismiss at the trial.

<sup>8</sup> St. Corp. L. § 66 (L. 1909, c. 61).

<sup>9</sup> See § 350, *supra*.

**§ 413. Id.: Dealing With Other Corporations, In General.—**

“The law permits no such anomaly as one corporation organized by another corporation, which furnishes all its capital, takes all its shares of stock and holds them for sale.”<sup>10</sup> Assuming that a guaranty by one corporation of payment of the bonds of another is *ultra vires*, yet the guaranty may nevertheless be enforced by one taking the bonds as a *quid pro quo* of his claim against the guarantor company.<sup>11</sup> A corporation is not liable upon notes given by another corporation prior to the incorporation of the former unless it received some benefit from the goods for which the notes were given or some other consideration than such goods given for the notes.<sup>12</sup> A contract between a corporation controlled by certain individuals and another corporation formed and owned by them is presumptively fraudulent, particularly if they fraudulently conspired to accomplish the contract; and, if the contract was a mere scheme to avoid the issue of stock for money or property, it is void.<sup>13</sup> “The rule is well settled that an injunction will not be granted or sustained against a private corporation in a suit brought by an individual in the interest of a rival private corporation.”<sup>14</sup> During the continuance of the World War any corporation organized under the laws of the State of New York may co-operate with other corporations and with natural persons in the creation and maintenance of instrumentalities conducive to the winning of the war.<sup>14a</sup>

**§ 414. Id.: Interlocking Directorates.—**When any stock corporation becomes a stockholder in another pursuant to the

<sup>10</sup> Schwab v. Potter Co., 194 N. Y. 409, 87 N. E. 670 (1909).

<sup>11</sup> Arnot v. Erie Ry. Co., 67 N. Y. 315 (1876).

<sup>12</sup> Ginsburg v. Union Cloak & Suit Co., 35 Misc. 389, 71 N. Y. Supp. 1030 (1901).

<sup>13</sup> Currier v. New York, West Shore & Buffalo R. R. Co., 35 Hun, 355 (1885).

<sup>14</sup> Jenkins v. Auburn City Ry. Co., 27 A. D. 553, 50 N. Y. Supp. 852 (1898).

<sup>14a</sup> L. 1918, c. 240: “and its directors or trustees may appropriate and expend for such purposes such sum or sums as they may deem expedient and as, in their judgment, will contribute to the protection of the corporate interests, provided that

whenever the expenditures for such purposes in any calendar year shall in the aggregate amount to one per centum on the capital stock outstanding, then, before any further expenditure is made during such year for such purposes by the corporation, ten days’ notice shall be given to the stockholders in such manner as the directors or trustees may direct of the intention to make such further expenditure, specifying the amount thereof, and if written objection to be made by stockholders holding twenty-five per centum or more of the stock of the corporation, such further expenditures shall not be made until it shall have been authorized at a stockholders’ meeting.”

statute permitting it to become such stockholder, its president or other officers are eligible to the office of director of such other corporation the same as if they were individually stockholders therein.<sup>15</sup> "It is undoubtedly a well-settled rule of law that executory contracts entered into by corporations having common directors are voidable at the instance of either corporation, and the court will not inquire into the question whether or not it is beneficial to the corporation seeking to avoid it. This right is vested in the corporation and not in the individual stockholder. A stockholder cannot enjoin the execution of a contract *intra vires* unless fraud is shown."<sup>16</sup> When an agreement is executed by two corporations having nearly identical directorates, the second controlling the first and having a large pecuniary interest in the non-performance of the agreement by the first, as well as in expenditure of moneys under the agreement, the law will invalidate the agreement at the instance of the first corporation even though there be no suggestion of actual fraud.<sup>17</sup> A corporation controlled by the same board of directors which controls it and the corporation holding its stock cannot be estopped from complaining of an agreement ratified by action of such board as stockholders, when, acting as directors, such board could not have bound the first corporation to the agreement.<sup>18</sup> A small stockholder and bondholder in a corporation may himself in his own name and without prior demand of the corporation call it to account in equity, as well as individual defendants owning a large majority of the stock, who practically are its sole directors and managers, if it is alleged that they as officers and trustees took from themselves as officers and trustees of another corporation a lease of the latter to the defendant corporation at an exorbitant rent, to deplete the corporate funds and injure the plaintiff; and if it averred that they have taken from the defendant corporation's funds large sums on account of loans alleged to have been made by them as individuals to the defendant corporation.<sup>19</sup>

**§ 415. Id.: Acquiring and Disposing of Stocks and Bonds of Another Corporation, Governing Statutes.**—The power of one corporation to buy another's stock is discussed in the one

<sup>15</sup> St. Corp. L. § 52 (L. 1909, c. 61).

<sup>16</sup> *Burden v. Burden*, 159 N. Y. 287, 54 N. E. 17 (1899).

<sup>17</sup> *Brooklyn Heights R. R. Co. v. Brooklyn City R. R. Co.*, 151 A. D. 465, 135 N. Y. Supp. 990 (1912).

<sup>18</sup> *Brooklyn Heights R. R. Co. v. Brooklyn City R. R. Co.*, 151 A. D. 465, 135 N. Y. Supp. 990 (1912).

<sup>19</sup> *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513 (1895).

hundred and thirty-third section of this book. Any domestic or foreign stock corporation (except a moneyed corporation) may purchase, acquire, hold and dispose of the stock, bonds and other evidences of indebtedness of any domestic or foreign corporation and issue in exchange therefor its stock, bonds or other obligations, (1) if authorized to do so by a provision in any certificate of incorporation of such stock corporation or in any certificate amendatory thereof or supplemental thereto filed in pursuance of law; or (2) if the corporation, the stock of which is so purchased, acquired, held or disposed of is (a) engaged in a business similar to that of such stock corporation, or (b) engaged in the manufacture, use or sale of the property or in the construction or operation of works necessary or useful in the business of such stock corporation or in which or in connection with which the manufactured articles, product or property of such stock corporation are or may be used, or (c) a corporation with which such stock corporation is or may be authorized to consolidate.<sup>20</sup> When any such corporation is a stockholder in any other corporation as just stated, its president or other officers are eligible to the office of director of such corporation the same as if they were individually stockholders therein; and the corporation holding such stock possesses and exercises in respect thereof all the rights, powers and privileges of individual owners or holders of such stock.<sup>1</sup>

**§ 416. Id.: In General.**—The statute permitting a corporation to hold stock of and consolidate with another corporation must be construed together with the statute prohibiting combinations of corporations in restraint of trade or for the purpose of monopoly.<sup>2</sup> “It is doubtless true that a corporation cannot purchase, or deal in stocks of other corporations unless expressly authorized by law so to do (*citations*). It is equally true, however, that it may do whatever may be necessary in the exercise of its corporate franchises. The selling of property and collection of debts is among the powers given; and hence, it may take title to all kinds of property, even the stock of another company, in the payment of a debt.”<sup>3</sup> The

<sup>20</sup> St. Corp. L. § 52 (L. 1909, c. 61).

<sup>1</sup> St. Corp. L. § 52 (L. 1909, c. 61).

<sup>2</sup> Matter of Attorney-General, 124 A. D. 401, 108 N. Y. Supp. 823 (1908); St. Corp. L. § 40 (L. 1902, c. 601); § 7 (L. 1897, c. 384); see now St. Corp. L. § 52; Anti-Monop-

oly Acts (L. 1897, c. 383; L. 1899, c. 690).

<sup>3</sup> Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 27 N. E. 831 (1891). L. 1848, c. 40, § 8, under which the company was incorporated, provided that “it shall not be lawful for such company to use any of their funds

statutory authority to a corporation of holding stock in another " does not permit one corporation to create another, endow it with capital from its own assets and take all its shares of stock in exchange."<sup>4</sup> " There is no limit to which one stock corporation may purchase and hold the stock of another stock corporation, no limit to the extent to which the corporation as such stockholder may intrude its officers into the directorate of the company whose stock is thus purchased . . . ."<sup>5</sup> Equity will not intervene to enjoin the acquisition of the stock of one corporation by another, at the behest of a stockholder in the former, simply because the purchasing corporation confesses its desire to obtain a majority of the other company's stock.<sup>6</sup> A corporation empowered to buy the stocks and bonds of any corporation in exchange for its own stocks and bonds may buy the stocks and bonds of a corporation controlling a franchise ruinous in its operation to the purchasing corporation.<sup>7</sup> The burden of proof is on one complaining that a corporation unlawfully holds stock of other companies to show the stocks are illegally held, and in the absence of such proof the court will assume the action of the corporation is legal.<sup>8</sup> It is the business of one corporation owning the majority of the stock of another to so operate the latter as to make its stock of the highest possible value to the holding company.<sup>9</sup> " . . . A corporation cannot acquire the majority of the stock of another corporation, obtain control of its affairs, divert the income of its business, refuse business which would have enabled the defaulting company to pay its interest, and then institute an action in equity to enforce its obligations against such company, with the avowed purpose of obtaining control of its property at less than its value to the injury of the minority stockholders. . . . " <sup>10</sup>

in the purchase of any stock in any other corporation." It sold out, by unanimous consent of its stockholders, to a new corporation and took its stock in payment.

<sup>4</sup> Schwab v. Potter Co., 194 N. Y. 409, 87 N. E. 670 (1909); St. Corp. L. § 40; now § 52.

<sup>5</sup> Venner v. New York Central & H. R. R. Co., 160 A. D. 127, 145 N. Y. Supp. 725 (1914); aff'd 217 N. Y. 615 and 617, 111 N. E. 487; St. Corp. L. § 52.

<sup>6</sup> Phelan v. Edison Electric Illuminating Co., 24 Misc. 109, 53 N. Y. Supp. 205 (1898).

<sup>7</sup> Rafferty v. Buffalo City Gas Co., 37 A. D. 618, 56 N. Y. Supp. 288 (1899); St. Corp. L. § 40 (L. 1892, c. 688); now § 52.

<sup>8</sup> Burden v. Burden, 159 N. Y. 287 (1899).

<sup>9</sup> Venner v. New York Central & Hudson R. R. Co., 160 A. D. 127, 145 N. Y. Supp. 725 (1914); aff'd 217 N. Y. 615 and 617, 111 N. E. 487.

<sup>10</sup> Farmers' Loan & Trust Co. v. New York & N. R. Co., 150 N. Y. 410, 34 L.R.A. 76, 44 N. E. 1043 (1896); St. Corp. L. § 40; now § 52.

One corporation cannot disaffirm a transaction by which it acquires the stock of another corporation in an unauthorized and unlawful manner, or recover the money it paid therefor, without either returning or offering to return the stock; and a receiver of a corporation is under the same obligation in this regard as is the corporation itself.<sup>11</sup> A stockholder of a holding corporation, formed by agreement of stockholders of several constituent companies and others who became the sole stockholders of the holding company, has no cause of action against those who became stockholders in the holding company for the recovery of alleged secret profits retained by them in transactions toward the organization of the holding company, when no one else interested in the holding or constituent companies disputes the validity of its organization and the gravamen of the action is fraud of the rights of the stockholders of such companies, as even if there be overcapitalization it will not avail plaintiff because the rights of the public are not involved.<sup>12</sup>

**§ 417. Id.: Combinations in Restraint of Trade, Governing Statutes.**— Neither a domestic stock corporation nor a foreign corporation doing business in New York State may combine with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life.<sup>13</sup> Every contract, agreement, arrangement or combination is against public policy, illegal and void, and any corporation or officer or agent thereof who makes or attempts to make or enter into it or who within New York State does any act pursuant thereto or in, toward or for the consummation of it (wherever it may have been made) is guilty of a misdemeanor punishable as to the corporation by a fine of not exceeding twenty thousand dollars and as to the individual agent or officer by a fine not exceeding five thousand dollars or by imprisonment for not longer than one year or both, if such contract, agreement, arrangement or combination (1) creates, establishes or maintains or may create, establish or maintain a monopoly in the manufacture, production or sale in New York State of any article or commodity of common use, or (2) restrains or prevents or may restrain or prevent competition in New York State in the supply or price of any such article or commodity,

<sup>11</sup> *Pierson v. McCurdy*, 33 Hun, 520 (1884); *aff'd* 100 N. Y. 608, 2 N. E. 615.

<sup>12</sup> *Blum v. Whitney*, 185 N. Y. 232, 77 N. E. 1159 (1906). The

whole details should be seen in the report itself.

<sup>13</sup> St. Cor. L. § 14 (L. 1909, c. 61).

or (3) restricts or prevents or may restrict or prevent the free pursuit in this State of any lawful business, trade or occupation for the purpose of creating, establishing or maintaining a monopoly within this State of the manufacture, production or sale of any such article or commodity.<sup>14</sup> The statute provides for an action by the Attorney-General in the People's name against a corporation, director, officer or agent violating its provisions; and the procedure for the action; and the statutory provisions are hereinafter quoted.<sup>15</sup> During the continuance of the World War any corporation organized under the laws of the State of New York may co-operate with other corporations and with natural persons in the creation and maintenance of instrumentalities conducive to the winning of the war, and its directors or trustees may appropriate and expend for such purposes such sum or sums as they may deem expedient and as, in their judgment, will contribute to the protection of the corporate interests, provided that whenever the expenditures for such purposes in any calendar year shall in the aggregate amount to one per centum on the capital stock outstanding, then, before any further expenditure is made during such year for such purposes by the corporation, ten days' notice shall be given to the stockholders in such manner as the directors or trustees may direct of the intention to make such further expenditure, specifying the amount thereof, and if written objection be made by stockholders holding twenty-five per centum or more of the stock of the corporation, such further expenditure shall not be made until it shall have been authorized at a stockholders' meeting.<sup>15a</sup>

The text of the Federal, Sherman Anti-Trust Act and of the act forbidding trusts by importers is given in the note.<sup>16</sup>

<sup>14</sup> Gen. Bus. L. §§ 340, 341 (L. 1909, c. 25).

<sup>15</sup> Gen. Bus. L. §§ 342-346, both inclusive (L. 1909, c. 25).

<sup>15a</sup> L. 1918, c. 240.

<sup>16</sup> § 1. "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by im-

prisonment not exceeding one year, or by both said punishments, in the discretion of the court." Act of July 2, 1890, c. 647; 26 Stat. L. 209.

§ 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the dis-

cretion of the court." Act of July 2, 1890, ch. 647; 26 Stat. L. 209.

§ 3. "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." Act of July 2, 1890, ch. 647; 26 Stat. L. 209.

§ 4. "The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises." Act of July 2, 1890, c. 647; 26 Stat. L. 209.

§ 5. "Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of

justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof." Act of July 2, 1890, c. 647; 26 Stat. L. 209.

§ 6. "Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law." Act of July 2, 1890, c. 647; 26 Stat. L. 209.

§ 7. "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." Act of July 2, 1890, c. 647; 26 Stat. L. 209.

§ 8. "That the word 'person,' or 'persons,' wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." Act of July 2, 1890, c. 647; 26 Stat. L. 209.

§ 73. "That every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void when the same is made by or

between two or more persons or corporations either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or hereafter shall be engaged in the importation of goods or of any commodity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months." Act of Feb. 12, 1913, c. 40, 402; 37 Stat. L. 667.

§ 74. "That the several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of section seventy-three of this Act; and it shall be the duty of the several district attorneys of the United States in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petitions setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. Where the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition

and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises." Act of Aug. 27, 1894, c. 349; 28 Stat. L. § 70.

§ 75. "That whenever it shall appear to the court before which any proceeding under the seventy-fourth section of this act may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof." Act of Aug. 27, 1894, c. 349; 28 Stat. L. 570.

§ 76. "That any property owned under any contract or by any combination, or pursuant to any conspiracy, and being the subject thereof, mentioned in section seventy-three of this Act, imported into and being within the United States or being in the course of transportation from one State to another, or to or from a Territory or the District of Columbia, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law." Act of Feb. 12, 1913, c. 40; 37 Stat. L. 667.

§ 77. "That any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of the suit, including a reasonable attorney's fee." Act of Aug. 27, 1894, c. 349; 28 Stat. L. 570.

§ 418. **Id.: In General.**—The Anti-Monopoly Law is but a codification of the common law and does not limit the statutory right of corporations to acquire stock of other corporations even to the last share and the resultant merger.<sup>17</sup> “The Anti-Monopoly Act is really aimed at combinations between independent concerns for the purpose of regulating prices and production, and what is abhorrent and repugnant to the statute are contracts, agreements, arrangements or combinations which tend toward a control of the sale or production of a thing of common use, and so prevent competition in supply or price.”<sup>18</sup> A covenant in partial and reasonable restraint of trade is in the nature of a property right and assignable, at least in connection with a sale of the property and business of the assignor.<sup>19</sup> The courts are not prevented from giving equitable relief by injunction against breach of a contract in restraint of trade because a bond, with a stipulation for liquidated damages, was executed in connection with the covenant.<sup>20</sup> A vendor corporation delivering goods under an agreement illegal for the reason that it is against public policy cannot recover for the price.<sup>1</sup> An injunction will not lie to prevent stockholders of one corporation from selling their holdings to another corporation on the mere assumption that the latter corporation seeks to obtain control of the former one for purposes inimical to the former’s minority stockholders.<sup>2</sup>

§ 419. **Id.: What Is Trade or Commerce.**—The production of opera is not trade or commerce so as to make a contract by one corporation with another in that business not to produce it in a couple of cities for a decade void under the Sherman Anti-Trust Act, even though incidentally some acts or transactions of inter-state nature are involved.<sup>3</sup>

§ 420. **Id.: What Constitutes Restraint or Combination.**—“No contracts are void as being in general restraint of trade, where they operate simply to prevent a party from engaging

<sup>17</sup> *Matter of Consolidated Gas Co.*, 56 Misc. 49, 106 N. Y. Supp. 407 (1907); *aff’d* 124 A. D. 401, 108 Supp. 823; L. 1899, c. 690.

<sup>18</sup> *Matter of Consolidated Gas Co.*, 56 Misc. 49, 106 N. Y. Supp. 407 (1907); *aff’d* 124 A. D. 401, 108 Supp. 823; L. 1899, c. 690.

<sup>19</sup> *Diamond Match Co. v. Roeber*, 106 N. Y. 473 (1887).

<sup>20</sup> *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419 (1887).

<sup>1</sup> *Arnot v. Pittston and Elmira Coal Co.*, 68 N. Y. 558 (1877).

<sup>2</sup> *Ingraham v. National Salt Co.*, 72 A. D. 582, 74 N. Y. Supp. 388 (1902); *aff’d* 179 N. Y. 556, 71 N. E. 1131.

<sup>3</sup> *Metropolitan Opera Co. v. Hammerstein*, 162 A. D. 691, 147 N. Y. Supp. 532 (1914).

or competing in the same business.”<sup>4</sup> “If the business of a private individual or corporation is threatened with competition it is not illegal or immoral if one can persuade his competitor to abandon an enterprise in which both cannot succeed, and take employment with the one remaining in the business at a stated compensation.”<sup>5</sup> A covenant supported by a good consideration and constituting a partial and not a general restraint of trade, which is reasonable in view of the circumstances disclosed, is valid.<sup>6</sup> “Briefly, contracts in restraint of trade are void if they are so unreasonable as unduly to interfere with the rights of the public. The test is not whether the corporation has the right of eminent domain, or whether its property is impressed with a semi-public use, but whether or not such rights are unduly affected.”<sup>7</sup> When a combination of corporations is accomplished through the acquisition of many by one without intent to restrain commerce but only to more conveniently operate, the combination is not illegal if the acquiring corporation previously controlled the acquired corporations in another way.<sup>8</sup> A contract by one corporation to purchase stock of others to prevent competition is not of itself necessarily illegal unless it result in limiting the supply and enhancing the cost of the commodity dealt in by the corporations; and in a commodity such as gas this danger is not present because the Legislature can control its price.<sup>9</sup> A corporation having a by-law permitting its board of directors to fix the market price of the commodity in which it deals at which it shall be purchased by its stockholders, and largely controlling the market in that commodity in and about New York City, which fixes the price of the commodity accordingly, is guilty of a combination inimical to trade and commerce, and, therefore, unlawful, and may be annulled at suit of the attorney-general.<sup>10</sup>

<sup>4</sup> *Leslie v. Lorillard*, 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363 (1888).

<sup>5</sup> *Oakes v. Cattaraugus Water Co.*, 143 N. Y. 430, 26 L.R.A. 544, 38 N. E. 461 (1894). The agreement was for only one of the two parties to make application for a certain franchise.

<sup>6</sup> *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419 (1887).

<sup>7</sup> *Whitaker v. Kilby*, 55 Misc. 337, 106 N. Y. Supp. 854 (1907); *Central New York Telephone & Telegraph Co. v. Averill*, id., 346, 105 N. Y. Supp. 378.

<sup>8</sup> *Venner v. New York Central & Hudson River R. R. Co.*, 177 A. D. 296, 164 N. Y. Supp. 626 (1917).

<sup>9</sup> *Matter of Attorney-General*, 124 A. D. 401, 108 N. Y. Supp. 823 (1908); *St. Corp. L. § 7* (L. 1897, c. 384); *Anti-Monopoly Acts* (L. 1897, c. 383; L. 1899, c. 690). See now *St. Corp. L. § 14* and *Gen. Bus. L. § 340*.

<sup>10</sup> *People v. Milk Exchange*, 145 N. Y. 287, 27 L.R.A. 437, 39 N. E. 1062 (1895).

A by-law by an association of newspaper owners providing that the associates should not take news from any other association is not in restraint of trade or restriction of the liberty of the press.<sup>11</sup> Telegraph companies each reaching some points not reached by any of the others, though not owning precisely parallel lines or lines running exactly between the same places, may lawfully combine under the law.<sup>12</sup> A corporation dealing in a public commodity such as coal, has the right to use all legitimate efforts to obtain the best price for the article in which it deals; but when it endeavors artificially to enhance prices by suppressing or keeping out of market the products of others, and to accomplish that purpose by means of contracts binding them to withhold their supply, the combination is illegal as against public policy.<sup>13</sup> Joint purchase of equipment for affiliated railroads operating lines is not violative of the Sherman Anti-Trust Act or the New York Stock Corporation Law.<sup>14</sup> "A telephone corporation may, where such a course is not expressly or impliedly prohibited by its charter, where its charter permits it to do practically any business anywhere at any time, agree to limit a part of its activities within a certain district."<sup>15</sup> A corporation's act by which it buys the worthless notes of a competitor to embarrass the latter's business and injure his credit by a law suit and pays a bonus to induce his printers to refuse to do his printing is *ultra vires*.<sup>16</sup>

§ 421. **Id.: Internal Management.**—The interference of a court between minority and majority stockholders in their squabbles as to the internal management of their corporation has already been discussed.<sup>17</sup> Every corporation has power to make by-laws not inconsistent with any existing law for the management of its property and the regulation of its affairs.<sup>18</sup> ". . . in the absence of fraud or bad faith courts have nothing to do with the internal management of business corporations, provided they keep within their corporate

<sup>11</sup> *Matthews v. Associated Press of the State of N. Y.*, 136 N. Y. 333, 32 N. E. 981 (1893); L. 1867, c. 754.

<sup>12</sup> *Williams v. Western Union Telegraph Co.*, 93 N. Y. 162 (1883); L. 1848, c. 265, as amend'd L. 1851, c. 98, L. 1853, c. 471, L. 1862, c. 425, L. 1870, c. 568, L. 1875, c. 319.

<sup>13</sup> *Arnot v. Pittston and Elmira Coal Co.*, 68 N. Y. 558 (1877).

<sup>14</sup> *Venner v. New York Central & H. R. R. R. Co.*, 160 A. D. 127, 145

N. Y. Supp. 725 (1914); aff'd 217 N. Y. 615 and 617, 111 N. E. 487; St. Corp. L. § 14; 26 U. S. Stat. at Large, 209, c. 647.

<sup>15</sup> *Whitaker v. Kilby*, 55 Misc. 337, 106 N. Y. Supp. 854 (1907).

<sup>16</sup> *Colles v. Trow City Directory Co.*, 11 Hun, 397 (1877).

<sup>17</sup> See § 184, *supra*.

<sup>18</sup> Gen. Corp. L. § 11 (L. 1909, c. 28).

powers.”<sup>19</sup> “The visitorial supervision inherent in the courts (when not regulated by statute) over the affairs of public or private corporations, extends to the investigation of their proceedings for the purpose of keeping them within their chartered powers and protecting the rights of members against usurpation of the governing body to their prejudice.”<sup>20</sup> “The jurisdiction which courts of equity exercise over individuals extends equally to acts done, or omitted to be done, by private or municipal corporations.”<sup>1</sup> An action for the judicial supervision of a business corporation, its officers and members, can be maintained by the attorney-general in the name of the People without a relator, and the question as to what the public interests require is committed to his absolute discretion which cannot be inquired into by the courts.<sup>2</sup> “. . . the question whether or not a corporation shall redeem its property from mortgages is entirely a question for the corporation to decide and not for the courts to decide”, and the courts will not entertain an action by a stockholder, after refusal at his request by the corporation to bring it, to secure such redemption.<sup>3</sup> The cost of publishing a notice of a special meeting of stockholders to pass on a dispute between directors and the president of a corporation, authorized by resolution of the board, may properly be charged against the corporation, even if its by-laws contemplated only notice by mail; but the expense of publication of other notices urging stockholders to execute and return proxies to such directors, and replying to a circular by the president for proxies, though signed by a majority of those acting as directors, cannot be charged to the corporation.<sup>4</sup>

**§ 422. Id.: Contracts.**—“Unless restrained by law, every corporation has the incidental power to make any contract necessary to advance the objects for which it was created.”<sup>5</sup> “When a corporate contract is not on its face necessarily beyond the scope of the power of the corporation, it will, in the absence of averment and proof to the contrary, be pre-

<sup>19</sup> Schwab v. Potter Co., 194 N. Y. 409, 87 N. E. 670 (1909).

<sup>20</sup> People *ex rel.* Johnson v. New York Produce Exchange, 149 N. Y. 401, 44 N. E. 84 (1896). The action of the defendant in disciplining its member was held within its charter powers and not subject to judicial review.

<sup>1</sup> Cushman v. Thayer Mfg. Jewelry Co., 76 N. Y. 365 (1879).

<sup>2</sup> People v. Ballard, 134 N. Y. 269, 17 L.R.A. 737, 32 N. E. 54 (1892).

<sup>3</sup> Lefi v. Nachod, 64 Misc. 497, 119 N. Y. Supp. 470 (1909).

<sup>4</sup> Lawyers' Ad. Co. v. Consolidated Ry. L. & R. Co., 187 N. Y. 395, 80 N. E. 199 (1907).

<sup>5</sup> Legrand v. Manhattan Mercantile Assn., 80 N. Y. 638 (1880). Headnote — no opinion reported.

sumed to be valid.”<sup>6</sup> “The presumption is that all contracts made by corporations are within their power, unless the contrary appears on the face of the contract, or unless it is shown affirmatively, by way of defense, that the corporation had no power to make the contract.”<sup>7</sup> “A corporation may become bound by a contract, express or implied, under the same circumstances as an individual. To make a corporation liable, it is not necessary to show an express resolution passed at a meeting of its directors. Where a party does work or furnishes materials to a corporation under a contract with one assuming to act as its agent, to the knowledge of its officers, without dissent on the part of the corporation, it will be held to have ratified the contract, and to be liable thereunder.”<sup>8</sup> A court is not called upon to declare a corporate contract ineffectual for illegality if its validity is recognized by the corporation which has accepted the performance of it by the other party to it, unless it be inherently illegal or contrary to public policy.<sup>9</sup> The general rule is that corporations have such powers only as are specifically granted by the act of incorporation and as are necessary to carry into effect the powers expressly granted, and it is true that a corporate contract *malum in se* is void and that a corporation cannot bind itself by a contract expressly prohibited by statute or its charter, however lawful the contract might be but for the prohibition; but a contract of lease entered into by a corporation as lessee, terminated as to the future and unperformed solely as to payment of rent, may be enforced against the corporation by the lessor, as it is not in the true sense of the word illegal.<sup>10</sup> An agreement by a corporation to buy back from its employee stock of it which he has bought upon his leaving its employ is not necessarily void as contravening public policy.<sup>11</sup> “It is settled law that a corporation has no power, by contract or indorsement, to become a surety or guarantor for any other person except in the course of the authorized business of a guarantor or indorser.”<sup>12</sup> Where

<sup>6</sup> *Jacobs v. Monaton R. I. Co.*, 212 N. Y. 48, 105 N. E. 968 (1914).

<sup>7</sup> *Mutual Life Insurance Co. v. Yates County National Bank*, 35 A. D. 218, 54 N. Y. Supp. 743 (1898).

<sup>8</sup> *Cunningham v. Massena Springs & Fort Covington R. R. Co.*, 63 Hun, 439, 18 N. Y. Supp. 600 (1892); *aff'd* 138 N. Y. 614, 33 N. E. 1082.

<sup>9</sup> *Palmer v. Cypress Hill Ceme-*

*tery*, 122 N. Y. 429, 25 N. E. 983 (1890).

<sup>10</sup> *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24, 36 L.R.A. 664, 45 N. E. 390 (1896).

<sup>11</sup> *Strodl v. Farish-Stafford Co.*, 145 A. D. 406, 130 N. Y. Supp. 35 (1911).

<sup>12</sup> *Harms Co. v. Michel Brewing Co.*, 176 A. D. 235, 162 N. Y. Supp. 1071 (1916).

a corporation has made a contract many years ago, within its power to make and as it would have been had a statute then existing and authorizing it been observed, it will be assumed that the circumstances essential to a due execution of the power existed.<sup>13</sup> The signature "Louis Rosenberg, Inc." by a corporation "L. Rosenberg, Incorporated" if made with intent to bind the corporation will do so.<sup>14</sup> An assignment by a corporation to an individual to be signed, according to resolution by it, by two of its officers is valid though dated and signed by one of them before the adoption of such resolution.<sup>15</sup> A company-lessee agreeing to pay all taxes on a corporation-lessor's property and business except the "present income tax" on the rent (paid direct to the lessor's stockholders as dividends on their stock-holdings), referred to in the lease as "interest and dividends", or any tax imposed or to be imposed thereon, is not bound to pay an income tax subsequently imposed after a lapse of time from the repeal of such "present income tax."<sup>16</sup> An agreement approved by stockholders with an attorney who has extricated their company from difficulties by exercising dictatorial powers to pay him a percentage of net earnings applicable to dividends, later paid by the directors, is good.<sup>17</sup> In order to set aside an *intra vires* corporate contract it is not sufficient that some stockholders believe it unwise, but fraudulently oppressive conduct at least must be shown.<sup>18</sup> The law of that state in which a contract of employment and an accident injuring the employee happened governs the liability of the corporate employer.<sup>19</sup> To make out a case of *assumpsit* against a corporation the plaintiff must prove that the defendant either contracted as a corporation or was incorporated and incurred the indebtedness so as to raise an implied

<sup>13</sup> Marklove v. Utica, Clinton & Binghamton R. R. Co., 48 Misc. 258, 96 N. Y. Supp. 795 (1905).

<sup>14</sup> Van Norden Trust Co. v. Rosenberg, 62 Misc. 285, 114 N. Y. Supp. 1025 (1909).

<sup>15</sup> Carroll v. Cone, 40 Barb. 220 (1862); aff'd 41 N. Y. 216.

<sup>16</sup> Rensselaer & Saratoga R. R. Co. v. Delaware & Hudson Co., 168 A. D. 699, 154 N. Y. Supp. 739 (1915); aff'd 217 N. Y. 692, without opinion, 112 N. E. 1072; Income Tax L. § 2. "There is a broad distinction between a tax upon leased property and an income tax upon the rental.

An income tax is not a tax upon specific property, but is a tax upon the annual net gain of the individual or corporation received from its business, the use of its property or otherwise."

<sup>17</sup> Dupignee v. Bernstrom, 76 A. D. 105, 78 N. Y. Supp. 705 (1902).

<sup>18</sup> Holmes v. St. Joseph Lead Co., 84 Misc. 278, 147 N. Y. Supp. 104 (1914); aff'd 163 A. D. 885, 147 N. Y. Supp. 1117.

<sup>19</sup> Voshefskey v. Hillside Coal & Iron Co., 21 A. D. 168, 47 N. Y. Supp. 386 (1897).

*assumpsit*.<sup>20</sup> If one having a contract with a corporation oust all its officers, as a stockholder, take the presidency and appoint his clerk as secretary and treasurer, he assumes such officers' duties, including payment of the company's obligations to himself and the preservation of the corporation's contract right; and if he transfer all such corporation's property and interest to a newly organized company in exchange for its stock which he appropriates, he puts it out of the old corporation's power to perform its contract with him and must be deemed to have undertaken to look to the new company for discharge of the old company's obligations.<sup>1</sup> In the absence of fraud neither a corporation nor a *cestui que trust* may rescind a contract of purchase made with its trustee and compel the latter to pay for improvements put upon the premises either by the corporation or *cestui que trust*.<sup>2</sup>

§ 423. *Id.*: **Commercial Paper, In General.**—The powers and duties of corporate officers with respect to the commercial paper of their corporation have already been discussed.<sup>3</sup> “ . . . a corporation, not restricted by its charter, has the same right to give notes as evidence of its indebtedness that an individual possesses.”<sup>4</sup> A corporation may without special authority make a note or draft or accept a draft for a debt contracted in its legitimate business, or borrow money for any of its lawful purposes.<sup>5</sup> A corporation which has received the benefits of a loan made upon a note by it cannot question its liability on the note.<sup>6</sup> The fact that a promissory note signed by a corporation by its president is not also signed by its treasurer as required by its by-laws is no defense to its liability thereon if the note is not diverted from its original purpose, went into the hands of a *bona fide* holder and the corporation received the benefit of the proceeds.<sup>7</sup> A

<sup>20</sup> Stoddard v. Onondaga Annual Conference, 12 Barb. 573 (1851); 2 R. S. 458, § 3.

<sup>1</sup> Grant v. Cobre Grande Copper Co., 193 N. Y. 306, 86 N. E. 34 (1908).

<sup>2</sup> Paine v. Irwin, 16 Hun, 390 (1878). The fact that the trustee was one of a committee authorized by the corporation to make the improvements does not change the rule.

<sup>3</sup> See § 325 *et seq.*, *supra*.

<sup>4</sup> Moss v. Averell, 10 N. Y. 449 (1853). “No question is better settled upon authority, than that a corporation, not prohibited by law from

doing so, and without any express power in its charter for that purpose, may make a negotiable promissory note payable either at a future day, or upon demand when such note is given for any of the legitimate purposes for which the company was incorporated.”

<sup>5</sup> Partridge v. Badger, 25 Barb. 146 (1857).

<sup>6</sup> Gaitley v. Albany Foundry Co., 157 A. D. 10, 141 N. Y. Supp. 676 (1913); *aff'd* 216 N. Y. 693, 110 N. E. 1041.

<sup>7</sup> National Spraker Bank v. Treadwell Co., 80 Hun, 363, 30 N. Y. Supp. 77 (1894).

note given by a corporation chartered to raise and smelt lead ore, which has only raised it, for the purpose of buying the equipment to smelt it, too, is within the powers of its officers to give.<sup>8</sup> Merely writing a corporation's name on the back of a negotiable instrument payable to it is not an endorsement by it, as it can act only through its officer or agent and must assume so to do in endorsing the instrument.<sup>9</sup> To create a liability in a corporation for a draft it is not necessary that the corporate name should be used thereon, but it is enough that it be drawn or accepted under a name adopted by it by a party authorized for that purpose by the company by writing, by resolution of its board of directors or by conduct of its officers.<sup>10</sup> A corporate note with its seal is still negotiable and not a specialty until shown that the parties intended the seal to make it a specialty and non-negotiable.<sup>11</sup> A note and chattel mortgage given in the name of a corporation to pay for practically all its stock bought by an individual are not merely *ultra vires* but void, even in the hands of an innocent holder.<sup>12</sup> A counterclaim by the maker of notes to a firm is available against a corporation which is a mere successor to the rights of the firm, as distinguished from a holder of the paper for value before maturity.<sup>13</sup>

No corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of New York State or of the United States, except as permitted by such laws, is by any implication or construction to be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, of receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt for circulation as money, or of engaging in any other form of banking.<sup>13a</sup>

<sup>8</sup> *Moss v. McCullough*, 7 Barb. 279 (1849).

<sup>9</sup> *Moch Co. v. Security Bank*, 166 A. D. 121, 151 N. Y. Supp. 756 (1915). The cheque was to the order of "E. Moch Company", endorsed "E. Moch Co.", underneath "Eugene Moch"; the company's charter gave its president (Eugene Moch) no power to endorse its cheques; the cheque was deposited to his individual account.

<sup>10</sup> *Conro v. Port Henry Iron Co.*, 12 Barb. 27 (1851).

<sup>11</sup> *Chase National Bank v. Faurot*, 72 Hun, 373, 26 N. Y. Supp. 447

(1893); *aff'd* 149 N. Y. 532, 35 L.R.A. 605, 44 N. E. 164.

<sup>12</sup> *Republican Art Printery, Inc., v. David*, 173 A. D. 726, 159 N. Y. Supp. 1010 (1916).

<sup>13</sup> *McElwee Mfg. Co. v. Trowbridge*, 62 Hun, 471, 17 N. Y. Supp. 3 (1891).

<sup>13a</sup> Gen. Corp. L. § 22 (L. 1911, c. 771): "nor shall any such corporation, except an express company having contracts with railroad companies for the operation of an express service upon the lines of such railroad companies, or a transatlantic steamship company, or a tele-

“ . . . when a corporation opens an account with a banking institution it confers upon that institution the power to determine whether any check drawn upon the account conforms to the contract between the depositor and the depository. When it makes a mistake in the determination of such a question the depository may be liable to the depositor; but the depositor cannot recover back the money paid on such check to a third person who has received it in good faith, relying on the representation of the deposit bank that the check was all right and has subsequently parted with the money.”<sup>14</sup> If one taking a corporation’s note assumes the legality of its negotiation, he is protected, even though he made no inquiry, if, on the question of its authorization coming up, it develops that there was authority.<sup>15</sup> One dealing, by taking its notes, with a railroad company which has a right to, and ordinarily does, pay its president a salary need not, in order to ascertain if the salary is legally payable, go beyond an assertion by its directors in a resolution that the corporation was indebted to the president for salary, and authorizing the issue of notes to pay it.<sup>16</sup> A corporation at the request of the president of which and for the alleged benefit of which a note on which it was the last indorser is discounted is liable on its endorsement in the absence of knowledge by the discounteer that the proceeds were to be used otherwise than for the corporation’s benefit.<sup>17</sup>

**§ 424. Id.: Accommodation Paper.**—The powers and duties of corporate officers with respect to accommodation paper of their corporation have already been discussed.<sup>18</sup> A domestic manufacturing corporation, or its treasurer, has no power to make or indorse notes for the accommodation of others, and

graph company, or a corporation incorporated prior to the year eighteen hundred and fifty, to promote the welfare of emigrants, possess the power of receiving money for transmission or of transmitting the same, by draft, traveler’s check, money order or otherwise.”

<sup>14</sup> *Havana C. R. R. Co. v. Knickerbocker T. Co.*, 198 N. Y. 422, L.R.A. 1915B, 720, 92 N. E. 12 (1910). The A. corporation deposited money with the B. bank to be drawn by cheques signed a certain way by its treasurer who drew amounts by cheques signed in that way but to his own individual order and deposited them with the C.

bank, which presented them for payment to the B. bank and then let the treasurer draw out such sums from his individual account with it.

<sup>15</sup> *Wilson v. Metropolitan Elevated Ry. Co.*, 120 N. Y. 145, 24 N. E. 384 (1890).

<sup>16</sup> *Wilson v. Metropolitan Elevated Ry. Co.*, 120 N. Y. 145, 24 N. E. 384 (1890).

<sup>17</sup> *Orvis v. Warner & Co.*, 75 A. D. 463, 78 N. Y. Supp. 328 (1902).

On liability of corporation on negotiable paper executed by officer or agent, see note in 21 L.R.A. (N.S.) 1046.

<sup>18</sup> See § 329 *et seq.*, *supra*.

is not in general liable thereon.<sup>19</sup> Endorsements for accommodation are *ultra vires* a corporation.<sup>20</sup> An accommodation endorsement by a corporation, not authorized by its charter, is *ultra vires* and void.<sup>1</sup> "So far as we know no corporations organized under the statutes of this State are authorized to bind the property of their shareholders by accommodation indorsements, except corporations organized under the statutes providing for the incorporation of guaranty and indemnity companies, and we know of no statute authorizing such corporations to make accommodation indorsements without receiving a valuable consideration."<sup>2</sup> ". . . a corporation cannot become surety, either as an accommodation indorser, or in any other form, unless the note has been discounted in good faith, in consequence of representations made by its proper officers that it was their own note, (the note of the corporation), or unless it has passed into the hands of a *bona fide* holder without notice, who has paid valuable consideration for it."<sup>3</sup> The power to issue accommodation paper "is not incidental to the powers expressly conferred on corporations organized under statutes authorizing the formation of corporations for banking, insuring, manufacturing and like business corporations."<sup>4</sup> A manufacturing corporation has no power to bind itself as an accommodation party to negotiable paper and the burden is not upon it to show that one accepting the paper knew of its accommodation character, but is rather upon the acceptor to show its character as holder for value and its ignorance of the accommodation character of the paper.<sup>5</sup> A corporation empowered by its board of directors to issue promissory notes signed or endorsed by its president to transact its authorized business cannot bind itself by making or endorsing promissory notes for the accommodation of the makers, for a consideration paid.<sup>6</sup> Although as a rule corporations cannot bind themselves as accommodation

<sup>19</sup> *Jacobs v. Jamestown Mantel Co.*, 211 N. Y. 154, 105 N. E. 210 (1914).

<sup>20</sup> *A. D. Farmer & Son Co. v. Humboldt Publishing Co.*, 27 Misc. 314, 57 N. Y. Supp. 821 (1899).

<sup>1</sup> *Carlaftes v. Goldmeyer Co.*, 72 Misc. 75, 129 N. Y. Supp. 396 (1911).

<sup>2</sup> *Fox v. Rural Home Co.*, 90 Hun, 365, 35 N. Y. Supp. 896 (1895); *aff'd* 157 N. Y. 684, 51 N. E. 1090.

<sup>3</sup> *Bridgeport City Bank v. Empire*

*Stone Dressing Co.*, 30 Barb. 421 (1859).

<sup>4</sup> *National Park B'k v. German-American Mutual W. & S. Co.*, 116 N. Y. 281, 5 L.R.A. 673, 22 N. E. 567 (1889).

<sup>5</sup> *National Bank of Newport v. Snyder Mfg. Co.*, 117 A. D. 370, 102 N. Y. Supp. 478 (1907).

<sup>6</sup> *National Park B'k v. German-American Mutual W. & S. Co.*, 116 N. Y. 281, 5 L.R.A. 673, 22 N. E. 567 (1889).

parties and a holder of a note to which they are such parties must show he became such for value and without notice of the accommodation, yet they are bound if the note was given for a valuable consideration.<sup>7</sup> The knowledge of one of three members of the investment committee of a trust company, acting entirely in his individual capacity or as an officer of another corporation, that a note of a third party, which he presented to the trust company for discount and which it discounted, was an accommodation note, is not imputable to the trust company.<sup>8</sup>

§ 425. **Id.: Torts, Nuisance.**—The State cannot bring in equity, under the common-law, a suit to abate a public nuisance by a corporation in the State's highways, even though it involve the public safety or convenience, when the matter can be dealt with effectually by the local authorities to whom the State has delegated a portion of its authority (although otherwise perhaps it might); nor can the State bring an action against *a corporation* for such a nuisance under a statute permitting an action against *persons acting as a corporation* without being duly incorporated or exercising corporate powers not granted by law.<sup>9</sup> It is no bar to the maintenance by one of an action against a corporation to abate a nuisance by it that he is a stockholder and director in it unless he actually co-operated with others to cause the nuisance.<sup>10</sup> “Where franchises are conferred upon a corporation the terms of the statute giving the authority are not necessarily imperative or permissive, and the mere fact of the delegation of the right to manufacture does not confer a license to commit a nuisance, although what is contemplated by the statute cannot be done without it.”<sup>11</sup> A railroad corporation is as liable for a nuisance committed by it as is an individual.<sup>12</sup>

§ 426. **Id.: Libel and Slander.**—“A corporation may sue for a libel upon it as distinct from a libel upon its individual members, and a corporation engaged in business may maintain an action for libel upon such business without proof of special

<sup>7</sup> Durbrow v. Swedish Iron & Steel Corporation, 95 Misc. 160, 158 N. Y. Supp. 701 (1916), Sup. Ct. App. T.

<sup>8</sup> Jacobus v. Jamestown Mantel Co., 211 N. Y. 154, 105 N. E. 210 (1914).

<sup>9</sup> People v. Equity Gas Light Co., 141 N. Y. 232, 36 N. E. 194 (1894); C. C. P. § 1948.

<sup>10</sup> Leonard v. Spencer, 108 N. Y. 338, 15 N. E. 397 (1888).

<sup>11</sup> Rosenheimer v. Standard Gas Light Co., 36 A. D. 1, 55 N. Y. Supp. 192 (1898).

<sup>12</sup> First Baptist Church in Schenectady v. Troy R. R. Co., 5 Barb. 79 (1848).

damage where the language used concerning it is defamatory in itself and injuriously and directly affects its credit and necessarily and directly occasions pecuniary injury"; but "it cannot maintain an action for slander or libel upon words spoken or published solely of and concerning its officers or stockholders."<sup>13</sup> " . . . a corporation engaged in business may maintain an action for libel without allegation and proof of special damage, where the language used concerning it is defamatory in itself and injuriously and directly affects its credit and necessarily and directly occasions pecuniary injury"; but a corporation "having no character to be affected by libel and no feelings to be injured, to be libelous *per se* the article must be such as directly to affect the credit or property of the corporation and to occasion it pecuniary injury, and unless such is the necessary result of the publication, to sustain the action the corporation must allege special damage."<sup>14</sup> "The true rule . . . is that a corporation is liable for torts committed by its officers or agents when acting within the actual or implied scope of their employment, or by ratification may become responsible for such acts when committed in excess of their authority. Within the content of this rule a corporation may be held liable for a slander."<sup>15</sup> A corporation may legally be sued for tortious slander of another corporation's business; and it is proper to state the acts complained of as being those of the corporation itself.<sup>16</sup> A corporation is not liable for a libel written on its letter by an attorney employed by trustees to whom the corporate property has been transferred under a statute permitting this and their continuance of its business.<sup>17</sup> The dictation by the general manager of a corporation to a stenographer of the corporation of a libelous letter which is sent by mail after transcription by the stenographer and signature by the manager to the addressee, who is the person suing for the libel, is not a publication of the libel.<sup>18</sup> In a complaint against a corporation for slander it is not necessary to allege that a duly

<sup>13</sup> *Hapgoods v. Crawford*, 125 A. D. 856, 110 N. Y. Supp. 122 (1908).

<sup>14</sup> *Kemble Mills, Inc., v. Kaighn*, 131 A. D. 63, 115 N. Y. Supp. 809 (1909).

<sup>15</sup> *Kharas v. Collier, Inc.*, 171 A. D. 388, 157 N. Y. Supp. 410 (1916); overruling *Eichner v. Bowery Bank*, 24 A. D. 63, 48 N. Y. Supp. 978.

<sup>16</sup> *Lubricating Oil Co. v. Standard Oil Co.*, 42 Hun, 153 (1886).

<sup>17</sup> *Thompson v. American Optical Co.*, 173 A. D. 123, 159 N. Y. Supp. 412 (1916).

<sup>18</sup> *Owen v. Ogilvie Publishing Co.*, 32 A. D. 465, 53 N. Y. Supp. 1033 (1898).

authorized agent of the corporation uttered the defamatory words or that the corporation authorized, ratified or instigated the speaking of the slanderous words, as "the ultimate facts are to be pleaded and not the evidence that would tend to substantiate those facts."<sup>19</sup> An answer by a corporation to a verified complaint for libel need not be verified if it contain a general denial.<sup>20</sup>

**§ 427. Id.: Trespass.**—A private corporation is liable in damages for trespass to an individual on whose land water backs up from an insufficient dam built by it; and it cannot (as could a public corporation) acquire the right to maintain the dam, as by payment of compensation after condemnation.<sup>1</sup>

**§ 428. Id.: False Representation.**—Causes of action against a corporation arising from false representations contained in a prospectus issued by it are assignable so that the assignee may join them all in one complaint.<sup>2</sup> A corporation is chargeable with liability for false representations contained in a prospectus issued by it.<sup>3</sup>

**§ 429. Id.: Malicious Prosecution.**—There is no reason why in a proper case an action should not be brought against a corporation to recover damages for the malicious prosecution of a civil action.<sup>4</sup> A corporation may be held liable in a proper case for malicious prosecution.<sup>5</sup> The president of a corporation which is sued for malicious prosecution should be permitted to testify as to the intent or motive that characterized the transaction directed or guided by him on behalf of the corporation.<sup>6</sup>

<sup>19</sup> *Kharas v. Collier, Inc.*, 171 A. D. 388, 157 N. Y. Supp. 410 (1916).

<sup>20</sup> *Batterman v. Journal Co.*, 28 Misc. 375, 59 N. Y. Supp. 965 (1899).

On the question of liability of a corporation for slander by an agent or employee, see notes in 9 L.R.A.(N.S.) 929, 21 L.R.A.(N.S.) 873, and L.R.A.1916E, 774.

<sup>1</sup> *Brown v. Ontario Tale Co.*, 81 A. D. 273, 80 N. Y. Supp. 837 (1903); C. C. P. §§ 3357-3384.

<sup>2</sup> *Benedict v. Guardian Trust Co.*, 58 A. D. 302, 68 N. Y. Supp. 1082 (1901); C. C. P. §§ 1910, 484, 3343, subd. 10.

<sup>3</sup> *Benedict v. Guardian Trust Co.*, 58 A. D. 302, 68 N. Y. Supp. 1082 (1901).

<sup>4</sup> *Willard v. Holmes, Booth & Haydens*, 142 N. Y. 492, 37 N. E. 480 (1894).

<sup>5</sup> *Morton v. Metropolitan Life Ins. Co.*, 34 Hun, 366 (1884); aff'd 103 N. Y. 645.

<sup>6</sup> *Schwartz v. Van Wie N. Y. Grocery Co.*, 60 A. D. 475, 69 N. Y. Supp. 978 (1901).

On liability of corporation for exemplary damages in action for malicious prosecution or abuse of process in suing out attachment for collection of debt only, see note in 29 L.R.A.(N.S.) 280.

**§ 430. Id.: Crimes and Contempt.**—A corporation cannot be held liable for the crime of manslaughter in New York.<sup>7</sup> A corporation may be fined as punishment for a civil contempt of court as defined by statute.<sup>8</sup> A corporation directed by judgment in an action to which it is a party to pay over to receiver in sequestration proceedings may be punished for contempt, and its president also, if it refuse to make such payment, even though it may have been adjudicated bankrupt prior to the rendition of such judgment, if it did not plead its discharge in bankruptcy.<sup>9</sup>

**§ 431. Id.: Annual Report.**—Every domestic corporation (except moneyed and railroad corporations) must (1) annually (2) during the month of January (unless doing business without the United States when the time is before the first day of May), (3) make a report (4) as of the first day of January stating: (a) The amount of its capital stock, (b) the proportion of its capital stock actually issued, (c) the amount of its debts or an amount which they do not exceed, (d) the amount of its assets or an amount which its assets at least equal, (e) the names of all the directors and officers of the company, and (f) the addresses of all the directors and officers of the company; (5) made by the president or a vice-president or the treasurer or a secretary of the corporation; and (6) filed in the office of the Secretary of State.<sup>10</sup> Under a statute requiring the filing of a corporation's report "as of the first day of January," it is not required to state literally, in the precise words of the statute, that the report is made as of the first day of January, but the statute is complied with when, by fair intendment, the report speaks as of the prescribed date.<sup>11</sup> The requirement, under a former statute, of annual filing of a report by every corporation has no application to a company practically abandoned and broken up, even though not technically dissolved.<sup>12</sup> A corporate annual report signed by the corporation's president and actually verified

<sup>7</sup> *People v. Rochester Railway & Light Co.*, 59 Misc. 347, 112 N. Y. Supp. 362; *aff'd* 129 A. D. 843, 144 N. Y. Supp. 755.

<sup>8</sup> C. C. P. § 2284.

<sup>9</sup> *Schreiber v. Garden*, 152 A. D. 817, 137 N. Y. Supp. 747 (1912).

On criminal prosecution of corporation for acts or omissions while in hands of receiver, see note in 26 L.R.A.(N.S.) 710.

<sup>10</sup> St. Corp. L. § 34 (L. 1909, c. 61).

<sup>11</sup> *American Grocery Co. v. Pratt*, 36 A. D. 152, 55 N. Y. Supp. 467 (1899); *aff'd* 161 N. Y. 649, 57 N. E. 1103; L. 1892, c. 688, § 30. See now St. Corp. L. § 34.

<sup>12</sup> *Losee v. Bullard*, 79 N. Y. 404 (1880); L. 1848, c. 40, § 12. See now St. Corp. L. § 34.

before a proper officer complies with the statute.<sup>13</sup> Decisions under former statutes requiring and regulating the filing of annual reports of corporations are collated in the note.<sup>14</sup>

<sup>13</sup> *Bonnell v. Griswold*, 80 N. Y. 128 (1880); *Gen. Mfg. Act*, L. 1848, c. 40. See now *St. Corp. L.* § 34.

<sup>14</sup> A corporation need file no annual report when no acts other than formal ones were performed by it in furtherance of the objects of its organization and "it never got into business;" so that its trustees cannot be held liable for its debts for failure to file such a report. *Kirkland v. Kille*, 99 N. Y. 390, 2 N. E. 36 (1885); *Gen. Mfg. Act*, L. 1848, c. 40, § 12. "When the condition of the company is such that the end and object for which it was formed are destroyed and there is neither an ability or intention on its part at any time to further prosecute its business, it is no longer required to make the report mentioned in section 12 of the Manufacturing Act." *First Nat. Bank of Jersey City v. Lamont*, 130 N. Y. 366, 29 N. E. 321 (1891); *Gen. Mfg. Act*, § 12 (L. 1848, c. 40). The statute requiring the filing annually by corporations of a capital stock report, being penal in its nature, must not be enlarged by construction; so long as the report be in form a complete compliance with the statute it need not specify how much of the stock was paid for in cash and how much in property; and its failure so to do will not subject the trustees to liability for its debts. *Whitaker v. Masterton*, 106 N. Y. 277, 12 N. E. 604 (1887); *Gen. Mfg. Act*, L. 1848, c. 40, § 12, L. 1853, c. 333, § 2. The statutory requirement that every manufacturing corporation file a report of the amount of its capital stock paid in "within twenty days from the first day of January" does not mean "that the section may be complied with by making a report within twenty days before or after the first day of January;" but only *after*. *Cincinnati Cooperage Co. v.*

*O'Keefe*, 120 N. Y. 603, 24 N. E. 993 (1890); *Gen. Mfg. Act*, L. 1848, c. 40, § 12. The statutory annual report required to be made by a corporation need only be prepared, signed and verified within the twenty days from the first of each year; and may be filed or published within any reasonable time after such twenty days. *Cameron v. Seaman*, 69 N. Y. 396 (1877); L. 1848, c. 40, § 12. The requirement of statute that stock issued for property shall not be stated in a corporation's annual report as being issued for cash but according to the fact is directory only, subjecting one disobeying it to no penalty; and no penalty elsewhere prescribed can be made applicable on its violation. *Bonnell v. Griswold*, 80 N. Y. 128 (1880); *Gen. Mfg. Act*, L. 1853, c. 333, § 2. A corporate annual report which states the capital stock of the company and "that it has been paid up in full" is the same as if it said that the capital has been paid in, and satisfies the statute. *Bonnell v. Griswold*, 80 N. Y. 128 (1880); *Gen. Mfg. Act*, L. 1848, c. 40, § 12. A statute requiring a stock corporation annually to make a capital stock report "verified by the oath of the president or vice-president and treasurer or secretary" calls for verification by either the president or vice-president with either the treasurer or secretary. *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, 58 N. E. 790 (1900); L. 1892, c. 2, § 30. A corporate report required by statute to be verified by the president or vice-president and treasurer or secretary is properly verified by the president alone without stating that he signs it also as other officers whose positions he also occupies as the *de facto* incumbent. *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, 58 N. E. 790 (1900); L.

**§ 432. Id.: Political Contributions.**—The liability of directors and officers of a corporation for political contributions has been heretofore discussed.<sup>15</sup> No corporation doing business in

1892, c. 2, § 30. The duty imposed by statute upon manufacturing corporations to make a report is a corporate duty to be discharged by making a report signed by the president and a majority of the trustees. *Cornell v. Roach*, 101 N. Y. 373, 5 N. E. 52 (1886); *Gen. Mfg. Act*, L. 1848, c. 40, § 12. An annual report of a corporation verified solely by its president as such is sufficient if prior to the time when it was made the person who was treasurer and secretary had resigned, though his resignation was not formally accepted till after that date; and if, further, the president since such other's resignation had exercised the duties of secretary and treasurer pursuant to the by-laws. *Noble v. Euler*, 20 A. D. 548, 47 N. Y. Supp. 302 (1897); *St. Corp. L. § 30* (L. 1892, c. 688). When by statute a corporate report must be made and verified in duplicate and filed both with the Secretary of State and the County Clerk, the fact that one of the duplicates filed with one of such officials is verified while the other is not does not make the verification insufficient. *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, 58 N. E. 790 (1900); L. 1892, c. 2, § 30. If no newspaper is published in the place named in a corporation's certificate of incorporation as that where its operations are to be carried on, and it has, therefore, to publish its annual report, according to the statute "in some newspaper published nearest the place where the business of the company was carried on," it is not essential that it be published in a newspaper of the village in that town if a village in another town is equally near, as a publication in a paper in the latter village is sufficient. *Cameron v. Seaman*, 69 N. Y. 396 (1877); L. 1848, c. 40,

§ 12. (The company's mines and operations were in the village of East Fishkill. No newspaper was there published, but one was published in the village of Fishkill, in the town of Fishkill, adjoining the village of East Fishkill, and another in Poughkeepsie, to which one part of East Fishkill was nearer than to Fishkill village. A publication in the newspaper either in Poughkeepsie or Fishkill village is sufficient.) The continuance of the default to file a corporate report in successive years does not have the effect of renewing the liability of the corporation's trustees for its debts so as to make them liable for a period longer than three years after the first default happened. *Losee v. Bullard*, 79 N. Y. 404 (1880); L. 1848, c. 40, § 12. "When, in an action to recover a statutory penalty for failure to file a report and for filing a false report, the plaintiff dies after judgment and during the pendency of the appeal, and judgment is affirmed without knowledge of plaintiff's death, substitution, on motion, of plaintiff's personal representative will be made on the ground that the cause of action after judgment is merged in the judgment, which itself may be assigned, and passes as assets to the representatives of a deceased party." *Blake v. Griswold*, 104 N. Y. 613, 11 N. E. 137 (1887). An annual report which states that its assets do not exceed a certain sum is not equivalent to a statement that the assets at least amount to such a sum, and directors filing it are equally as liable as if they had not filed any report. *Lilienthal v. Batz*, 61 A. D. 601 (1901); *aff'd* 172 N. Y. 643; *St. Corp. § 30* (L. 1892, c. 688).

<sup>15</sup> See §§ 300, 336, *supra*.

New York State except one organized or maintained for political purposes only must directly or indirectly pay or use, or offer, consent or agree to pay or use any money or property for or in aid of any political party, committee or organization, or for or in aid of any corporation, joint-stock company or other association organized or maintained for political purposes, or for or in aid of any candidate for political office or for nomination for such office, or for any political purpose whatever, or for the reimbursement or indemnification of any person for moneys or property so used; and no person is excused from attending and testifying, or producing any books, papers or other documents before any court or magistrate upon any investigation, proceeding or trial for a violation of this prohibition upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to convict him of a crime or to subject him to a penalty or forfeiture; but no person must be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced must be received against him upon any criminal investigation or proceeding.<sup>16</sup>

§ 433. **Id.: Practising Law, and Medicine.**—In considering the statutes prohibiting corporations from practising law and doing things incidental thereto, it must be borne in mind that the prohibitions do not apply to any corporation lawfully engaged in a business authorized by the provisions of any existing statute, nor to a corporation lawfully engaged in the examination and insuring of titles to real property; nor do they prohibit a corporation from employing an attorney or attorneys in and about its own immediate affairs or in any litigation to which it is or may be a party; nor do they apply to any corporation organized for benevolent or charitable purposes or for the purpose of assisting persons without means in the pursuit of any civil remedy when such corporation's incorporation is approved by the Appellate Division of the Supreme Court of the department in which the principal office of such corporation may be located; nor do such prohibitions prevent a corporation from furnishing to any person lawfully engaged in the practice of the law such information or clerical services in and about his professional work as, except for such prohibitions, may be lawful — provided that at all times the

<sup>16</sup> Gen. Corp. L. § 44 (L. 1909, c. 28).

lawyer receiving such information or such services maintain full professional and direct responsibility to his clients for the information and services so rendered; but no corporation is permitted to render any services which cannot lawfully be rendered by a person not admitted to practice law in New York State nor to solicit directly or indirectly professional employment for a lawyer.<sup>17</sup> A corporation engaged in the business of conducting litigation and providing counsel therefor must not directly or indirectly buy or be in any manner interested in buying a bond, promissory note, bill of exchange, book-debt or other thing in action with the intent and for the purpose of bringing an action thereon, or by itself or in the name of another person either before or after action brought promise or give or procure to be promised or given a valuable consideration to any person as an inducement to placing or in consideration of having placed in its hands or the hands of another person a demand of any kind for the purpose of bringing an action thereon or of representing the claimant in the pursuit of any civil remedy for the recovery thereof (except an agreement to divide compensation to be received); and a corporation which violates these prohibitions is guilty of a misdemeanor and on conviction thereof must be punished accordingly; but these prohibitions do not prohibit the receipt of a bond, promissory note, bill of exchange, book-debt or other thing in action in payment for property sold or for services actually rendered or for a debt antecedently contracted, or from buying or receiving a bill of exchange, draft or other thing in action for the purposes of remittance and without intent to violate these prohibitions.<sup>18</sup>

No corporation can be organized or created under the provisions of the Business Corporations Law for the purpose or purposes of conducting any branch of the practice of law or of retaining or employing an attorney or attorneys to furnish legal advice, draw legal papers or perform legal services of any kind or description, either directly for the person, persons or corporation for whose use such services are rendered or for the corporation retaining such attorney in compliance with any contract of employment of the corporation or of the attorney made by the corporation with any other person, persons or corporation; and the statement of the purpose or purposes of a corporation in any certificate filed under the provisions of the Business Corporations Law, in whatsoever language set forth, must not be held or construed to confer on

<sup>17</sup> Penal L. § 280 (L. 1916, c. 254).      <sup>18</sup> C. C. P. §§ 73, 74, 75, 76, 77.

the corporation the power to transact any law business, as a purpose for which the creation of a corporation under the Business Corporations Law is prohibited, and particularly when the stated objects of a corporation include the collection of debts or accounts, in words or substance, they must not be construed to include the employment or furnishing of attorneys to prosecute any action or pursue any legal or equitable remedy in aid of such collections.<sup>19</sup>

It is unlawful for any corporation to practice or appear as an attorney-at-law for any person other than itself in any court of New York State or before any judicial body, or to make it a business to practice as an attorney-at-law for any person other than itself in any of the courts of New York State, or to hold itself out to the public as being entitled to practice law or render or furnish legal services or advice or to furnish attorneys or counsel or to render legal services of any kind in actions or proceedings of any nature or in any other way or manner, or in any other manner to assume to be entitled to practice law or to assume, use or advertise the title of lawyer or attorney, attorney-at-law, or equivalent terms in any language in such manner as to convey the impression that it is entitled to practice law or to furnish legal advice, services or counsel, or to advertise that either alone or together with or by or through any person whether a duly and regularly admitted attorney-at-law, or not, it has, owns, conducts or maintains a law office or an office for the practice of law or for furnishing legal advice, services or counsel.<sup>20</sup> It is unlawful further for any corporation to solicit itself or by or through its officers, agents or employees any claim or demand for the purpose of bringing an action thereon or of representing as attorney-at-law or for furnishing legal advice, services or counsel to a person sued or about to be sued in any action or proceeding or against whom an action or proceeding has been or is about to be brought, or who may be affected by any action or proceeding which has been or may be instituted in any court or before any judicial body, or for the purpose of so representing any person in the pursuit of any civil remedy.<sup>1</sup> Any corporation violating the statutory prohibitions given in the last two sentences is liable to a fine of not more than five thousand dollars.<sup>2</sup> The fact that an officer, director, trustee,

<sup>19</sup> Bus. Corp. L. § 2 (L. 1909, c. 484).

<sup>20</sup> Penal L. § 280 (L. 1916, c. 254).

<sup>1</sup> Penal L. § 280 (L. 1916, c. 254).

<sup>2</sup> Penal L. § 280 (L. 1916, c. 254);  
“and every officer, trustee, director,

agent or employee of such corporation . . . who directly or indirectly engages in any of the acts herein prohibited or assists such corporation . . . to do such prohibited acts is guilty of a misde-

agent or employee of the corporation is a duly and regularly admitted attorney-at-law is not held to permit or allow the corporation to do the acts prohibited.<sup>3</sup>

" . . . it is unlawful for a corporation, whether domestic or foreign, to practice law in this State."<sup>4</sup> The statutory permission that "three or more persons may become a stock corporation for any lawful business" looks to "a business lawful to all who wish to engage in it;" and does not permit a corporation to practice law.<sup>5</sup> The statute prohibiting a corporation from rendering legal services embraces other services than those connected with litigation.<sup>6</sup> If services of a legal nature are rendered by an attorney to anyone because employed by a corporation, that corporation is practising law.<sup>7</sup> "The vice is that the employee of the corporation, serving it for pay, owes his duty to the corporation. As he cannot serve two masters, so he cannot serve both the client and his corporation employer."<sup>8</sup> An agreement of retainer of a corporation to represent an individual in legal proceedings and to furnish legal services therein is illegal on its face.<sup>9</sup> A contract by a corporation with an individual to undertake legal proceedings on his behalf is illegal, as is its contract with a lawyer to conduct such litigations; but this will not avail the lawyer in an action by the corporation against him for an accounting of moneys advanced to him by the corporation and collections made by him for it in such proceedings.<sup>10</sup> Preparation of papers requisite to incorporation

meanor. The fact that such officer, trustee, director, agent or employee shall be a duly and regularly admitted attorney-at-law, shall not . . . be a defense upon the trial of any of the persons mentioned herein for a violation of the provisions of this section."

<sup>3</sup> Penal L. § 280 (L. 1916, c. 254).

<sup>4</sup> Matter of Pace, 170 A. D. 818, 156 N. Y. Supp. 641 (1915); Penal L. § 280.

<sup>5</sup> Matter of Co-operative Law Co., 198 N. Y. 479, 32 L.R.A.(N.S.) 55, 92 N. E. 15 (1910); Bus. Corp. L. § 2; decided under facts not controlled by L. 1909, c. 483.

<sup>6</sup> People v. Title Guarantee & Trust Co., — A. D. — (1917), N. Y. L. J. Dec. 22, 2d Dept.; Penal L. § 280. Employee of corporation drew a bill of sale and chattel mort-

gage and it was held to be practising law.

<sup>7</sup> People v. People's Trust Co., — A. D. — (1917), N. Y. L. J. Dec. 14; Penal L. § 280.

<sup>8</sup> People v. Title Guarantee & Trust Co., — A. D. — (1917), N. Y. L. J. Dec. 22, 2d Dept., 1 Penal L. § 280. But see Snow, Church & Co. v. Hall, 19 Misc. 655, 44 N. Y. Supp. 427 (1897). "While it is true that a corporation as such cannot practice law, it is within the scope of its powers to employ lawyers to conduct suits upon claims placed with it for collection, the same as any unincorporated agency might."

<sup>9</sup> Matter of City of New York (Avenue A, etc.), 144 A. D. 107, 128 N. Y. Supp. 999 (1911).

<sup>10</sup> United States Title Guarantee Co. v. Brown, 166 A. D. 688, 152

and the incidental advice necessarily given in connection therewith constitute practice of the law so as to make a corporation guilty thereof come within the statutory prohibition against practice of law by corporations.<sup>11</sup> A corporation cannot legally render the services incident to representing a creditor and enforcing his claim in bankruptcy matters, as this is practicing law.<sup>12</sup> The business of reducing real estate tax assessments contemplates and necessarily includes the practice of law and cannot be done by a corporation.<sup>13</sup> A corporation holding itself out to the public and assuming to discharge the same duties as an individual conveyancer or attorney has the same duties and responsibilities in such transactions as an individual.<sup>14</sup>

A corporation not organized as a hospital, dispensary or similar corporate body is a "person" within the meaning of a statute prohibiting any person not a registered physician from advertising to practice medicine.<sup>15</sup>

**§ 434. Id.: Liability for Others, Acts, In General.**—The powers of corporate directors, officers and agents have already been discussed.<sup>16</sup> "The true rule . . . is to hold the corporation liable for negligence or want of proper care in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance."<sup>17</sup> " . . . a corporation is liable for the consequences of its wrongful acts and omissions; and for the acts of its agents while engaged in the business of their agency, to the same extent and under the same circumstances as natural

N. Y. Supp. 470 (1915); *aff'd*, without opinion, 217 N. Y. 628, 111 N. E. 828; Penal L. § 280.

<sup>11</sup> Matter of Pace, 170 A. D. 818, 156 N. Y. Supp. 641 (1915); Penal L. § 280.

<sup>12</sup> Meisel & Co. v. National Jewelers Board of Trade, 90 Misc. 19, 152 N. Y. Supp. 913 (1915); *aff'd* 173 A. D. 889, 157 Supp. 1133; Penal L. § 280.

<sup>13</sup> People *ex rel.* Trojan Realty Corporation v. Purdy, 174 A. D. 702, 162 N. Y. Supp. 56 (1916); Bus. Corp. L. § 2-a (L. 1909, c. 484); Penal L. § 280 (L. 1911, c. 317); People *ex rel.* Floersheimer v. Purdy, 174 A. D. 694, 162 N. Y. Supp. 70.

<sup>14</sup> Ehmer v. Title Guarantee & Trust Co., 156 N. Y. 10, 50 N. E. 420 (1898).

<sup>15</sup> People v. Woodbury Dermatological Inst., 192 N. Y. 454, 85 N. E. 697 (1908); L. 1907, c. 344, § 15; Statutory Construction L. § 5.

On right to practice law or medicine by corporation, see note in 32 L.R.A.(N.S.) 56.

<sup>16</sup> As to directors, see § 284 *et seq.*, *supra*; as to officers, see § 319 *et seq.*, *supra*; as to agent, see § 368, *supra*.

<sup>17</sup> Flike v. Boston & Albany R. R. Co., 53 N. Y. 549 (1873). Agent sent out train with insufficient number of brakemen, and the corporation was held for damages resulting.

persons.”<sup>18</sup> “When an agent or officer of a person or corporation acts within the apparent scope of his authority the principal is estopped from effectually asserting the want of power in the particular case against another who in reliance on such authority has in good faith proceeded upon it and would suffer injury by the repudiation of the act of the agent or officer. In such case the principal is concluded by the representation of the agent as to any extrinsic fact which rests peculiarly within his knowledge, although false, and which is not ascertainable by reference to the power in relation to the act so done by the agent (*citations*). The party thus dealing with an agent is presumed to have ascertained his power, and that his act corresponds with it. He may then take his representation of the fact *dehors* the power unknown to him, although misrepresented by the agent who, by reason of the falsity of the fact, is denied the right to do the act which he assumes to perform as such agent.”<sup>19</sup> “In these days, when corporations may be formed for the transaction of any business, where a party is held out by the corporation as occupying a position to answer for the corporation . . . , the corporation will be bound by any action of his coming within the ordinary executive duties pertaining to the transaction of the business of the corporation; and no resolution of the board of directors will be necessary to clothe with vitality every word that he utters or letter that he writes.”<sup>20</sup> A corporation running a hotel is bound by the acts of its hotel clerk in the usual course of business.<sup>1</sup> “. . . when an agent forms the purpose of dealing with his principal’s property for his own benefit and advantage, or for the benefit and advantage of other persons who are opposed in interest, he ceases in fact to be an agent acting in good faith for his principal, and the presumption that he has disclosed all the facts that have come to his knowledge no longer prevails,” *e. g.*, if a corporate lessee refuses to abide by a lease from a corporate lessor on the ground that the lease was part of a plan to create a monopoly, the knowledge of the lessor’s president of the plan, by reason of his relations with the lessee, is not attributable to the lessor.<sup>2</sup>

<sup>18</sup> Fishkill Savings Institution v. National Bank, 80 N. Y. 162 (1880).

<sup>19</sup> Van Wagenen v. Genesee Falls Sav. Assn., 88 Hun, 43, 34 N. Y. Supp. 491 (1895).

<sup>20</sup> Hall v. Herter Brothers, 90

Hun, 280, 35 N. Y. Supp. 769 (1895); *aff’d* 157 N. Y. 694, 51 N. E. 1091.

<sup>1</sup> Hoffman House v. Jordan, 28 Misc. 193, 58 N. Y. Supp. 1091 (1899).

<sup>2</sup> Brooklyn Distilling Co. v. Stand-

§ 435. **Id.: For Torts Of.**—“ Neither an individual or a corporation, by appointing a general agent, authorizes him to commit a wilful trespass, or to authorize or approve of such a trespass, any more than such authority is conferred by the appointment of a special agent.”<sup>3</sup> A corporation which has put it within the power of its employee—whether he be a general or special agent—to defraud a third person by intermingling fraudulent and genuine bills and collecting money therefrom, should be held responsible to an innocent third party for the employee’s dishonesty, irrespective of whether or not the act of the agent be *ultra vires*.<sup>4</sup> Evidence of declarations and representations of goods sold, made by a superintendent of a corporation, having all the usual powers of a salesman except that of fixing prices, to a purchaser is admissible in an action based on the sale against it.<sup>5</sup> A corporation is bound by the oral representation as to the validity of a mortgage made by its employee who had its written authorization to act for it in the transaction, if the corporation receives the proceeds of the sale in which the representation was made.<sup>6</sup> A corporation is liable for the loss suffered by brokers in making good under a rule of the Stock Exchange their guaranty of an endorsement on a certificate of stock presented to them for sale by an employee of the corporation who had forged the holder’s name and the endorsement thereof if the corporation duly executed the certificate after all its stock had already been issued, knew of the Stock Exchange rule in question, had listed its stock on the Stock Exchange, and assured the brokers prior to their guaranteeing and selling the certificate that the title of the holder was good.<sup>7</sup> When an act causing an injury to an employee is an independent one, and is done by order of a corporation or its *alter ego*, the liability of the corporate employee is settled, particularly when it is within the principle that it owes its

ard Distilling & D. Co., 193 N. Y. 551, 86 N. E. 564 (1908).

On liability of corporation for acts of special police officer appointed by public authority, see notes in 23 L.R.A.(N.S.) 289; 30 L.R.A.(N.S.) 481; 39 L.R.A.(N.S.) 122; 43 L.R.A.(N.S.) 1164, L.R.A. 1915C, 1184.

<sup>3</sup> Vanderbilt v. Richmond Turnpike Co., 2 N. Y. 479 (1849).

<sup>4</sup> Wilderming v. Postal Telegraph-Cable Co., 118 A. D. 685, 103 N. Y.

Supp. 594 (1907); aff’d 192 N. Y. 580, 85 N. E. 1109.

<sup>5</sup> Decker v. Guttå Percha & Rubber Co., 61 Hun, 516, 16 N. Y. Supp. 352 (1891).

<sup>6</sup> Akberg v. John Kress Brewing Co., 65 Hun, 182, 19 N. Y. Supp. 656 (1892); aff’d 138 N. Y. 648, 34 N. E. 513.

<sup>7</sup> Jarvis v. Manhattan Beach Co., 53 Hun, 362, 6 N. Y. Supp. 703 (1889).

servant the duty of furnishing him a safe and proper place to prosecute his work.<sup>8</sup>

**§ 436. Id.: For Contracts By.**—The power of directors, officers and agents of a corporation to bind it by contracts has been previously discussed.<sup>9</sup> In general, a corporation is bound by a contract made by its agent if it appears either from the contract itself or the contract coupled with the conduct of the parties thereto that credit was given not to the agent but to the corporation.<sup>10</sup> “Corporations can act only through their officers and agents; and if a person has been entrusted by the officers to carry on the business, the acts of that person must be deemed to be binding upon the corporation in all cases where the parties dealing with him have not notice or knowledge of his want of actual authority.”<sup>11</sup> Corporations are bound not only by their contracts under their common seal, but by their simple contracts and those resulting from other acts of their officers and agents performed in the discharge of their ordinary duties — the essential point is not the form of the contract but that it should appear that the corporation and not its agent or officer is the contracting party and got the credit.<sup>12</sup> “. . . When officers or other agents contract for a corporation, and have full authority to do so, and the work to be done, or the property purchased, is for the exclusive benefit of the corporation, and that is known at the time of the making of the contract, the agent is not bound personally, unless he binds himself by some particular, personal contract, or fails to make a contract binding upon his principal.”<sup>13</sup> That a check for stock of a corporation made out to its order was deposited to its credit and that it transferred such stock with knowledge of a guaranty thereof by an individual are sufficient facts to justify a holding that the individual guaranteeing the stock and who sold it was acting for the corporation so as to make it liable on the guaranty.<sup>14</sup> An individual cannot hold a corporation liable for

<sup>8</sup> *Tendrup v. John Stephenson Co.*, 51 Hun, 462, 3 N. Y. Supp. 882; *aff'd* 121 N. Y. 681, 24 N. E. 1097.

<sup>9</sup> As to directors, see § 285 *et seq.*, *supra*; as to officers, see § 322 *et seq.*, *supra*; as to agents, see §§ 366, 367, *supra*.

<sup>10</sup> *Lake Shore National Bank v. Butler Colliery Co.*, 51 Hun, 63, 3 N. Y. Supp. 771 (1889).

<sup>11</sup> *Craig Medicine Co. v. Merchants' Bank*, 59 Hun, 561, 14 N. Y. Supp. 16 (1891).

<sup>12</sup> *Watson v. Bennett*, 12 Barb. 196 (1851).

<sup>13</sup> *Bellinger v. Bentley*, 1 Hun, 562 (1874). One of those contracting with the corporation was a stockholder therein.

<sup>14</sup> *Malcomson v. Monaton Realty Investing Corporation*, 154 A. D. 694, 139 N. Y. Supp. 405 (1913); *aff'd* 214 N. Y. 677, 108 N. E. 1100.

breach of an alleged contract that he should be employed by another corporation to be formed, partly through his efforts, if the ground of his claim is simply the promise by the former corporation's president that he should be so employed in the event that such corporation should take up through the corporation to be formed the business contemplated for it, and it did not do so, although some of its stockholders did go into a new corporation organized to do such business, with which, however, the individual in question had nothing to do.<sup>15</sup> A corporation is bound by an agreement made by its claim agent with one injured through its negligence to employ him for life in consideration of his releasing it from liability if the evidence justifies the inference the corporation's officers knew of the agreement and did not repudiate it.<sup>16</sup> In the absence of proof to show what the duties are of one who is "general manager" of a corporation for manufacturing and selling alcohol, a contract signed by him as such imports simply that he is a general executive officer for all the *ordinary* business of the corporation and does not bind the corporation to the purchase of an automobile.<sup>17</sup> A traveling salesman of a corporation has no authority to make an agreement for the giving of commissions binding on it.<sup>18</sup> The question whether a contract, signed in the name of an individual followed by the words "Mgr." of a corporation, which does not in terms purport to be that of the corporation but refers to its subject matter as "our advertisement" and states "we will pay" the price named, is that of the corporation or not is ordinarily for the jury to determine.<sup>19</sup>

**§ 437. Id.: For Crimes By.**—A corporation is liable not only for a libel but for punitive damages therefor if written in its name by an employee having the general management and exclusive control for it of all that department of its business in the management of which and as part of which management the letter containing the libel was written.<sup>20</sup> "An individual cannot hold a corporation for false imprisonment on a warrant issued by a police magistrate in part reliance on

<sup>15</sup> Flaherty v. Murray, 60 A. D. 92, 69 N. Y. Supp. 675 (1901); *dism'd* 172 N. Y. 646, 65 N. E. 1116.

<sup>16</sup> Montevil v. American Locomotive Co., 173 A. D. 387, 159 N. Y. Supp. 21 (1916).

<sup>17</sup> Studebaker Bros. Co. v. Rose Co., 65 Misc. 322, 119 N. Y. Supp. 970 (1909).

<sup>18</sup> Jones v. Keeler, 40 Misc. 221, 81 N. Y. Supp. 648 (1903).

<sup>19</sup> Conant v. American Rubber Tire Co., 48 A. D. 327, 62 N. Y. Supp. 974.

<sup>20</sup> Rose v. Imperial Engine Co., 127 A. D. 885, 112 N. Y. Supp. 8 (1908); *aff'd* 195 N. Y. 515, 88 N. E. 1130.

the affidavit of the corporation's superintendent."<sup>1</sup> A corporation is responsible for the act of its agent within the general scope of the matter intrusted to him, even if unlawful, *e. g.*, his attempt to bribe a witness on the other side of an action against the corporation; and no proof of a corporate act expressly authorizing the act is needed to make the corporation liable.<sup>2</sup>

**§ 438. Id.: When Corporation Retains Benefit of.**—“ . . . . Where persons, either officers in fact or agents, assume to act in behalf of a corporation, employ a person to perform a service for the corporation, and it is performed with a knowledge of the directors and principal officers of the corporation, and such corporation receives the benefit of such service without objection, the corporation is liable under an implied assumption.”<sup>3</sup> A corporation is bound by a four-months' oral lease made by its manager who had general control of its business and of the benefits of which it availed itself.<sup>4</sup> An agreement by an officer or agent of a corporation who assumes to act in its behalf may be enforced against it when it has received the benefit of the agreement although it could not have been enforced had it been wholly executory because of lack of authority in the officer or agent to execute the agreement.<sup>5</sup>

**§ 439. Id.: Actions By and Against Corporations, Governing Statutes.**—All corporations have the right to sue and are subject to be sued in all courts in like cases as natural persons.<sup>6</sup> An action for the determination of a claim to real property may be maintained as prescribed by the statute by or against a corporation as if it was a natural person.<sup>7</sup> A domestic corporation which would have been liable to an action in favor of a decedent by reason of its wrongful act, neglect or default if death had not ensued, is liable to an action by his

<sup>1</sup> Lubliner v. Tiffany & Co., 54 A. D. 326, 66 N. Y. Supp. 659 (1900).

<sup>2</sup> Nowack v. Metropolitan St. Ry. Co., 166 N. Y. 433, 54 L.R.A. 592, 60 N. E. 32 (1901).

The question as to whether a corporation may be convicted of homicide, is discussed in notes in 21 L.R.A.(N.S.) 998 and 45 L.R.A.(N.S.) 344.

On criminal responsibility of corporation for acts of servant or agent, see note in 43 L.R.A.(N.S.) 40.

<sup>3</sup> Prindle v. Washington Life Ins. Co., 73 Hun, 448, 26 N. Y. Supp. 474 (1893); *aff'd* 149 N. Y. 614, 43 N. E. 1124. Retainer of attorney.

<sup>4</sup> William Wicke Co. v. Kaldenberg Mfg. Co., 21 Misc. 79, 46 N. Y. Supp. 937 (1897).

<sup>5</sup> Dill & Collins Co. v. Morison, 159 A. D. 583, 144 N. Y. Supp. 894 (1913); St. Corp. L. § 66.

<sup>6</sup> N. Y. Const. of 1894, art. 8, § 3.

<sup>7</sup> C. C. P. § 1650.

legal representative.<sup>8</sup> A proceeding for condemnation of real property must be instituted by the presentation of a petition by plaintiff, if it is a corporation, setting forth its principal place of business within New York State, the names and residences of its principal officers and of its directors, and the object or purpose of its incorporation, quite aside from other matters.<sup>9</sup> An attachment may be levied upon a cause of action arising upon a contract, including a bond, promissory note or other instrument for the payment of money only, negotiable or otherwise, whether past due or yet to become due, executed by a domestic or foreign corporation, either within or without New York State, which is found within the county and belongs to the defendant; and the method of levy is prescribed by the statute, as well as the certificate which the proper officer of the corporation must give the sheriff specifying the rights of the defendant in such corporate property.<sup>10</sup> The statute prescribes when peremptory and when alternative writs of mandamus issue in actions to which corporations, their officers, directors and agents are parties; the notice to be given them; the procedure and practice; and the method of service of the writs.<sup>11</sup> When the defendant enjoined was an officer of a corporation and the damages sustained by him are less than the sum specified in the undertaking the court or the referee may also separately ascertain and determine the damages sustained by reason of the injunction by the corporation which the defendant represents to an amount not exceeding the surplus of the sum specified in the undertaking, and those damages may be recovered in a separate action brought according to statute.<sup>12</sup> When execution has issued against the earnings of a judgment debtor and has been presented to the corporate employer of the debtor, such corporation must pay over the amount of its indebtedness to the judgment debtor for earnings as such execution prescribes; and if such corporation fails or refuses so to pay over, it is liable to action by the judgment creditor.<sup>12a</sup>

**§ 439-a Id.: In General.**—Ordinarily an officer of a corporation cannot decide that it shall bring an action, but such

<sup>8</sup> C. C. P. § 1902.

<sup>9</sup> C. C. P. § 3360.

<sup>10</sup> C. C. P. §§ 648, 649.

<sup>11</sup> C. C. P. §§ 2070, 2071.

<sup>12</sup> C. C. P. § 624.

<sup>12a</sup> C. C. P. § 391. For the purpose of garnishment, a corporation

incorporated under the laws of New York, which has a factory in another State as well as in New York, but pays the judgment debtor in the foreign State where he works for it, is a resident of New York. *Morris Plan Co. v. Miller*, 102 Misc. 470 (1918).

decision must be made by its directors.<sup>13</sup> An attorney in good faith bringing suit for a non-existent corporate client (which had once existed but had gone out of existence) is liable for the costs imposed.<sup>14</sup> An individual and a corporation to which he sold out for his stock cannot join in an action to recover damages because of bankruptcy proceedings maliciously instituted against him to injure him and the corporation.<sup>15</sup> When an individual defendant answers a corporate complaint against him as guarantor that the guaranty was not to be effective, by agreement with another individual, until certain conditions, of which the plaintiff had notice were fulfilled, and that such fulfillment never came about, the corporation is entitled, on showing ignorance (by affidavit) of such agreement, to a bill from the defendant particularizing if the agreement is in writing or oral, the names of its officers who had the knowledge thereof, the time and place when such knowledge was acquired.<sup>16</sup> A complaint by a corporation in an action at law to recover money by conspiracy obtained by its officer and his son through employment of the latter's firm as agent for the company at exorbitant commissions and of the latter as superintendent of the corporation at an exorbitant salary states but one cause of action though renewals of the agreement of employment at increased commissions are alleged, if said to have been pursuant to the original conspiracy.<sup>17</sup> A suit in equity by a corporation against its officer for an accounting will be entertained though the allegations be no more definite as to the sums he received or the dates of their receipt or the trusts upon which received than the knowledge possessed by the corporation permits it to allege; because if the company's property came into the officer's control as such and was withdrawn with his connivance and disbursed illegally, his official capacity *per se* imposes upon him trust duties giving equity

<sup>13</sup> Greater Pictures Corp'n v. Crystal Film Co., — Misc. — (1918), N. Y. L. J. Jan. 21, City Ct., Sp. T. Pt. I. O'Brien v. O'Connell, 7 Hun, 228 (1876). No opinion but only this headnote: "An action for the protection of a private corporation should be brought by it, and not by an individual, unless its refusal to prosecute such an action, or its collusion with the defendants be shown. If a person have no direct individual interest in the fund and property claimed, his applica-

tion for an injunction and receiver will be denied."

<sup>14</sup> Attleboro National Bank v. Wendell, 64 Hun, 208, 19 N. Y. Supp. 45 (1892).

<sup>15</sup> Lawrence v. McKelvey, 80 A. D. 514, 81 N. Y. Supp. (1903); C. C. P. § 446.

<sup>16</sup> Knickerbocker Trust Co. v. Packard, 109 A. D. 421, 96 N. Y. Supp. 412 (1905).

<sup>17</sup> Mutual Life Ins. Co. v. McCurdy and McCurdy, 118 A. D. 827, 103 N. Y. Supp. 837 (1907).

jurisdiction.<sup>18</sup> Allegations by a corporation in a complaint against its officer for recovery of damages for unauthorized and unlawful payments of its funds for political purposes allege but one cause of action, viz. for breach of duty in office, although several negligent acts in this regard are set forth and although the allegations are alternative, that he expressly authorized and personally participated in the payments or that his neglect properly to supervise and perform his official duties enabled the payments to be made by others.<sup>19</sup> Under a statute making registration a condition precedent to the right of any "person" to engage in the business of plumbing, a corporation must plead and prove registration as part of its case in an action to foreclose a mechanic's lien for plumbing work, and as it must have a certificate of competency, which cannot be issued to a corporation, it cannot lawfully do business as a plumber.<sup>20</sup>

"A corporation, like a natural person, may appear voluntarily by attorney, and such appearance gives jurisdiction to the same extent as if there was actual service of process."<sup>1</sup> In a representative action by a creditor of a corporation to set aside certain judgments and mortgages, and appropriate the corporate property to payment of its debts, the creditor may in the one complaint sue the corporation and its directors and state allegations sufficient to reach the property of the corporation, to obtain judgment against the directors for failure to pay for stock subscribed for by them and to make them personally liable because they made and caused to be filed a false certificate of the payment of the capital stock.<sup>2</sup> A corporation defendant in an action by a stockholder to recover for it moneys received by its officers who had themselves refused to bring the suit may appeal from the judgment against the plaintiff if pending the trial its officers had changed so that it backed the plaintiff on the trial.<sup>3</sup> A corporation sued for damages resulting from a conspiracy in which the complaint alleges its officers, agents and servants for it took part and its authorized agents made false statements is

<sup>18</sup> *Mutual Life Ins. Co. v. McCurdy*, No. 2, 118 A. D. 822, 103 N. Y. Supp. 840 (1907).

<sup>19</sup> *Mutual Life Ins. Co. v. McCurdy*, No. 1, 118 A. D. 815, 103 N. Y. Supp. 829 (1907).

<sup>20</sup> *Schnaier & Co. v. Grigsby*, 132 A. D. 854, 117 N. Y. Supp. 455 (1909); *aff'd* 199 N. Y. 577, 93 N. E. 1125; L. 1893, c. 803.

<sup>1</sup> *Attorney-General v. Guardian Mutual Life Ins. Co.*, 77 N. Y. 272 (1879).

<sup>2</sup> *Bagley & Sewall Co. v. Lennig*, 61 A. D. 26, 70 N. Y. Supp. 242 (1901).•

<sup>3</sup> *Sheridan v. Sheridan Electric Light Co.*, 38 Hun, 396 (1886); C. C. P. § 1294.

entitled to a bill of particulars of their names.<sup>4</sup> One receiving stock of a New York corporation in exchange for stock of a foreign corporation issued pursuant to an agreement in violation of the laws of New York cannot enforce such agreement against the New York corporation.<sup>5</sup> One suing to recover agreed compensation for selling shares of the stock of a corporation cannot recover if the sales were made during periods in which the corporation was not allowed to do business in this state and contrary to law.<sup>6</sup>

**§ 440. Id.: Averment and Proof of Corporate Existence.**—The subject of proof of corporate existence is considered generally in the four hundred and fifty-second section of this book. In an action brought by a corporation the complaint must aver that the plaintiff is a corporation; must state whether it is a domestic or foreign corporation; but the plaintiff need not set forth or specially refer to any act or proceeding by or under which the corporation was created.<sup>7</sup> In an action brought against a domestic corporation the complaint must aver that it is such but need not set forth or specially refer to any act or proceeding by or under which it was created.<sup>8</sup> In an action brought by or against a corporation the plaintiff need not prove upon the trial the existence of the corporation unless the answer is verified and contains an affirmative allegation that the plaintiff or the defendant, as the case may be, is not a corporation.<sup>9</sup> In an action or special proceeding brought by or against a corporation the defendant is deemed to have waived any mistake in the statement of the corporate name unless the misnomer is pleaded in the answer or other pleading in the defendant's behalf.<sup>10</sup> The certificate of incorporation of any corporation duly filed is presumptive evidence of its incorporation, and any amended certificate

<sup>4</sup> *Riker v. Erlanger*, 87 A. D. 137, 84 N. Y. Supp. 69 (1903).

<sup>5</sup> *Haule v. Consumers' Park Brewing Co.*, 150 A. D. 582, 135 N. Y. Supp. 900 (1912); app. dism'd 211 N. Y. 578, 105 N. E. 1086. The agreement was by a West Virginia corporation in consideration of money received from an individual to issue to him its bonds, meanwhile transferring its stock to him as security.

<sup>6</sup> *Lowey v. Granite State Provident Assn.*, 8 Misc. 319, 28 N. Y. Supp. 560 (1894); L. 1890, c. 146, § 9.

On the effect of insolvency of corporation or appointment of receiver, as affecting its right to sue, see note in 50 L.R.A.(N.S.) 383.

On effect of adjudication of insolvency and of proceedings for dissolution of corporation upon its rights of action, see note in 15 L.R.A. 627.

<sup>7</sup> C. C. P. § 1775.

<sup>8</sup> C. C. P. § 1775.

<sup>9</sup> C. C. P. § 1776.

<sup>10</sup> C. C. P. § 1777.

or other paper duly filed or recorded relating to the incorporation of any corporation or its existence or management, and containing facts required or authorized by law to be stated therein, is presumptive evidence of the existence of such facts; and when two or more corporations have been or hereafter are consolidated and merged into a new corporation, a certificate of the Secretary of State under his official seal concisely stating the names of the respective corporations consolidated, the dates of the filing of the certificates respectively of the incorporation of such corporations in his office, the object for which they were formed, including the nature and locality of their business as set forth in their respective incorporation papers on file in his office, the date of the filing of the consolidation agreement and other proceedings in his office, the name of the new corporation formed by such consolidation and merger, the term of its corporate existence, the place where its principal office is situated and the amount of its capital stock, is presumptive and prima facie evidence in all actions and special proceedings for all purposes of the incorporation of the corporations so consolidated, the incorporation of the new corporation by such consolidation and merger from the date of filing of said consolidation agreement and proceedings, and of other facts so certified by him.<sup>10a</sup>

Since the statute the plea of *nul tiel corporation* in an action by a corporation is good; but not in one against a corporation.<sup>11</sup> No plaintiff or defendant corporation in an action can deny its corporate existence at the time of the commencement of the action unless it sets up the fact affirmatively in a verified pleading.<sup>12</sup>

“ . . . the bringing of an action, in a name purporting to be a corporate name, is a sufficient averment of the existence of the plaintiff as a corporation.”<sup>13</sup> A plaintiff need not establish its corporate existence if there be no affirmative allegation that it is not a corporation.<sup>14</sup> “ . . . a corpo-

<sup>10a</sup> Gen. Corp. L. § 9, subds. 1, 3 (L. 1909, c. 28). The statute also permits the use as evidence of a certified copy of the charter of a foreign corporation.

<sup>11</sup> Stoddard v. Onondaga Annual Conference, 12 Barb. 573 (1851).

<sup>12</sup> Galdieri & Co., Inc., v. Waist Co., 98 Misc. 612, 163 N. Y. Supp. 154 (1917); C. C. P. § 1776. “This would preclude any such corporation, even though impliedly admitting

its existence at the time of the commencement of the action, from proving under a general denial that contracts alleged to have been made in its name were made at a time when it had no corporate existence.”

<sup>13</sup> Canandaigua Academy v. McKechnie, 19 Hun, 62 (1899).

<sup>14</sup> Atlantic Construction Co. v. Kreusler, 40 A. D. 268, 57 N. Y. Supp. 983 (1899); C. C. P. § 1776.

ration, when suing, need not aver or prove its corporate existence, upon the trial, unless it be expressly pleaded that it is not a corporation."<sup>15</sup> " . . . a corporation need not set forth its title in the pleadings, but may show on the trial its corporate existence, and that it had power to make the contract it seeks to enforce or make available."<sup>16</sup> Once a defendant has answered in such form as to admit the corporate existence of a plaintiff he is estopped in law from denying the corporate existence.<sup>17</sup> The existence of a corporation cannot be put in issue save as permitted by statute, and a defendant not affirmatively alleging in his answer the contrary of the existence of the corporation alleged in the complaint admits the allegation and cannot at the trial put in evidence the certificate of incorporation of the plaintiff to show that the corporation was not in existence at the time in issue.<sup>18</sup> By answering on the merits a complaint by a corporation a defendant waives its omission to state in its complaint whether or not it was a corporation.<sup>19</sup> Advantage must be taken of failure of a complaint which alleges that defendant is a corporation to state whether it is domestic or foreign by motion and not by demurrer.<sup>20</sup> A complaint stating a good cause of action but omitting to state that the plaintiff is incorporated and has capacity to sue cannot be taken advantage of by demurrer which specifies as its only ground that the complaint does not state facts sufficient to constitute a cause of action, as the demurrer omits to specify the ground of objection that the plaintiff has no capacity to sue.<sup>1</sup> "If it appears upon the face of the complaint, that a plaintiff suing as a corporation is not such in fact, a demurrer is the proper remedy of the defendant . . . If the complaint does not show the plaintiff is not a corporation on its face, the objection that it is not such must be taken by answer . . ."<sup>2</sup> An allegation by a plaintiff's complaint that it is and was a

<sup>15</sup> *La Fayette Ins. Co. of Brooklyn v. Rogers*, 30 Barb. 491 (1859).

<sup>16</sup> *Camden & Amboy R. R. & T. Co. v. Remer*, 4 Barb. 127 (1848).

<sup>17</sup> *Loaners' Bank v. Jacoby*, 10 Hun, 143 (1877). Also put on ground that defendant had prevented plaintiff from getting possession of property it sought to replevy by executing an undertaking, and had not questioned the incorporation.

<sup>18</sup> *Schmidt v. Nelke Art Lithographic Co.*, 17 Misc. 124, 39 N. Y. Supp. 353 (1896); C. C. P. § 1776.

<sup>19</sup> *Noye Manufacturing Co. v. Raymond*, 8 Misc. 353, 28 N. Y. Supp. 693 (1894); C. C. P. §§ 1775, 488, subds. 3, 8.

<sup>20</sup> *Harmon v. Vanderbilt Hotel Co.*, 79 Hun, 392, 29 N. Y. Supp. 783 (1894); aff'd 143 N. Y. 665, 39 N. E. 20; C. C. P. § 1775.

<sup>1</sup> *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648 (1868); Code, §§ 144, 145, 147, 148.

<sup>2</sup> *The Phoenix Bank v. Donnell*, 40 N. Y. (1 Hand), 410 (1869); Code, §§ 144, 147.

domestic corporation is not so controverted by an answer alleging the defendant has no knowledge or information sufficient to form a belief as to such allegation as to require proof on the trial: the defendant should affirmatively allege the plaintiff is not a corporation to put the corporate existence in issue.<sup>3</sup> An answer alleging that the defendant has no knowledge or information sufficient to form a belief as to whether plaintiff is a corporation or not created under the laws referred to in the complaint which alleges that plaintiff is a corporation created under a designated act of the legislature is "not sufficient to put plaintiff upon proof of its corporate existence. The language used certainly has no greater force than a general denial of the whole complaint could have. It is not tantamount to an affirmative allegation that the plaintiff is not a corporation."<sup>4</sup> A mere denial in an answer to a complaint by a corporation properly averring the plaintiff's corporate character is not sufficient to raise an issue of the corporate character; but the answer must contain an affirmative allegation to the effect that the plaintiff is not a corporation.<sup>5</sup> The court should grant a motion by a plaintiff to amend its complaint so as to show the plaintiff to be a corporation rather than an association organized pursuant to statute.<sup>6</sup> Contracts put in evidence in an action by a corporation against an individual made between the two which necessarily assumed the corporation's corporate character operate as against the individual to prove that the plaintiff is a corporation as stated in the contracts.<sup>7</sup>

If a complaint contain no distinct averment that the defendant is a corporation, it cannot be demurred to on the ground that it does not comply with the code requirements of what must be averred in a complaint in an action against a corporation.<sup>8</sup> Lack of denial by a defendant that it is a corporation alleged relieves the plaintiff from the duty of proving defendant's incorporation.<sup>9</sup> A defendant's incorporation need not be proven if the answer does not put it in issue.<sup>10</sup> All

<sup>3</sup> *Snow, Church & Co. v. Hall*, 19 N. Y. Supp. 655, 44 N. Y. Supp. 427 (1897); C. C. P. § 1776.

<sup>4</sup> *Concordia Savings and Aid Society v. Read*, 93 N. Y. 474 (1883); C. C. P. § 1776.

<sup>5</sup> *United States Vinegar Co. v. Schlegel*, 143 N. Y. 537, 38 N. E. 729 (1894); C. C. P. § 1776.

<sup>6</sup> *Dean v. Gilbert*, 92 Hun, 427, 36 N. Y. Supp. 1004 (1895); C. C. P. § 1723, 1919.

<sup>7</sup> *United States Vinegar Co. v.*

*Schlegel*, 143 N. Y. 537, 38 N. E. 729 (1894).

<sup>8</sup> *Adams v. Lamison Store-Service Co.*, 59 Hun, 127, 13 N. Y. Supp. 118 (1891); C. C. P. § 1775.

<sup>9</sup> *Goldsmith v. Wells Co.*, 86 Hun, 489, 33 N. Y. Supp. 727 (1895); C. C. P. § 1776.

<sup>10</sup> *Dentz Lithographing Co. v. International Registry Co.*, 32 Misc. 687, 66 N. Y. Supp. 540 (1900); C. C. P. § 1776.

that need be alleged in a declaration or reply in an action against a corporation is the general fact of incorporation: how it took place is matter of evidence.<sup>11</sup> The first step in a trial in which the corporate existence of the defendant is an issue is to prove it.<sup>12</sup> To prove the existence of a corporation *de facto* both the existence of a charter and a use of rights claimed to be conferred thereby or by law must be shown.<sup>13</sup>

**§ 441. Id.: Verification of Pleadings.**—The verification of corporate pleadings by the corporation's directors, officers and agents is discussed in the two hundred and eighty-seventh, three hundred and thirty-fourth and three hundred and sixty-eighth sections, respectively, of this book. The verification to a pleading by a party which is a domestic corporation must be made by an officer thereof, except that the corporation's agent or attorney may verify if none such officer is within the county where the corporate party's attorney resides, or if he be a nonresident of New York State the county where he has his office, and capable of making the affidavit, or there are two or more parties united in interest and pleading together and neither of them acquainted with the facts is within that county and capable of making the affidavit, or the action or defence is founded upon a written instrument for the payment of money only which is in the possession of the agent or attorney, or all the material allegations are within the personal knowledge of the agent or attorney.<sup>14</sup> A director of a corporation may legally verify a pleading by it in an action to which it is a party.<sup>15</sup> "Section 525 of the Code of Civil Procedure provides that the verification of a pleading 'must' be made by a 'party', 'except' (only what is applicable being here cited) that where the 'party' is a domestic corporation it 'must' be made by an officer thereof, and that where a foreign corporation is, 'may' be made by 'the agent of or the attorney for the party.' This terminology shows that an 'officer' of a corporation party is not to be deemed a 'party.' If otherwise, this distinction between a corporation 'party' and its 'officer' would be a contradiction of terms. An officer of a foreign corporation is an agent thereof in law, and within the meaning of the code provision. The secretary of this corporation can therefore verify this answer; but to do so he must comply with section

<sup>11</sup> Stoddard v. Onondaga Annual Conference, 12 Barb. 573 (1851).

<sup>12</sup> Van Buren v. Reformed Church of Gansevoort, 62 Barb. 495 (1872).

<sup>13</sup> Van Buren v. Reformed Church of Gansevoort, 62 Barb. 495 (1872).

<sup>14</sup> C. C. P. § 525.

<sup>15</sup> Eastham v. York State Telephone Co., 86 A. D. 562, 83 N. Y. Supp. 1019 (1903); C. C. P. § 525.

526, *i. e.*, 'set forth in the affidavit the grounds of his belief as to all matters not stated upon his knowledge.' He need not set forth 'the reason why it is not made by the party,' for that would be senseless in the case of a corporation, which cannot take an oath."<sup>16</sup> An officer of a domestic corporation is to be considered a party to an action against it for the purpose of verifying pleadings; so that a verification of a corporation's pleading by an officer is sufficient though it do not state the source of his information and belief.<sup>17</sup> A verification of a corporation's pleading may be made by its president without a statement of the sources of his knowledge regarding the matters in suit.<sup>18</sup> A pleading of a domestic corporation may properly be verified by its attorney when it appears by his verification that all its officers are absent from the county where he resides.<sup>19</sup>

**§ 442. Id.: Jurisdictional Questions.**—The jurisdiction of the city court of the City of New York extends to an action against a domestic or foreign corporation wherein the complaint demands judgment for a sum of money only, or to recover one or more chattels, with or without damages for the taking or detention thereof, provided the judgment if demanding a sum of money only do not require a judgment of over two thousand dollars.<sup>20</sup> For the purpose of determining the jurisdiction of a county court in an action to which a corporation is a party, a domestic corporation the principal place of business of which is established by or pursuant to a statute or its articles or is actually located—or any part of its plants, shops, factories or offices is actually located—in the county, is deemed a resident of the county, provided that a city including more than one county is not deemed a domestic corporation so as to give the county court jurisdiction.<sup>1</sup> An action cognizable by a justice of the peace may be brought by or against a corporation.<sup>2</sup> The jurisdiction of the city court of Yonkers extends to a civil action against a domestic corporation wherein the complaint demands judgment for a sum of

<sup>16</sup> *Robinson v. Ecuador Development Co.*, 32 Misc. 106, 65 N. Y. Supp. 427 (1900).

<sup>17</sup> *Henry v. Brooklyn Heights R. Co.*, 43 Misc. 589, 89 N. Y. Supp. 525 (1904); C. C. P. § 526. See 13 Daly 200, in accord; and 32 Misc. 106, *contra*.

<sup>18</sup> *Duryea, Watts & Co. v. Rayner*, 11 Misc. 294, 32 N. Y. Supp. 247 (1895).

<sup>19</sup> *Climax Specialty Co. v. Smith*

& Sons, 31 Misc. 275, 64 N. Y. Supp. 42 (1900); C. C. P. § 525, subd. 3.

Is affidavit or verification by officer of a corporation to be regarded as made by an agent of the corporation, see note in 16 L.R.A. (N.S.) 703.

<sup>20</sup> C. C. P. §§ 315, 316.

<sup>1</sup> C. C. P. § 341.

<sup>2</sup> C. C. P. § 2865.

money only or to recover one or more chattels with or without damages for the taking, withholding or detention thereof.<sup>3</sup>

“ . . . corporations are citizens of the states which create them, irrespective of the residence of the corporators.”<sup>4</sup> A corporation practically controlled by aliens, residents of a country with which this country is at war, may nevertheless sue in our courts, especially if a treaty between the two nations permits.<sup>5</sup> All applications (relating to corporations) must be made in the judicial district where the principal office of the corporation against which proceedings are taken is located excepting such applications as are made in actions brought by the Attorney-General on behalf of the People of the State; and all such applications must be made in the judicial district in which the action is triable.<sup>6</sup> For the purpose of the venue of an action to which a corporation is a party, the county stated in its certificate of incorporation as that in which its principal place of business is to be and in which it files its annual reports, is to be considered the county of its residence.<sup>7</sup> The residence of a domestic corporation for the purpose of determining the venue of an action against it is where its principal office and place of business is.<sup>8</sup> In deciding whether there is proof that an execution against a domestic corporation was issued to the sheriff of the county where it has “ a place for the regular transaction of business,” pursuant to statute, the corporation must be held to reside “ where its principal place of business is situated and an allegation that it has its principal place of business in the county of New York is equivalent to an allegation that it resides in that county.”<sup>9</sup> An objection by a corporate defendant to the jurisdiction of the court may be taken by answer if the allegations of the complaint as to its residence are sufficient.<sup>10</sup> The County Court of one county has not jurisdiction of an action against a domestic corporation the principal place of business of which is in another county and which

<sup>3</sup> C. C. P. § 3203.

<sup>4</sup> *Cooke v. State Nat. B'k of Boston*, 52 N. Y. 96 (1873).

<sup>5</sup> *Schultz, Jr., Co., Inc., v. Raines, & Co.*, 99 Misc. 626, 104 N. Y. Supp. 454 (1917); *aff'd*, with opinion, 100 Misc. 697, 166 N. Y. Supp. 567 (1917).

<sup>6</sup> Gen. Corp. L. § 314 (L. 1907, c. 28).

<sup>7</sup> *Rossie Iron Works v. Westbrook*, 59 Hun, 345, 13 N. Y. Supp. 141 (1891).

<sup>8</sup> *Speare v. Troy Laundry Machinery Co.*, 44 A. D. 390, 60 N. Y. Supp. 1080 (1899).

<sup>9</sup> *Groshut v. Kinetophote Corporation*, 93 Misc. 558, 157 N. Y. Supp. 312 (App. T. 1st Dept. 1916); C. C. P. § 2458, subd. 1; *Bradley v. Certigue Mining & Dredging Co.*, 93 Misc. 519, 157 N. Y. Supp. 275, same court.

<sup>10</sup> *Heenan v. New York, West Shore & Buffalo Ry. Co.*, 34 Hun, 602 (1885); C. C. P. § 498.

was not served with process within its county.<sup>11</sup> A representative action by a stockholder against the corporation and certain individuals to recover money for the company will be removed from a rural county to New York county if the corporation's books and papers are more accessible to New York county, the witnesses inconvenienced by trial in New York county exceed those inconvenienced by trial in the rural county and the cause of action arose in New York City.<sup>12</sup> A question as to whether or not a court acquires jurisdiction of an action against a corporation because brought by a non-resident cannot properly be raised on a motion to set aside service of the summons on the ground that the court had not acquired jurisdiction of the person of the defendant; but should be raised by demurrer or answer.<sup>13</sup> The courts of this State will entertain a suit in equity by a non-resident judgment creditor of a corporation whose judgment is founded on a cause of action arising in a foreign state in order to compel an accounting and the restoration of corporate assets by one who is a resident of the State who has transferred the corporate assets in this State in fraud of creditors.<sup>14</sup>

**§ 443. Id.: Service of Process In.**—The service of process on corporations through their directors, officers and agents is discussed in the two hundred and eighty-seventh, three hundred and thirty-fourth and three hundred and seventieth to seventy-fourth sections, respectively, of this book. Personal service of a summons within a county or of a mandate commencing a special proceeding is sufficient service upon a domestic corporation, wherever it is located, to give the county court jurisdiction.<sup>15</sup> An attempt to commence an action in a court of record is equivalent to the commencement thereof against a corporate defendant within the meaning of each provision of the Code of Civil Procedure limiting the time for commencement of an action when the summons is delivered with the intent that it shall actually be served to the sheriff, or if the sheriff is a party to the coroner, of the county in which the corporation is established by law or wherein its general business is or was last transacted or wherein it keeps

<sup>11</sup> *Heenan v. New York, West Shore & Buffalo Ry. Co.*, 34 Hun, 602 (1885).

<sup>12</sup> *Cate v. Fisk*, 175 A. D. 235, 161 N. Y. Supp. 441 (1916); C. C. P. § 987.

<sup>13</sup> *Mabon v. Ongley Electric Co.*, No. 2, 24 A. D. 50, 48 N. Y. Supp. 973 (1897); C. C. P. § 1780.

<sup>14</sup> *Trotter v. Lisman*, 209 N. Y. 174, 102 N. E. 575 (1913); C. C. P. § 1780 does not affect the right of the Supreme Court to exercise its equitable jurisdiction when proper.

<sup>15</sup> C. C. P. § 341.

or last kept an office for the transaction of business; but in order to entitle the plaintiff to the benefit of this procedure the delivery of the summons to an officer must be followed within sixty days after the expiration of the time limited for the actual commencement of the action by personal service thereof upon the corporate defendant or by the first publication of the summons as against that defendant pursuant to an order for service upon him in that manner.<sup>16</sup> The same holds true of an attempt to commence an action in a court not of record when the summons is delivered to an officer authorized to serve it within the city or town wherein the corporation is located, except as to the provision requiring a publication or service of the summons within sixty days, provided actual service thereof is made with due diligence.<sup>17</sup> When a summons is issued in any court of record, an order for its service upon a domestic corporation having its principal office or place of business in New York State may be made by the court or a judge thereof or the county judge of the county where the action is triable upon satisfactory proof by the affidavit of a person not a party to the action or by the return of the sheriff of the county where such office or place of business is that proper and diligent effort has been made to serve the summons upon the corporate defendant but that none of the persons mentioned in the statute as those upon whom service can be made against the corporation can be found.<sup>18</sup> The order must direct that service of the summons be made by leaving a copy of it and of the order at its principal office or place of business with a person of proper age if upon reasonable application admittance can be obtained and such person found who will receive it, or if admittance cannot be so obtained nor such a person found, by affixing the same to the outer or other door of such place of business or office and by depositing another copy thereof properly enclosed in a post-paid wrapper addressed to the defendant at such principal office or place of business in the postoffice where such office or place of business is located.<sup>19</sup> An order directing the service of a summons by publication upon a defendant which is a domestic corporation may be made when after diligent effort service cannot be made within New York State upon the president or other head of the corporation, the secretary or clerk to the corporation, its cashier, treasurer, director or managing agent, or when an attempt was made to commence the action against it as required by statute before the expira-

<sup>16</sup> C. C. P. § 399.

<sup>17</sup> C. C. P. § 400.

<sup>18</sup> C. C. P. § 435.

<sup>19</sup> C. C. P. § 436.

tion of the limitation applicable thereto as fixed by statute and the limitation would have expired within sixty days next preceding the application if time had not been extended by the attempt to commence the action.<sup>20</sup> The order may be made by the court or by a judge thereof or the county judge of the county where the action is triable; and must direct that service of the summons upon the defendant named or described in the order be made by publication thereof in two newspapers designated in the order as most likely to give notice to the defendant for a specified time which the judge deems reasonable not less than once a week for six successive weeks; and must contain either a direction that on or before the day of the first publication the plaintiff deposit in a postoffice one or more sets of copies of the summons, complaint and order each contained in a securely closed post-paid wrapper directed to the defendant at a place specified in the order, or a statement that the court or judge being satisfied by the affidavits upon which the order was granted that the plaintiff cannot with reasonable diligence ascertain a place or places where the defendant would probably receive matter transmitted through the postoffice, dispenses with the deposit of any papers therein.<sup>1</sup> Service of an injunction order upon a corporation may be made as prescribed in the Code of Civil Procedure for making personal service of a summons upon a corporation and copies of the papers upon which the order was granted must be delivered with the copy of the order.<sup>2</sup> A precept in summary proceedings to recover the possession of real property directed to a corporation must be served by delivering to an officer thereof, upon whom a summons issued out of the Supreme Court in an action against the corporation might be served, a copy of the precept together with a copy of the petition and at the same time showing him the original precept, or if service cannot with reasonable diligence be so made, by affixing a copy of the precept and petition upon a conspicuous part of the property; and if the precept is returnable on the day on which it is issued it must be served at least two hours before the hour at which it is returnable, and in every other case at least two days before the day on which it is returnable.<sup>3</sup> Personal service of a citation within New York State must be made upon a corporation by delivering a copy thereof in the manner prescribed for personal service of a summons upon such a corporation.<sup>4</sup> When a defendant to be served in

<sup>20</sup> C. C. P. § 438.

<sup>1</sup> C. C. P. § 440.

<sup>2</sup> C. C. P. § 610.

<sup>3</sup> C. C. P. § 2240.

<sup>4</sup> C. C. P. § 2525.

an action in a court of a justice of the peace is a corporation doing business in another county than that in which it resides the summons may be personally served upon it by delivering a copy thereof to an officer, managing agent or person to whom a copy of the summons in an action brought against the corporation in the Supreme Court might be delivered as prescribed in the statute, or to any director, managing agent or trustee of the corporation by whatever official title he or it is called.<sup>5</sup>

“Corporations are intangible, incorporeal existences, and service of process upon them can only be made by service upon some one of their agents or officers. The legislature has power to determine how and upon whom service shall be made . . . . The object of all service of process is said to be to give notice to the party on whom service is made, that he may be aware of and resist what is sought of him, and it is a general rule that any service must be deemed sufficient which renders it reasonably probable that the party proceeded against will be apprised of what is going on against him, and have an opportunity to defend. . . . But where a service is authorized by the legislature which is not according to common experience reasonably calculated, according to the circumstances of the case, to reach the party intended to be affected, and to give him an opportunity to defend, it may be challenged as a violation of the constitutional provision, that no person shall be deprived of his personal rights or property without due process of law . . . .”<sup>6</sup> “A service on a director of a corporation is regular.”<sup>7</sup> A corporation is not bound by process served on one who had been its director but had presented or filed his resignation prior to being served.<sup>8</sup> Service of process on one after he has sold and transferred his stock and the election of someone in his place as director does not bind the corporation.<sup>9</sup> A director who has resigned as such before being served with process against it cannot be used as a means of service upon the corporation although his resignation has not been formally accepted and his resignation reduced the number of directors to less than the statutory minimum of three.<sup>10</sup>

<sup>5</sup> C. C. P. § 2879.

<sup>6</sup> *Hiller v. Burlington and Missouri River R. R. Co.*, 70 N. Y. 223 (1877).

<sup>7</sup> *Curtis v. Avon, Geneseo and Mount Morris Co.*, 49 Barb. 148 (1867).

<sup>8</sup> *Barber Asphalt Paving Co. v.*

*Gayley*, — Misc. — (1918); N. Y. L. J. Feb. 26, Sp. T. N. Y. Co.

<sup>9</sup> *Beardsley v. Johnson*, 121 N. Y. 224, 24 N. E. 380 (1890); C. C. P. § 431, subd. 3.

<sup>10</sup> *Wilson v. Brentwood Hotel Co.*, 16 Misc. 48, 37 N. Y. Supp. 655 (1896). The president remained as

**§ 444. Id.: Cessation and Revivor.**—An action for personal injuries against a corporation dies upon its dissolution and does not survive as against its receiver, unless, perhaps, it was incorporated under the Business Corporations Law.<sup>11</sup> One claiming stock in a corporation as a result of an agreement of a predecessor partnership to the corporation may not revive a long discontinued action against the corporation against a receiver thereof, when the indebtedness of the corporation is such that its stock is worthless.<sup>12</sup>

**§ 445. Id.: Actions on Notes.**—A civil cause of action against a corporation founded upon a note or other evidence of debt for the absolute payment of money is entitled to a trial preference.<sup>13</sup> In an action against a domestic corporation to recover damages for the non-payment of a promissory note or other evidence of debt for the absolute payment of money upon demand or at a particular time, an order extending the time to answer or demur cannot be granted except by the court upon notice to the plaintiff's attorney; and the plaintiff may take judgment as in case of default in pleading at the expiration of twenty days after service of a copy of the complaint either personally with the summons or upon the defendant's attorney pursuant to his demand therefor, or if the service of the summons was otherwise than personal, at the expiration of twenty days after the service is complete; unless the defendant serves with a copy of his answer or demurrer a copy of an order of a judge directing that the issues presented by the pleadings be tried.<sup>14</sup>

If a corporation sued on its note does not serve with its answer a copy of an order directing the issues to be tried the plaintiff is entitled to take judgment as upon a default, without returning the answer or taking any other step.<sup>15</sup> The statute requiring a corporation sued on its note to serve an order directing trial of the issues with its answer in order to avoid judgment against itself as in default applies only to a case in which the note itself is defended and not when the note is admitted but a counterclaim is set up: when this is the case

an available person to be served and there was no suggestion of resignation to defeat service.

For a note on the question of validity of statutes authorizing constructive or substitute service on domestic corporation see note in '4 L.R.A.(N.S.) 117.

<sup>11</sup> *Matter of Yuengling Brewing Co.*, 24 A. D. 223, 49 N. Y. Supp.

12 (1897); Bus. Corp. L. § 5 (L. 1892, c. 691).

<sup>12</sup> *Marshall v. Wendell*, 45 A. D. 120, 61 N. Y. Supp. 13 (1899).

<sup>13</sup> C. C. P. § 791, subd. 8.

<sup>14</sup> C. C. P. § 1778.

<sup>15</sup> *Watertown National Bank v. Westchester County Water Works*, 19 Misc. 685, 44 N. Y. Supp. 1101 (1897); C. C. P. § 1778.

no proper issue can be said to be joined until the plaintiff replies.<sup>16</sup> The statutory permission to a plaintiff in an action against a corporation on its evidence of debt to take judgment by default, unless it serve with its answer or demurrer a judge's order directing trial of the issues, does not apply to an answer so served in a suit against a corporation as indorser.<sup>17</sup> The statutory provision that judgment may be taken by default against a corporation in an action on its note or other evidence of debt unless it serves with its answer or demurrer a copy of an order directing trial of the issue is constitutional and applies to a municipal corporation.<sup>18</sup> The statute permitting judgment by default in an action against a corporation on its note or other evidence of debt unless with its answer or demurrer it serve a copy of a judge's order directing trial of the issues applies to an action in the Municipal Court of New York City.<sup>19</sup> It is not necessary that a domestic corporation sued in a justice's court should file with its verified answer to the summons and verified complaint an order of a judge directing that the issues presented by the pleadings be tried as required by statute.<sup>20</sup> The statutory provision giving priority on the trial calendar to "an action against a corporation, founded upon a note or other evidence of debt for the absolute payment of money" does not apply to an action against a corporation based on an agreement by it with another corporation primarily liable upon a note to be liable for payment thereof.<sup>1</sup> An allegation in a complaint that drafts were accepted by a defendant corporation by its treasurer includes an averment of authority to the treasurer to so accept, as the company could not accept by him unless he had such authority.<sup>2</sup> If a complaint allege that a note was endorsed by a corporate defendant, it implies that it was lawfully endorsed and throws the burden on it of showing it was not lawfully done.<sup>3</sup> A complaint setting out

<sup>16</sup> *Pennypacker v. Levis & Co.*, 63 Misc. 384, 116 N. Y. Supp. 771 (1909); C. C. P. § 1778.

<sup>17</sup> *Shorer v. Times Printing and Publishing Co.*, 119 N. Y. 483, 23 N. E. 979 (1890); C. C. P. § 1778.

<sup>18</sup> *Moran v. Long Island City*, 101 N. Y. 439, 5 N. E. 80 (1886); C. C. P. § 1778.

<sup>19</sup> *Duke v. Mount Morris Construction Co.*, 127 A. D. 39, 111 N. Y. Supp. 313 (1908); C. C. P. § 1778; old Mun. Ct. Act, § 20.

<sup>20</sup> *Center v. Hoosick River Pulp Co.*, 43 Misc. 247, 88 N. Y. Supp. 548 (1904); C. C. P. § 1778.

<sup>1</sup> *Polhemus v. Fitchburg R. R. Co.*, 113 N. Y. 617, 20 N. E. 601 (1889); C. C. P. § 791, subd. 8.

<sup>2</sup> *Partridge v. Badger*, 25 Barb. 146 (1857).

<sup>3</sup> *Mechanics' Banking Assn. v. Spring Valley Shot & Lead Co.*, 25 Barb. 419 (1857).

a note and averring that the defendant corporation duly endorsed it to the plaintiff by writing that it should be paid to plaintiff, adding simply the name of the defendant company, is sufficient, as the addition of the name of the agent of the corporation by whom the indorsement was written is unnecessary, though on the trial the plaintiff would be bound to prove that the corporate name was endorsed by someone authorized to sign the corporate name.<sup>4</sup>

**§ 446. Id.: Costs and Security for Costs.**—When an action is brought by the Attorney-General in the name of the People upon the relation of a private corporation having an interest in the question, a judgment awarding costs to the defendant must award them against the relator in the first instance, and against the People only in case an execution issued thereupon against the property of the relator is returned unsatisfied.<sup>5</sup> Under a statute permitting a defendant in an action in the county court to require security for costs when the plaintiff is a person residing in that county, such security may be required of a plaintiff which is a corporation and has its principal place of business there.<sup>6</sup>

**§ 447. Id.: Examination Before Trial.**—One desiring to take a deposition in which the party sought to be examined is a corporation must state in his affidavit the name of the officers, directors or managing agents thereof, or any of them whose testimony is necessary and material, or the books and papers as to the contents of which an examination or inspection is desired, and the order to be made in respect thereto must direct the examination of such persons and the production of such books and papers, and on such examination the books or papers or any part or parts thereof may be offered and received in evidence in addition to the use thereof by the witness to refresh his memory.<sup>7</sup> There is no rule by which, as a condition precedent to the right of an examination of a defendant corporation before trial, the plaintiff is required to request the corporation for a copy of the records and papers desired.<sup>8</sup> An order for examination before trial of a corporation by its officers may direct the production of books and papers for the use of the witness without need of a *subpoena duces tecum*, but not for an inspection by the adverse party.<sup>9</sup>

<sup>4</sup> *Youngs v. Perry*, 42 A. D. 247, 59 N. Y. Supp. 19 (1899).

<sup>5</sup> C. C. P. § 3242.

<sup>6</sup> *Sherin Special Agency v. Seaman*, 49 A. D. 33, 63 N. Y. Supp. 407 (1900); C. C. P. § 3268.

<sup>7</sup> C. C. P. § 872, subd. 7.

<sup>8</sup> *Jacobs v. Mexican Sugar Refining Co., Ltd.*, No. 1, 112 A. D. 655, 98 N. Y. Supp. 541 (1906).

<sup>9</sup> *Matter of Sands*, 98 A. D. 148, 90 N. Y. Supp. 749 (1904); C. C. P. § 872, subd. 7.

“ There is no authority to examine an officer of a corporation as such, apart from the examination of the corporation. . . . The proper practice . . . is to authorize the examination of the party, and then, the party being a corporation, the order should provide that the information is to be elicited by an examination of certain of its officers.”<sup>10</sup> An order for the examination before trial of a corporation should in form provide for the examination of the corporation by its proper officer; but if it direct the examination of a named person, as a specified officer of the corporation, it is an irregularity merely, which is properly cured by an amendment of the order by the court at Special Term.<sup>11</sup> An order not purporting to require a corporation but its officers individually to be examined is improper.<sup>12</sup> Persons having personal knowledge at the time they happened of facts which a party to an action to which a corporation later incorporated of which they became officers also is a party may be compelled as such officers to be examined before trial, though the order for examination call technically for the examination of the corporation through them as its officers.<sup>13</sup> A corporation of which receivers have been appointed cannot be examined through its officers by a judgment creditor in proceedings supplementary to execution when the real purpose of the examination is to find out if the plaintiff has any right of action against the officers individually under a statute.<sup>14</sup> An affidavit on which an order for examination of a corporation before trial is based must name the officer whose examination is sought and a copy of it and the order must be served on the corporation's attorney if it has appeared in the action.<sup>15</sup> It is for the party applying for an order for examination before trial of a corporation through one of its officers to show that the person to be examined, described as “ managing agent ” is in fact an officer of the corporation.<sup>16</sup> An officer of a defendant corporation may be examined when it is a party to

<sup>10</sup> *Jacobs v. Mexican Sugar Refining Co., Ltd.*, No. 2, 112 A. D. 657, 98 N. Y. Supp. 542 (1906).

<sup>11</sup> *Palumbo v. L'Araldo Italiano Publishing Co.*, 150 A. D. 221, 134 N. Y. Supp. 655 (1912).

<sup>12</sup> *Herrman v. Tapley Co.*, 64 Misc. 466, 118 N. Y. Supp. 803 (1909).

<sup>13</sup> *New York Assets Realization Co. v. Pforzheimer*, 158 A. D. 700, 143 N. Y. Supp. 898 (1913); C. C. P. § 870 *et seq.*

<sup>14</sup> *Matter of Jones v. Standard Plunger Elevator Co.*, 167 A. D. 178, 152 N. Y. Supp. 910; *aff'd* 215 N. Y. 692, 109 N. E. 1080 (1915); Gen. Corp. L. §§ 90, 91.

<sup>15</sup> *Turk v. Koehler & Co.*, 144 A. D. 53, 128 N. Y. Supp. 809; C. C. P. § 872, subd. 7, and § 875.

<sup>16</sup> *Herzig v. Washington Fire Ins. Co.*, 144 A. D. 174, 128 N. Y. Supp. 983 (1911); C. C. P. § 872, subd. 7.

an action even if it has made default in answering the complaint; but a copy of the order for examination should be served on the attorney for the defendant, if he has appeared in the action.<sup>17</sup> An order for examination before trial of individuals to find if a contract signed "\_\_\_\_\_ Co. by \_\_\_\_\_ [one of such individuals], manager," was signed by a corporation or a co-partnership is proper.<sup>18</sup> In an examination before trial of a corporation and its officers the order should not compel the production of the corporate books for the purpose of inspection by the adverse party but simply for use in connection with the examination of a witness who would be able to testify therefrom and unable to thwart the purposes of the examination by claiming he could not give the information without having his recollection refreshed by an inspection of the books.<sup>19</sup> An order vacating the examination of a corporation by its officers should not be vacated if made after another order staying all proceedings by the corporation pending the production and examination of such officers.<sup>20</sup> The word "necessary" in the statute permitting an examination of a defendant before trial does not mean "absolutely necessary" or "indispensable," but is used in the sense of "needful"; and it is no answer to an application for an examination of a corporate defendant through its officers that the plaintiff might prove by the testimony of others what he seeks to prove by the examination asked.<sup>20a</sup> In an action in which the main question involved is the authority of a corporation's employee to make a contract for it, the plaintiff, on submitting an affidavit, complying with the statute, is entitled to an order for the examination of the corporation's officers.<sup>1</sup> That officers of a corporation which is a party to an action intend to be present upon the trial is of no import insofar as their examination before trial is concerned.<sup>2</sup> On an examination before trial of a corporation sued for an accounting and damages for using a business name of another

<sup>17</sup> *New York, Lake Erie & Western R. R. Co. v. Carhart*, 36 Hun, 288 (1885); C. C. P. § 873.

<sup>18</sup> *Clark v. Wileklow*, 75 Hun, 290, 27 N. Y. Supp. 43 (1894); C. C. P. § 872.

<sup>19</sup> *Duffy v. Consolidated Gas Co.*, 59 A. D. 580, 69 N. Y. Supp. 635 (1901); C. C. P. § 872, subd. 7.

<sup>20</sup> *Dennis v. Stock, Grain & Provision Co. of N. Y., Ltd.*, 144 A. D. 585, 129 N. Y. Supp. 760 (1911).

<sup>20a</sup> *Terry v. Ross Heater & Mfg. Co., Inc.*, 180 A. D. 714 (1917); C. C. P. § 870 *et seq.*

<sup>1</sup> *Wood v. Mott Iron Works*, 114 A. D. 108, 99 N. Y. Supp. 677 (1906); C. C. P. §§ 872, 873.

<sup>2</sup> *Press Publishing Co. v. Star Co.*, 33 A. D. 242, 53 N. Y. Supp. 371 (1898); C. C. P. § 872.

for purposes of unfair trading only such officers should be required by order to appear as are likely to have the knowledge necessary to the plaintiff and the examination should be limited to showing the use of the name and the relations between the parties material to the question of the defendant's liability.<sup>3</sup> An executor may obtain an order for an examination of the persons who were the officers of a corporation at the time of the transaction in question against which he is prosecuting a claim in favor of his testator against it, so that he may give a bill of particulars.<sup>4</sup> A witness in an action to which a corporation is a party cannot stay proceedings therein, in order to save himself from an examination before trial, on the theory that by reason of the dissolution of the corporation, the action had abated.<sup>5</sup> Under a statute providing that a party to an action may be examined on his own behalf, the same as any other witness, subject to the qualification that the opposite party in interest be living, and excluding such testimony when the opposite party was the assignee, administrator, executor or legal representative of a deceased person, the testimony of an individual plaintiff in an action against a corporate defendant is admissible, as the corporation must be considered a living person within the meaning of the statute.<sup>6</sup>

**§ 448. Id.: Inspection of Corporate Books.**—Inspection of corporate books is discussed in the fifty-third to fifty-seventh sections of this book. The production upon a trial of a book or paper belonging to or under the control of a corporation may be compelled in like manner as if it was in the hands or under the control of a natural person and for that purpose a *subpoena duces tecum* or an order made according to statute, as the case requires, must be directed to the president or other head of the corporation, or to an officer thereof, in whose custody the book or paper is; but the subpoena or order is deemed to be sufficiently obeyed if the book or paper is produced by a subordinate officer or employee of the corporation who possesses the requisite knowledge to identify it and to testify respecting the purposes for which it is used, and if the personal attendance of a particular officer of the corporation

<sup>3</sup> *Solar Baking Powder Co. v. Royal Baking Powder Co.*, 128 A. D. 550, 112 N. Y. Supp. 1013 (1908).

<sup>4</sup> *Chittenden v. San Domingo Improvement Co.*, 132 A. D. 169, 116 N. Y. Supp. 829 (1909); C. C. P. § 871.

<sup>5</sup> *Sterne v. Metropolitan Telephone Co.*, No. 2, 33 A. D. 169, 53 N. Y. Supp. 467 (1898); C. C. P. § 872.

<sup>6</sup> *La Farge v. Exchange Fire Insurance Co.*, 22 N. Y. 352 (1860); Code of 1857, § 399.

is required, a subpoena without a *duces tecum* clause, must also be served upon him.<sup>7</sup> The statutory provision permitting an order for production of corporate books on examination of a corporation through its officers is not intended to replace the statute permitting discovery of books and the order should, therefore, only direct production of such books as appear from the papers to be necessary for the proper examination of the party in question.<sup>8</sup> It is not sufficient to thwart an otherwise rightful demand for discovery of a corporation adversary's papers, etc., that its officer swears he believes the discovery is only a scheme to devise technical defenses to avoid an honest liability.<sup>9</sup> “. . . a corporation ought not to be required to produce its books upon the examination of one of its officers before trial, to enable him to refresh his memory therefrom while on the stand, unless he requires their assistance in order to testify concerning the matters in regard to which he is to be examined.”<sup>10</sup> One claiming as a litigant and not in the right of a stockholder to examine a corporation's books must show what specific books contain entries necessary for him to see before he can proceed to trial.<sup>11</sup> A plaintiff who states that he intends to begin an action and serve a summons, cannot, by moving for the examination of a defendant corporation's president, who knows nothing of the facts involved, under the guise of such an examination, obtain an inspection of the defendant's books.<sup>12</sup> A stockholder cannot have discovery and inspection of his corporation's books in an action pending by him against it and one of its directors and officers for an account and repayment of corporate property wasted, in which he has only served a summons, for the purpose of framing his complaint, if all the specific charges of waste are on information and belief save one occurring while he himself was a director, and the only specific information sought is the money received by the corporation from advertisers and the money kept by the individual defendant, and he does not aver any more than that he

<sup>7</sup> C. C. P. § 869.

<sup>8</sup> *Secayno v. Vulcan Steel Products Co.*, — Misc. — (1918); N. Y. L. J. *Mch.* 13, 1918, p. 1885; C. C. P. §§ 803, 872.

<sup>9</sup> *Title Guaranty & Surety Co. v. Culgin Pace Contracting Co.*, 66 Misc. 157, 121 N. Y. Supp. 226 (1910); C. C. P. §§ 803, 804.

<sup>10</sup> *Bruen v. Whitman Co.*, 106 B. C. N. Y.—35

A. D. 248, 94 N. Y. Supp. 304 (1905).

<sup>11</sup> *Snyder v. De Forest Wireless Telegraph Co.*, 113 A. D. 840, 99 N. Y. Supp. 644 (1906).

<sup>12</sup> *Matter of Thompson*, 95 A. D. 542, 89 N. Y. Supp. 4 (1904); C. C. P. § 872, subd. 7. Under C. C. P. §§ 803-809 discovery of corporate books may be had.

thinks such retention will be shown.<sup>13</sup> A corporation cannot be compelled to give access without limitation to all its business books and papers for the benefit of a discharged employee seeking to recover salary based on a percentage of his sales: the plaintiff should either examine one of the corporate officers to find what books and papers contain the needed information and then apply for a limited order for discovery and inspection, or obtain such information by an examination of the proper officer before trial using a *subpoena duces tecum* to have the books there available to enable the officer to testify accurately.<sup>14</sup> When the relation between an individual plaintiff and a corporate defendant is that of employee and employer with compensation to be measured by an amount equal to a certain proportion of the receipts of a certain kind, less expenses, the plaintiff after discharge cannot in his action to recover his compensation have an inspection and examination of the defendant's books, but is confined to an examination before trial of the defendant's appropriate officer and to having a *subpoena duces tecum* at the examination for such corporate books as the officer needs accurately to testify.<sup>15</sup> An employee of a corporation entitled to a percentage of its net profits each year in addition to a fixed compensation who sues to recover a percentage of net profits due him is entitled to an inspection and discovery of its books almost as a matter of right.<sup>16</sup>

**§ 449. Id.: Witnesses.**—The admission of a member of an aggregate corporation who is not a party cannot be received as evidence against the corporation unless it was made concerning and while engaged in a transaction in which he was the authorized agent of the corporation or unless it was made while a member of such corporation and testifying as a witness concerning a transaction of the corporation, when the official record of such testimony is to be received.<sup>17</sup> Stockholders of a corporation are interested witnesses in favor of it in an action by or against it, and cannot, therefore, testify as to personal transactions between them and a decedent whose personal representative is suing the corporation.<sup>18</sup>

<sup>13</sup> Walsh v. Press Co., 48 A. D. 333, 62 N. Y. Supp. 833 (1900).

<sup>14</sup> Fungler v. Brooklyn Bottle Stopper Co., 132 A. D. 837, 117 N. Y. Supp. 799 (1909).

<sup>15</sup> Harburgh v. Middlesex Securities Co., 110 A. D. 633, 97 N. Y. Supp. 350 (1906).

<sup>16</sup> Thomas v. Waite Co., 113 A. D. 494, 99 N. Y. Supp. 297 (1906).

<sup>17</sup> C. C. P. § 839.

<sup>18</sup> Andrews v. Reinert, 112 A. D. 378, 98 N. Y. Supp. 658 (1906); C. C. P. § 829.

**§ 450. Id.: Supplementary Proceedings.**—The statutory provisions permitting a judgment creditor whose execution against his judgment debtor's property has been returned unsatisfied to sue to compel discovery of the debtor's property do not apply when the judgment debtor is a domestic corporation.<sup>19</sup> A domestic corporation, or a foreign corporation doing business in New York, is not subject to proceedings supplementary to execution; but the remedy of a judgment creditor of such corporation is proceedings under sections 1784 and 1809-1812 of the Code of Civil Procedure.<sup>20</sup>

<sup>19</sup> C. C. P. § 1879.

Misc. 145, 39 N. Y. Supp. 409

<sup>20</sup> *Levy v. Swick Piano Co.*, 17 (1896).

## CHAPTER IX.

### CORPORATE EXISTENCE AND CHANGE.

(Existence, Expiration, Vacation, Annulment, Sequestration, Dissolution, Forfeiture, Sale, Merger, Consolidation and Reorganization.)

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**§ 451. Corporate Existence and Change, Existence; In General.**—A stock corporation's certificate of incorporation must contain its duration.<sup>1</sup> Every corporation has power, though not specified in the law under which it is incorporated, to have succession for the period specified in its by-laws or certificate of incorporation; and perpetually when no period is specified.<sup>2</sup> "Corporate charters are not forfeited in fragments, or annulled as damages for the violation of private contracts. . . . the corporate life and power, once fully granted and completely existing, may be lost in two ways: sometimes because the charter itself provides for self-executing causes of forfeiture which, whenever established, effect at once the corporate death; and sometimes where no such provisions exist, the forfeiture comes and can only come from a judicial decree at the suit of the state."<sup>3</sup> Corporate existence is not lost through mere corporate inaction or transfer of property; and its dissolution is not effected by a failure to elect officers, a sale and assignment of all its corporate property or a cessation of all corporate acts: a corporation by virtue of proceedings against it or by reason of its pecuniary condition may cease to exist for all practical purposes for which it was created or for which a corporation may exist, but cannot be held to be actually dissolved till so adjudged and determined either by judicial sentence or the sovereign power.<sup>4</sup> The trustees or directors of a corporation cannot, even with the consent of the majority of the stockholders, so dispose of its property to a foreign corporation organized for the purpose as to end its existence and put the foreign corporation in its place: "A corporation cannot cease to exist of its own will. Its life continues until either the charter period has expired or the court has decreed a dissolution. . . . While a corporation may sell its property to pay debts, or to carry on its business, it cannot sell its property in order to deprive itself of existence. It cannot sell all its property to a foreign corporation organized through its procurement, with a majority of non-resident trustees, for the express purpose of stepping into its shoes, taking all its assets and carrying on its business."<sup>5</sup> Delivery of a deed to a mortgagee, of the property mortgaged to it by a corporation with the

<sup>1</sup> Bus. Corps. L. § 2 (L. 1909, c. 484).

<sup>2</sup> Gen. Corp. L. § 11 (L. 1909, c. 28).

<sup>3</sup> Matter of Long Island R. R. Co., 143 N. Y. 67, 37 N. E. 636 (1894).

<sup>4</sup> Brock v. Poor, 216 N. Y. 387, 111 N. E. 229 (1915).

<sup>5</sup> People v. Ballard, 134 N. Y. 269, 17 L.R.A. 737, 32 N. E. 54 (1892).

consent of its stockholders, pursuant to an agreement by which the mortgagee delayed foreclosure and agreed to accept less than the amount due on the mortgage if payment were made within the time delayed provided such deed were given if such payment were not made at the deferred date, will not be enjoined at the instance of a stockholder on the ground that it amounts to a cessation of the corporation's life by its own act.<sup>6</sup> The corporate liability of one of several constituent companies out of which an association was to be formed which was, however, held to have no legal capacity to exist as a corporation, remains.<sup>7</sup> One who participates in the organization of a corporation, delivers his note for the purpose of perfecting such organization, and receives the benefit from such note on the theory that the corporation had a legal existence, cannot evade liability on the note by pleading that the corporation never was a legal organization.<sup>8</sup> In a suit to distribute the assets of a defunct corporation among its creditors neither the taxable costs nor the fees of counsel of intervening creditors will be charged upon the fund.<sup>9</sup>

§ 452. *Id.*: **Proof of.**— This subject is considered at greater length in a preceding section dealing with the averment and proof of a corporation's existence in actions by and against it.<sup>10</sup> A corporation having in form a proper charter and exercising its corporate powers as to third persons need only prove, to establish its existence, such facts.<sup>11</sup> "To make proof of the existence of a *de facto* corporation, it is necessary to show not only that there is a law under which the corporation might be organized and an attempt to organize it, but that corporate powers have been exercised. That is, that the corporation has exercised its particular franchise by doing business under it."<sup>12</sup>

<sup>6</sup> *Wolf v. Armimes Copper Mine Co.*, 6 Misc. 562, 27 N. Y. Supp. 642 (1894).

<sup>7</sup> *Latham v. Boston, Hoosac Tunnel & Western Ry. Co.*, 38 Hun, 265 (1885).

<sup>8</sup> *Raegener v. McDougall*, 33 A. D. 231, 53 N. Y. Supp. 484 (1898).

<sup>9</sup> *Attorney-General v. Continental Life Ins. Co.*, 27 Hun, 195, *dism'd* 90 N. Y. 45 (1882).

Generally on the question of period of existence and charter limitations of private corporation, see note in 33 L.R.A. 576.

<sup>10</sup> See § 440, *supra*.

<sup>11</sup> *Jones v. Dane*, 24 Barb. 395 (1855).

<sup>12</sup> *Emery v. De Peyster*, 77 A. D. 65, 78 N. Y. Supp. 1056 (1902). Suit to enforce liability of director to one rendering services to corporation which had not filed annual report. Certificate of incorporation filed in office of secretary of state but not of county clerk. No business was done in time defendant was director save one directors' meeting after such filing authorizing issue of stock to individual for his

**§ 453. Id.: Expiration and Extension, By Charter Time-Limit.**—The certificate of incorporation of a stock corporation must set forth its duration.<sup>13</sup> The certificate of incorporation of any corporation the duration of which is limited by such certificate or by law may require that the consent of the stockholders owning a greater percentage than two-thirds of the stock shall be requisite to effect an extension of corporate existence beyond the time specified in such certificate or by-law, or in any certificate of extension of corporate existence.<sup>14</sup> Any domestic stock corporation at any time before the expiration thereof may extend the term of its existence beyond the time specified in its original certificate of incorporation or by law or in any certificate of extension of corporate existence by the consent of the stockholders owning two-thirds in amount of its capital stock given either in writing or by vote at a special meeting of the stockholders called for that purpose upon the same notice as that required for the annual meetings of the corporation; and a certificate under the seal of the corporation that such consent was given by the stockholders in writing or by vote at such a meeting must be subscribed and acknowledged by the president or a vice-president, and by the secretary or an assistant secretary of the corporation and filed in the office of the Secretary of State and be by him duly recorded and indexed in a book specially provided therefor, and a certified copy of such certificate, with a certificate of the Secretary of State of such filing and record, or a duplicate original of such certificate must be filed and similarly recorded and indexed in the office of the clerk of the county wherein the corporation has its principal place of business and be noted in the margin of the record of the original certificates of such corporation, if any, in such offices; and thereafter the term of the existence of such corporation is extended as designated in such certificate.<sup>15</sup> The Secretary of State collects a fee of twenty-five dollars for filing a certificate of extension or revival of corporate existence.<sup>16</sup> At the end of the term for which a corporation is incorporated the corporation ceases to exist and no adjudication of a court is necessary to terminate the corporate life.<sup>17</sup> “ . . . a corpora-

interest in a paper needed by corporation; but nothing else was done. Held, defendant not liable.

<sup>13</sup> Bus. Corps. L. § 2 (L. 1909, c. 484).

<sup>14</sup> Gen. Corp. L. § 37 (L. 1913, c. 306).

<sup>15</sup> Gen. Corp. L. § 37 (L. 1913, c. 306).

<sup>16</sup> Executive L. § 26 (L. 1917, c. 69).

<sup>17</sup> Matter of Friedman, 177 A. D. 755, 164 N. Y. Supp. 892 (1917).

tion at the end of the term for which it is incorporated ceases to exist by virtue of the expiration of its term merely. No adjudication of a court is necessary to terminate its corporate life."<sup>18</sup> A corporation with life limited by its charter to a stated number of years cannot reincorporate under the Business Corporations Law so as to extend its life, alter and extend its business and increase the number of shares of its stock, which could not otherwise be accomplished except by complying with provisions of the General Corporation Law and the Stock Corporation Law.<sup>19</sup> An action in the name of the People, on the relation of persons directly interested to obtain the relief sought, may be brought to restrain persons made individual defendants from acting as a corporation or exercising corporate rights, on the theory that the corporation's term of life has expired, whether the public have any interest in the relief sought or not.<sup>20</sup> When those who have been stockholders in a corporation which has become extinct by the expiration of the time limited for its existence by its charter agree among themselves to continue the business, appoint an agent to continue it and furnish money *pro rata* to their holdings, it is obvious that they are to participate in the profits in the same proportion; and the agreement constitutes a partnership, as to third persons, irrespective of any particular agreement between the partners themselves limiting the right of each to make contracts binding on the firm and of the ignorance of the third persons that they are no longer dealing with a corporation.<sup>1</sup> A corporation is not a proper party defendant to an action by the People on the relation of a stockholder to restrain individual persons defendant from acting as a corporation without being incorporated, or from exercising corporate rights, privileges or franchises not

<sup>18</sup> People *ex rel.* Haberman v. James, 5 A. D. 412, 39 N. Y. Supp. 313 (1896).

<sup>19</sup> People *ex rel.* Haberman v. James, 5 A. D. 412, 39 N. Y. Supp. 313 (1896); Bus. Corp. L. § 4 (L. 1892, c. 691), now § 4; Gen. Corp. L. § 32 (L. 1892, c. 687), now § 37; St. Corp. L. § 32 (L. 1892, c. 688), now § 18, and § 56 (L. 1893, c. 196), now § 65. ". . . the real theory of the reincorporation provided for by this section 4 [of the Business Corporations Law] was to enable the corporations organized under former statutes to become a

corporation under this new act, with the same rights, privileges and franchises as it originally had, and not to change or enlarge such rights, privileges and franchises, and that if the corporation desired to make any such changes it should do it under and pursuant to the provisions of the other acts, expressly providing therefor."

<sup>20</sup> People *ex rel.* Haberman v. James, 5 A. D. 412, 39 N. Y. Supp. 313 (1896); C. C. P. § 1948, subd. 3

<sup>1</sup> The National Union Bank of Watertown v. Landon, 45 N. Y. 41 (1871).

granted to them by law, on the theory that the corporation's term of life has expired.<sup>2</sup> It is no ground for granting an application by the Attorney-General to start proceedings for dissolution of a corporation that its charter has expired if it be a legal amalgamation of constituent companies having perpetual life.<sup>3</sup> An action against a corporation for a tort may be revived against its directors as statutory trustees if its charter expires by its own limitation while the action is at issue and untried.<sup>4</sup>

**§ 454. Id.: By Failure for Two Years to Organize or Undertake Duties.**—If any corporation except a railroad, turnpike, plankroad or bridge corporation does not organize and commence the transaction of its business, or undertake the discharge of its corporate duties within two years from the date of its incorporation, its corporate powers cease.<sup>5</sup> The statutory forfeiture of the powers of any corporation which does not organize and commence to transact business or to discharge its duties within two years from the date of its incorporation is self-executory, requires no action to complete the loss of its corporate powers and applies to all corporations, whether created under general or special laws (save those companies excepted in the statute itself.)<sup>6</sup> A corporation incorporated under a special act containing nothing inconsistent with the general statute putting an end to the powers of a corporation not commencing business within two years of its incorporation *per se* terminates on failure to comply with such statute; and the Attorney-General may bring suit against the incorporators and their successors.<sup>7</sup> It seems that the true construction of a statute enacting that the powers of a corporation not organizing and commencing business within a year of incorporation shall cease is that business which it might lawfully do is referred to; so that if it has never done any such business — though it has done unauthor-

<sup>2</sup> *People ex rel. Haberman v. James*, 5 A. D. 412, 39 N. Y. Supp. 313 (1896); C. C. P. § 1948, subd. 3, and § 447.

<sup>3</sup> *Matter of Consolidated Gas Co.*, 56 Misc. 49, 106 N. Y. Supp. 407 (1907); *aff'd* 124 A. D. 401, 108 N. Y. Supp. 823; C. C. P. § 1797 *et seq.* See now Gen. Corp. L. § 130.

<sup>4</sup> *Hepworth v. Union Ferry Co.*, 62 Hun, 257, 16 N. Y. Supp. 692 (1891); *app. dism'd* 131 N. Y. 645, 30 N. E. 867.

Abatement of action by or against corporation in absence of a saving statute by expiration of charter, see note in 32 L.R.A.(N.S.) 446.

<sup>5</sup> Gen. Corp. L. § 36 (L. 1909, c. 28).

<sup>6</sup> *People v. Stilwell*, 157 A. D. 839, 142 N. Y. Supp. 881 (1913); Gen. Corp. L. § 36.

<sup>7</sup> *People v. Stilwell*, 78 Misc. 96, 138 N. Y. Supp. 693 (1912); Gen. Corp. L. § 36; C. C. P. § 1948, subd. 3.

ized business — the statute applies.<sup>8</sup> An action cannot be maintained to effect a forfeiture of a corporate charter for non-user within a year, under a statutory provision forfeiting it if not organized in a year; and such an action should, it seems, in any event not be brought by a stockholder but by the Attorney-General.<sup>9</sup> A clause in a legislative enactment incorporating a company that it and all rights and privileges granted by it should be null and void unless the work contemplated should be begun within two years of its passage does not disclose a legislative intent that the clause shall be self-executing, but the word "void" should be held to mean "voidable," so that the corporation could be dissolved only after action by the Attorney-General.<sup>10</sup>

**§ 455. Id.: Vacation, Annulment, and Injunction, Governing Statutes.**—An action may be brought by the Attorney-General against a domestic corporation to procure a judgment (1) vacating the act of incorporation, or charter, (2) annulling the act of incorporation or the existence of the corporation or any act renewing the corporation or continuing its corporate existence; but only under certain circumstances which differ according to the relief to be sought.<sup>11</sup> The Attorney-General may maintain an action upon his own information or upon the complaint of a private person against and enjoin one or more persons who act as a corporation within New York State without being duly incorporated or exercise within New York State any corporate rights, privileges or franchises not granted to them by the law of New York State.<sup>12</sup>

**§ 456. Id.: In General.**—This subject has been generally considered in the four hundred and fifty-first section of this book. The statute authorizing an action "to procure a judgment vacating the charter or annulling the existence" of a corporation does not permit an action to forfeit or take away from it any of its rights or property.<sup>13</sup> The discretion of a court applied to by the Attorney-General for the dissolution of a corporation in the public interest that leave should be granted him to bring the action for dissolution is not review-

<sup>8</sup> *The People v. Troy House Company*, 44 Barb. 625 (1865); 1 N. Y. Stats. at Large, 557, § 7. See now Gen. Corp. L. § 36.

<sup>9</sup> *Gilman v. Green Point Sugar Co.*, 61 Barb. 9 (1871); 2 R. S. 464, § 38; *Id.* 706, § 46, 4th ed. See now Gen. Corp. L. § 36.

<sup>10</sup> *Matter of New York & Long*

*Island Bridge Co.*, 148 N. Y. 540, 42 N. E. 1088 (1896).

<sup>11</sup> Gen. Corp. L. § 130 (L. 1909, c. 28).

<sup>12</sup> C. C. P. § 1948.

<sup>13</sup> *People v. Westchester Traction Co.*, 123 A. D. 689, 108 N. Y. Supp. 59 (1908); C. C. P. § 1798. See now Gen. Corp. L. § 131.

able in the Court of Appeals.<sup>14</sup> An action by the Attorney-General to dissolve a corporation in the public interest as distinguished from an action by him to protect the interest of an individual is one simply between the People and the corporation, involving no person's interests, in which no relator is needed and in which it is of no legal consequence that the corporate officers or stockholders have misconducted themselves in any way.<sup>15</sup> In an action by the Attorney-General to have a corporation's existence annulled it is "incumbent upon the State to show upon the trial of the action that a cause of forfeiture had not only been incurred by the defendant, but that it continued to exist, and that its existence involved some public interest, and also that the court had authorized the bringing of the action. An action thus commenced is, even then, necessarily always within the control of the State, as the sole party interested, to prosecute or abandon;" and a law passed making a certificate filed by a commission determinative of the public interest to have the action continued or dropped, instead of the discretion of the Attorney-General, followed by the filing of a certificate against continuance, compels abandonment of the action.<sup>16</sup> When the State asks the court to end the life of a corporation created under its laws two questions must be answered affirmatively to permit the judgment of death to be entered: "first, has the defendant corporation exceeded or abused its powers, and, second, does that excess or abuse threaten or harm the public welfare."<sup>17</sup> "The general principle is not disputed that a corporation, by omitting to perform a duty imposed by its charter or to comply with its provisions does not *ipso facto* lose its corporate character or cease to be a corporation, but simply exposes itself to the hazard of being deprived of its corporate character and franchises by the judgment of the court in an action instituted for that purpose by the Attorney-General in behalf

<sup>14</sup> *People v. Buffalo Stone & Cement Co.*, 131 N. Y. 140, 15 L.R.A. 240, 29 N. E. 947 (1892); C. C. P. § 1798. See now Gen. Corp. L. § 131.

<sup>15</sup> *People v. Buffalo Stone & Cement Co.*, 131 N. Y. 140, 15 L.R.A. 240, 29 N. E. 947 (1892); C. C. P. § 1798. See now Gen. Corp. L. § 131. Some of those who applied to the attorney-general to bring the action were trustees who omitted to make the annual corporate report

and stockholders who omitted to pay for their stock.

<sup>16</sup> *People v. Ulster & Delaware R. R. Co.*, 128 N. Y. 240, 28 N. E. 635 (1891); C. C. P. § 1798. See now Gen. Corp. L. § 131; L. 1874, c. 430, as amend'd L. 1889, c. 236.

<sup>17</sup> *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 9 L.R.A. 33, 24 N. E. 834 (1890); C. C. P. § 1798. See now Gen. Corp. L. § 131.

of the People; but it cannot be denied that the legislature has the power to provide that a corporation may lose its corporate existence without the intervention of the courts by any omission of duty or violation of its charter or default as to limitations imposed, and whether the legislature has intended so to provide in any case depends upon the construction of the language used."<sup>18</sup>

**§ 457. Id.: Grounds: Procuring Incorporation on Fraudulent Suggestion or Material Concealment.**—The action to vacate or annul the act of incorporation or any act renewing the corporation or continuing its corporate existence must be brought (1) upon the ground that the act was procured (a) upon a fraudulent suggestion or (b) the concealment of a material fact, made by or with the knowledge and consent of any of the persons incorporated, and (2) whenever the Attorney-General is so directed by the legislature.<sup>19</sup>

**§ 458. Id.: Offending Against Law or Creating Act; Failure of, or Unauthorized Exercise, or Surrender of, Rights.**—The action by the Attorney-General to enjoin one or more persons from acting as a corporation or exercising corporate rights not granted by law must be brought on the ground that they are so acting or exercising such rights.<sup>20</sup> The word "franchise" in the statute authorizing the Attorney-General to sue a person who unlawfully exercises a franchise within the State should not be construed to permit an action enjoining a corporation from exercising special grants or consents conferred by local authorities and attaching to franchises conferred by the legislature and together forming the franchises of the corporation.<sup>1</sup>

The action to vacate the charter or annul the existence of the corporation must be brought (1) upon the ground that it has either (a) offended against some provision of an act by or under which it was created, altered or renewed, or an act amending such act, and applicable to the corporation, or (b) violated some provision of law, whereby it has forfeited its charter, or become liable to be dissolved, by the abuse of its powers, or (c) forfeited its privileges or franchises by a

<sup>18</sup> Brooklyn Steam Transit Co. v. City of Brooklyn, 78 N. Y. 524 (1879). One mile of railroad was to be laid within a specified time, otherwise "this act and all the powers . . . granted, shall be deemed forfeited and terminated." This language *per se* held to put an

end to the corporation if the track was not so laid.

<sup>19</sup> Gen. Corp. L. § 130 (L. 1909, c. 28).

<sup>20</sup> C. C. P. § 1948.

<sup>1</sup> People v. Consolidated Gas Co., 130 A. D. 626, 115 N. Y. Supp. 393 (1909); C. C. P. § 1948, subd. 1.

failure to exercise its powers, or (d) done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises, or (e) exercised a privilege or franchise not conferred upon it by law, and (2) upon leave being granted by the court which may before granting it in its discretion require such previous notice of the application as it thinks proper to be given to the corporation or any officer thereof, and may hear the corporation in opposition thereto.<sup>2</sup> The statutory provision for an action to dissolve a corporation "contains no rule of liability whatever, but simply points out a mode of procedure to enforce duties or punish misconduct elsewhere and otherwise settled and determined. . . . The Attorney-General, with leave of the court obtained, may sue for a forfeiture in five enumerated cases. First, where the corporation has 'offended against' the law of its creation; what constitutes such an offense the section does not declare or affirm, but leaves us to look elsewhere for the proper and lawful test. Second, when the corporation 'has violated any provision of law whereby it has forfeited its charter or become liable to be dissolved by an abuse of its powers.' Here again the violation must be one *whereby* forfeiture follows, and we must go outside of the section to ascertain what violations will produce the result and what acts constitute an abuse of powers conferred. Third, 'where it has forfeited its privileges or franchises by a failure to exercise its powers.' When such failure works a liability to forfeiture the section does not undertake to determine. Fourth, where the corporation has 'done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises,' but what acts do amount to such a surrender, we must go beyond the section itself to ascertain. Fifth, where the corporation has 'exercised a privilege or franchise not conferred upon it by law.' Here again what acts, or how long continued or how material or important, shall bring the penalty of dissolution we are not told. . . . the section does not establish or pretend to establish any rule of liability, but simply to fix and enumerate the classes of cases in which, if liability does exist, the Attorney-General may move, having first obtained the assent of the court. That section relates, therefore, merely to procedure, and does not determine, much less enlarge, existing rules of corporate liability.'" <sup>3</sup> While an action to declare a corporation's franchise

<sup>2</sup> Gen. Corp. L. §§ 131, 132 (L. Co., 125 N. Y. 513, 26 N. E. 622 1909, c. 28).

<sup>3</sup> People v. Atlantic Avenue R. R. Gen. Corp. L. § 131.

repealed by non-user can only be brought by the People through the Attorney-General, an action to abate a public nuisance may be maintained by a municipality.<sup>4</sup> The charter of a corporation organized under the Business Corporations Law will be vacated and its existence annulled as tempting to do an insurance business without complying with the Insurance Law if it cares for plate glass and replaces it if broken, for a consideration and for a specified period.<sup>5</sup> An action may be brought by the People on the relation of a party, by the Attorney-General, to declare judicially dead a corporation which for more than two years from incorporation has been dormant or inactive.<sup>6</sup> A complaint against a private corporation by the Attorney-General that it has not used its powers given by charter but has done other illegal things not permitted by its certificate of incorporation, under cover of such certificate, is sufficient to demonstrate the public interest that it be dissolved.<sup>7</sup> "If there is any defect in the proceedings for the organization of a corporation, or any abuse of its powers, or of the statute authorizing the formation of corporations under general or special laws, the question is one of law, and it is for the state alone to take steps to dissolve such corporation or forbid the exercise by it of corporate rights and franchises."<sup>8</sup> A failure by a corporation to observe a law regulating the number of hours' work to be exacted from its employees is not reason for annulling its charter.<sup>9</sup> The subsequent abuse or perversion of powers of a corporation perfectly legal when created, though such abuse and perversion were intended by the organizers of it, do not destroy the body corporate.<sup>10</sup>

<sup>4</sup> *City of New York v. Montague*, 5 A. D. 172, 129 N. Y. Supp. 1084 (1911).

<sup>5</sup> *People v. Standard Plate Glass Salvage Co., Ltd.*, 174 A. D. 501, 6 N. Y. Supp. 1012 (1916).

<sup>6</sup> *People ex rel. Hearst v. Ramapo Water Co.*, 51 A. D. 145, 64 N. Y. Supp. 532 (1900); *Gen. Corp. L.* 31, now § 131 (L. 1892, c. 687, now L. 1909, c. 28); C. C. P. § 1798.

<sup>7</sup> *People v. Milk Exchange, Ltd.*, 13 N. Y. 565, 30 N. E. 850 (1892).

<sup>8</sup> *Doyle v. Peerless Petroleum Company*, 44 Barb. 239 (1865).

<sup>9</sup> *People v. Atlantic Avenue R. R. Co.*, 57 Hun, 378, 10 N. Y. Supp. 17 (1910), *aff'd* 125 N. Y. 513, 26 E. 622; L. 1887, c. 529.

<sup>10</sup> *Clancey v. Onondaga Fine Salt Mfg. Co.*, 62 Barb. 395 (1862). The failure of a company to make an annual report required by statute is cause for action for its dissolution in the public interest by the attorney-general, even though the statute make its trustees liable for its debts on failure to file such report, as such liability, while it may provide the only consequence to the trustees, leaves the consequence to the corporation to be determined by the general statutory provisions. *People v. Buffalo Stone & Cement Co.*, 131 N. Y. 140, 15 L.R.A. 240, 29 N. E. 947 (1892); *Gen. Mfg. Act*, § 12 (L. 1848, c. 40). If the attorney-general and the court to which

§ 459. **Id.: Leave of Court.**—It is not necessary to obtain leave to bring an action under the nineteen hundred and forty-eighth section of the Code of Civil Procedure for enjoining persons from acting as a corporation, but it is necessary in an action under the one hundred and thirty-first section of the General Corporation Law for vacating or annulling a corporate charter.<sup>11</sup> The court need not require previous notice in an action under the one hundred and thirty-first section of the General Corporation Law, and an *ex parte* order granting leave to bring the action is not, therefore, void.<sup>12</sup> Before the court grants leave to the Attorney-General to bring an action against a domestic corporation to vacate its charter or annul its existence because it has offended against the act creating, altering or renewing it, or an act amendatory thereto; or has so violated a law that it has forfeited its charter or become liable to be dissolved by the abuse of its powers; or has forfeited its privileges or franchises by failure to exercise its powers; or has done or omitted an act amounting to a surrender of its corporate rights, privileges and franchises; or has exercised a privilege or franchise not conferred upon it by law, it may in its discretion require such previous notice of the application as it thinks proper to be given the corporation or any officer thereof, and may hear the corporation in opposition thereto.<sup>13</sup> While the consent of court is necessary to an action by the People to annul a corporation, it is not to an action to oust a corporation from the unlawful exercise of a franchise; for while the legislature may reasonably have intended to leave it discretionary with the court whether an action should be brought which might kill it, it is not reasonable to suppose that the court should have discretion to decide if a corporation shall be permitted to exercise franchises not conferred upon it.<sup>14</sup> Whether or not leave should be given by the court to the Attorney-General to bring a statutory

he applies exercise their discretion in favor of an action for forfeiture of a corporation's charter in the public interest for failure by the corporation to have its capital stock paid in within the time limited by statute, the provision of the statute that the corporation "shall be dissolved" is imperative and no further discretion is left to the court. *People v. Buffalo Stone & Cement Co.*, 131 N. Y. 140, 15 L.R.A. 240, 29 N. E. 947 (1892); *Gen. Mfg. Act*, § 10 (L. 1848, c. 140).

<sup>11</sup> *People v. Boston, Hoosac Tunnel & Western Ry. Co.*, 27 Hun, 528 (1882).

<sup>12</sup> *People v. Boston, Hoosac Tunnel & Western Ry. Co.*, 27 Hun, 528 (1882); C. C. P. §§ 1798, 1799, now *Gen. Corp. L.* § 131.

<sup>13</sup> *Gen. Corp. L.* § 132 (L. 1909, c. 28).

<sup>14</sup> *People v. Bleecker Street & Fulton Ferry R. R. Co.*, 140 A. D. 611, 125 N. Y. Supp. 1045 (1910); *Gen. Corp. L.* § 131; C. C. P. § 1948, subd. 1.

tion to vacate a corporation's charter and to annul its existence rests in each case in the sound discretion of the court.<sup>15</sup>

an action by the Attorney-General against a corporation to vacate its charter, he is to determine if the public interests are to be served by instituting the action and the court is not concerned with the wisdom of instituting the action but with the inquiry whether or not he alleges against the corporation *prima facie* case, or a case of such gravity that it seems proper that the court should determine it upon a trial.<sup>16</sup> Before an order can be had permitting an action to annul a corporation's charter the written application of the Attorney-General with his opinion that the action should be begun for stated reasons must be presented.<sup>17</sup> " . . . leave should not be granted to bring an action to annul the charter of a corporation without the written application of the Attorney-General to the court stating that, in his opinion, the action should and ought to be maintained for reasons given;" and before authority should be given to bring an action to vacate the charter, or to annul the existence of a corporation, the Attorney-General should point out in his application to the court the particular act or acts done or omitted, which, in his judgment, are sufficient to justify the bringing of such an action, and should allege in his petition wherein the corporation has violated the laws of the State — what it has done or omitted — which allegations should be supported by sufficient evidence to render it probable that a cause of action exists."<sup>18</sup>

**§ 460. Id.: Who May Take Steps For.**—When the Attorney-General has good reason to believe that an action can be maintained in behalf of the People of the State against a domestic corporation to procure a judgment vacating its charter or annulling its existence upon the ground that it has defended against the act creating it, or an act amending or changing such act; or that it has violated a law whereby it has forfeited its charter or become liable to be dissolved by abuse

<sup>15</sup> Matter of Attorney-General, 124 D. 401, 108 N. Y. Supp. 823 (908); C. C. P. § 1798, see now Gen. Corp. L. § 131.

<sup>16</sup> Matter of Attorney-General, 50 Hun, 511, 3 N. Y. Supp. 464 (1888); C. C. P. § 1798, see now Gen. Corp. L. § 131.

<sup>17</sup> Matter of Attorney-General, 79 Hun, 369, 29 N. Y. Supp. 449 (894); C. C. P. § 1798, see now

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Gen. Corp. L. § 131. An affidavit by an attorney giving his opinion is insufficient, though an opinion of the attorney-general in the record says he may apply in his name, if the attorney applied in his own.

<sup>18</sup> Matter of Attorney-General, 81 Hun, 541, 30 N. Y. Supp. 1093 (1894); C. C. P. § 1798, see now Gen. Corp. L. § 131.

of its powers; or that it has forfeited its franchises by failure to exercise its powers; or that it has done or omitted any act amounting to a surrender of its franchises, he must bring an action, or apply to a competent court for leave to bring an action, as the case requires, if in his opinion the public interest requires that an action should be brought; and if the case be one in which the action can be brought only by the Attorney-General in behalf of the People, if a creditor, stockholder, director or trustee of the corporation applies to him for that purpose and furnishes the security required by law, he must bring the action, or apply for leave to bring it, if he has good reason to believe that it can be maintained, and when such an application is made section nineteen hundred and eighty-six of the code of civil procedure applies thereto and to the action brought in pursuance thereof.<sup>19</sup>

**§ 461. Id.: Trial and Testimony.**—In the trial of an action by the Attorney-General on his own or an individual's motion against persons acting as a corporation without being duly incorporated or exercising corporate rights not granted them by law, a party or a witness is not excused from answering a question on the ground that such answer will tend to incriminate him; but such answer cannot be used as evidence against the person so answering, in a criminal action or criminal proceeding.<sup>20</sup> An action to vacate or annul a corporate charter or its existence, is triable, of course and of right, by a jury, as if it was an action specified in section nine hundred and sixty-eight of the Code of Civil Procedure, and without procuring an order, as prescribed in section nine hundred and seventy of the Code of Civil Procedure.<sup>1</sup> In an action brought by the Attorney-General to procure a judgment vacating or annulling the act of incorporation, or any act renewing the corporation, or continuing its corporate existence upon the ground that the act was procured by fraudulent suggestion or concealment, or that it has offended against its charter or any provision of law forfeiting its charter or rendering it liable to dissolution by abuse of its powers, or that it has forfeited its franchises by failure to exercise its powers, or that it has done or omitted an act amounting to a surrender of its franchises, or that it has exercised a franchise not conferred upon it by law, a stockholder, officer, alienee or agent of a corporation is not excused from answering a question relating to the management of the corporation or the transfer or disposition of its property, on

<sup>19</sup> Gen. Corp. L. § 304 (L. 1909, c. 28).

<sup>1</sup> Gen. Corp. L. § 133 (L. 1909, c. 28).

<sup>20</sup> C. C. P. § 1955.

the ground that his answer may expose the corporation to a forfeiture of any of its corporate rights, or will tend to convict him of a criminal offense, or to subject him to a penalty or forfeiture, but his testimony cannot be used as evidence against him in a criminal action or special proceeding.<sup>2</sup>

**§ 462. Id.: Injunction, Receiver, Account, Distribution, Judgment and Practice.**—In an action by the Attorney-General on his own or an individual's motion against persons acting as a corporation without being duly incorporated or exercising corporate rights not granted them by law, a temporary injunction to restrain the commission or continuance of the act or acts complained of may be granted upon proof by affidavit that the defendants have violated the statutory prohibition in question.<sup>3</sup> In an action by the Attorney-General on his own or an individual's motion against persons acting as a corporation without being duly incorporated or exercising corporate rights not granted them by law, the final judgment in favor of the plaintiff must perpetually restrain the defendants from the commission or continuance of the act or acts complained of.<sup>4</sup> When in an action by the Attorney-General to vacate or annul an act incorporating a domestic company or any act renewing it or continuing its corporate existence upon the ground that the act was obtained by fraudulent suggestion or concealment of a material fact; or to vacate the charter or annul the existence of a domestic corporation on statutory grounds, the matters provided by statute as grounds for the action are established, the court may render final judgment that the corporation and each of its officers be perpetually enjoined from exercising any of its corporate rights, privileges and franchises, and that it be dissolved, and must also provide for the appointment of a receiver, the taking of an account and the distribution of the property of the corporation among its creditors and stockholders, as where a corporation is dissolved upon its voluntary application as prescribed by statute.<sup>5</sup> In an action brought to annul a corporation upon the grounds stated in the statute and as therein prescribed an injunction order may be granted at any stage of the action restraining the corporation and any or all of its directors,

<sup>2</sup> Gen. Corp. L. § 301 (L. 1909, c. 28).

<sup>3</sup> C. C. P. § 1955: "The provisions of title second of chapter seventh of this act apply to such a temporary injunction, and the proceedings thereupon, except where

provision is otherwise made in this title for that purpose.

<sup>4</sup> C. C. P. § 1955.

<sup>5</sup> Gen. Corp. L. § 134 (L. 1909, c. 28). The statute referred to is Art. 9 of c. 28, L. 1909.

trustees or other officers from exercising any of its corporate rights, privileges or franchises; or from exercising certain of its corporate rights, privileges or franchises, specified in the injunction order; or from exercising any franchise, liberty or privilege, or transacting any business, not allowed by law; and such an injunction is deemed one of those specified in section six hundred and three of the Code of Civil Procedure to which all the provisions of title second of chapter seventh of such Code applicable to an injunction specified in that section apply, except that it can be granted only by the court.<sup>6</sup> The subject of receivers on vacation and annulment is considered in the subsequent chapter on "Receivers."<sup>7</sup> When final judgment to annul a corporation upon the grounds specified by statute and in an action brought as therein prescribed is rendered against the corporation the Attorney-General must cause a copy of the judgment-roll to be forthwith filed in the office of the Secretary of State, who must cause a notice of the substance and effect of the judgment to be published for four weeks in a newspaper printed in the county wherein the principal place of business of the corporation was located.<sup>8</sup>

**§ 463. Id.: Creditors' Rights and Liabilities.**—In an action brought by the Attorney-General to procure a judgment vacating or annulling the act of incorporation, or any act renewing the corporation, or continuing its corporate existence upon the ground that the act was procured by fraudulent suggestion or concealment, or that it has offended against its charter or any provision of law forfeiting its charter or rendering it liable to dissolution by abuse of its powers, or that it has forfeited its franchises by failure to exercise its powers, or that it has done or omitted an act amounting to a surrender of its franchise, or that it has exercised a franchise not conferred upon it by law, the court may in its discretion on the application of either party at any stage of the action before or after final judgment and with or without security grant an injunction order restraining the creditors of the corporation from bringing actions against the defendants or any of them for the recovery of a sum of money or from taking any further proceedings in such actions theretofore commenced; and such an injunction has the same effect and is subject to the same provisions of law as if each creditor upon whom it is served was named therein and was a party to the action in which it was

<sup>6</sup> Gen. Corp. L. § 135 (L. 1909, c. 28).

<sup>8</sup> Gen. Corp. L. § 136 (L. 1909, c. 28).

<sup>7</sup> See § 513 *et seq.*, *infra*.

granted.<sup>9</sup> In an action brought by the Attorney-General to procure a judgment vacating or annulling the act of incorporation, or any act renewing the corporation, or continuing its corporate existence upon the ground that the act was procured by fraudulent suggestion or concealment, or that it has offended against its charter or any provision of law forfeiting its charter or rendering it liable to dissolution by abuse of its powers, or that it has forfeited its franchises by failure to exercise its powers, or that it has done or omitted an act amounting to a surrender of its franchise, or that it has exercised a franchise not conferred upon it by law, the court may at any stage of the action, before or after final judgment, make an order requiring all the creditors of the corporation to exhibit and prove their claims, and thereby make themselves parties to the action, in such manner and in such a reasonable time, not less than six months from the first publication of notice of the order, as the court directs; and that the creditors who make default in so doing shall be precluded from all benefit of the judgment and from any distribution which may be made thereunder, except that, notwithstanding such order, any such creditor who may exhibit and prove his claim in the manner directed by the order, with proof by affidavit or otherwise, that he has had no notice or knowledge thereof in time to comply therewith, is entitled at any time before an order is made directing a final distribution of the assets of such corporation to have his claim received, and has the same rights and benefits thereon, so far as the assets of such corporation then remaining undistributed may render possible, as if his claim had been exhibited and proved within the time limited by such order.<sup>10</sup> Notice of the order must be given by publication in such newspapers and for such length of time as the court directs.<sup>11</sup>

**§ 464. Id.: Sequestration and Dissolution, Distinctions.—**A distinction exists between an action to dissolve and to sequester the property of a corporation and it is only in the former that its officers will be absolutely restrained from exercising their corporate privileges; so that while a corporation after judgment of sequestration cannot prosecute (save through its receiver), it may defend, and appeal from a judgment rendered against it.<sup>12</sup> “Sequesterate is defined to

<sup>9</sup> Gen. Corp. L. § 302 (L. 1909, c. 28).

<sup>10</sup> Gen. Corp. L. § 303 (L. 1909, c. 28).

<sup>11</sup> Gen. Corp. L. § 303 (L. 1909, c. 28).

<sup>12</sup> *Auburn Button Co. v. Sylvester*, 68 Hun, 401, 22 N. Y. Supp. 891

mean 'The act of taking property from the owner for a time, till the rents, issues and profits satisfy a demand.'"<sup>13</sup>

§ 465. **Id.: Sequestration, Governing Statutes.**—An action to procure a judgment sequestering the property of a domestic corporation and providing for a distribution thereof may be maintained (1) by a judgment creditor, (2) when final judgment for a sum of money has been rendered against it, (3) an execution has been issued thereupon to the sheriff of the county where it transacts its general business or where its principal office is located, and (4) such execution has been returned wholly or partly unsatisfied.<sup>14</sup> When the Attorney-General has good reason to believe that an action can be maintained in behalf of the People of the State to procure a judgment sequestering the property of a domestic corporation and providing for a distribution thereof, he must bring an action accordingly, or apply to a competent court for leave to bring an action, as the case requires, if in his opinion the public interest requires that an action should be brought; and if the case be one in which the action can be brought only by the Attorney-General in behalf of the People, if a creditor, stockholder, director or trustee of the corporation applies to him for that purpose and furnishes the security required by law, he must bring the action, or apply for leave to bring it, if he has good reason to believe that it can be maintained, and when such an application is made section nineteen hundred and eighty-six of the Code of Civil Procedure applies thereto and to the action brought in pursuance thereof.<sup>15</sup> An action or proceeding brought by the Attorney-General on behalf of the People of the State against any corporation for the purpose of the sequestration of its property may be brought in any county of the State to be designated by the Attorney-General.<sup>16</sup> The statute dealing with dissolution of a corporation and sequestration of its property does not repeal or affect any special provision of law prescribing that a particular kind of corporation shall cease to exist or shall be dissolved in a case or in a manner not prescribed in such statute; or any special provision of law prescribing the mode

(1893); C. C. P. § 1784 *et seq.*, see now Gen. Corp. L. § 100 *et seq.*

<sup>13</sup> Proctor v. Sidney Sash & Furniture Co., 8 A. D. 42, 40 N. Y. Supp. 454 (1896); C. C. P. § 1784, see now Gen. Corp. L. § 100. Quoting the definition given in the *Century Dictionary*.

<sup>14</sup> Gen. Corp. L. § 100 (L. 1909, c. 28).

<sup>15</sup> Gen. Corp. L. § 304 (L. 1909, c. 28).

<sup>16</sup> Gen. Corp. L. § 315 (L. 1909, c. 28).

of enforcing the liability of the stockholders of a particular kind of corporation.<sup>17</sup>

**§ 466. Id.: In General.**—"It has long been the settled law of this State that the jurisdiction of chancery does not extend to the sequestration of the property of the corporation by means of a receiver (*citations*). The proceedings to dissolve a corporation, either voluntary or involuntary, rest wholly upon the provisions of the statute."<sup>18</sup> A judgment creditor of a corporation may bring suit under the statute to sequester its property and join with the corporation as defendants not only its directors but others to whom he alleges its officers have made separate and illegal transfers of its property.<sup>19</sup>

**§ 467. Id.: Injunction and Receiver.**—The subject of receivers on sequestration is considered in the subsequent chapter on "Receivers."<sup>20</sup> In an action for such sequestration the court may upon proof of the facts authorizing the action to be maintained grant an injunction order restraining the corporation, its trustees, directors, managers and other officers during the pendency of the action except by express permission of the court (a) from collecting or receiving any debt or demand, and (b) from paying out or in any way transferring or delivering to any person any money, property or effects of the corporation.<sup>1</sup> Except that it can be granted only by the court, the granting, vacating or modifying of an injunction order so granted is governed by the provisions of title second of chapter seventh of the Code of Civil Procedure.<sup>2</sup>

**§ 468. Id.: Trial and Testimony.**—In an action brought to procure a judgment sequestering the property of a corporation and providing for distribution thereof, a stockholder, officer, alienee or agent of the corporation is not excused from answering a question relating to the management of the corporation, or the transfer or disposition of its property, on the ground that his answer may expose the corporation to a forfeiture of any of its corporate rights, or will tend to convict him of a criminal offense, or to subject him to a penalty or forfeiture; but his testimony cannot be used as evidence against him in a criminal action or special proceeding.<sup>3</sup> A

<sup>17</sup> Gen. Corp. L. § 115 (L. 1909, c. 28).

<sup>18</sup> Matter of Coleman, 174 N. Y. 373, 66 N. E. 983 (1903).

<sup>19</sup> Proctor v. Sidney Sash & Furniture Co., 8 A. D. 42, 40 N. Y. Supp. 454 (1896); C. C. P. § 1784 *et seq.*, see now Gen. Corp. L. § 100 *et seq.*

<sup>20</sup> See § 513 *et seq.*, *infra*.

<sup>1</sup> Gen. Corp. L. § 103 (L. 1909, c. 28).

<sup>2</sup> Gen. Corp. L. § 103 (L. 1909, c. 28).

<sup>3</sup> Gen. Corp. L. § 301 (L. 1909, c. 28).

corporation about to bring an action to dissolve and sequester the property of a successor corporation formed by the same individuals as composed a corporation against which it had obtained a judgment should be allowed to examine the moving spirit in both such corporations whom it also intends to make a party, individually, to its contemplated action, in order to find out the facts as to the transfer by the predecessor to its successor corporation of all its property.<sup>4</sup>

**§ 469. Id.: Creditors.**—In an action brought to procure a judgment sequestering the property of a corporation and providing for distribution thereof, the court may in its discretion on the application of either party at any stage of the action before or after final judgment and with or without security grant an injunction order restraining the creditors of the corporation from bringing actions against the defendants or any of them for the recovery of a sum of money, or from taking any further proceedings in such actions theretofore commenced, and such an injunction has the same effect and is subject to the same provisions of law as if each creditor upon whom it is served was named therein and was a party to the action in which it is granted.<sup>5</sup> In an action brought to procure a judgment sequestering the property of a corporation and providing for distribution thereof, the court may at any stage of the action, before or after final judgment, make an order requiring all the creditors of the corporation to exhibit and prove their claims, and thereby make themselves parties to the action, in such manner and in such a reasonable time, not less than six months from the first publication of notice of the order, as the court directs; and that the creditors who make default in so doing shall be precluded from all benefit of the judgment and from any distribution which may be made thereunder, except that, notwithstanding such order, any such creditor who may exhibit and prove his claim in the manner directed by the order, with proof by affidavit or otherwise that he has had no notice or knowledge thereof in time to comply therewith is entitled at any time before an order is made directing a final distribution of the assets of such corporation to have his claim received, and has the same rights and benefits thereon, so far as the assets of such corporation then remaining undistributed may render possible, as if his claim had been duly exhibited and proved within the

<sup>4</sup> *Matter of Sayre*, 70 A. D. 329,  
75 N. Y. Supp. 286 (1902).

<sup>5</sup> Gen. Corp. L. § 302 (L. 1909,  
c. 28).

time limited by such order.<sup>6</sup> Notice of the order must be given by publication in such newspapers and for such length of time as the court directs.<sup>7</sup> A claim against a company which is surety on a contractor's bond who defaults in his contract before an action for dissolution of the company and an order for sequestration of its property is a fixed liability and shares with other fixed claims in its assets.<sup>8</sup>

**§ 470. Id.: Practice, Judgment and Subsequent Proceedings.**

—When the action is brought by a creditor and the stockholders, directors, trustees or other officers, or any of them are made liable by law, in any event or contingency, for the payment of the creditor's debt, they may be made parties defendant by the original or a supplemental complaint and their liability declared and enforced by the judgment in the action, and if they are not made parties defendant, the plaintiff may maintain a separate action against them to procure a judgment declaring, apportioning and enforcing their liability; and the court must when it is necessary cause an account to be taken of the property and debts of the corporation and thereupon the defendants' liability must be apportioned accordingly, but if it affirmatively appears that the corporation is insolvent and has no property to satisfy its creditors the court may without taking such an account ascertain and determine the amount of each defendant's liability and enforce the same accordingly.<sup>9</sup> The final judgment in the action, whether brought against a corporation separately or in conjunction with its stockholders, directors, trustees or other officers, must provide for a just and fair distribution of its property and the proceeds thereof among its fair and honest creditors in the order and in the proportions prescribed by law in case of the voluntary dissolution of a corporation.<sup>10</sup> When the stockholders are parties to the action, if the corporate property is not sufficient to discharge its debts the interlocutory or final judgment, as the case requires, must adjudge that each stockholder pay into court the amount due and remaining unpaid on the shares of stock held by him or so much thereof as is necessary to satisfy the corporate debts, and if it appears that the corporate property and the sums collected or collectible from the stockholders upon their stock

<sup>6</sup> Gen. Corp. L. § 303 (L. 1909, c. 28).

<sup>7</sup> Gen. Corp. L. § 303 (L. 1909, c. 28).

<sup>8</sup> *People v. Metropolitan Surety Co.*, 171 A. D. 15, 156 N. Y. Supp. 1027 (1916).

<sup>9</sup> Gen. Corp. L. §§ 109, 110, 111 (L. 1909, c. 28).

<sup>10</sup> Gen. Corp. L. § 112 (L. 1909, c. 28).

subscriptions are or will be insufficient to pay the corporate debts, the court must ascertain the several sums for which the directors, trustees or other officers, or the stockholders, being parties to the action, are liable, and must adjudge that the same be paid into court to be applied in such proportions and in such order as justice requires to the payment of the corporate debts.<sup>11</sup> A final judgment in an action to sequester the property of a corporation must be entered in the office of the clerk of the county in which the principal business office or the principal place of business of the corporation is located.<sup>12</sup>

**§ 471. Dissolution and Forfeiture, In General.**—"At common law, a corporation aggregate might be dissolved within the time limited by the charter: First, by act of parliament; second, by the loss of all its members, or of an integral part, by death or otherwise; third, by surrender of its franchises; and, fourth, by forfeiture of its charter through negligence or abuse of the privileges conferred by it."<sup>13</sup> The power of the court to dissolve a corporation depends entirely upon statute, and unless the complaint shows the jurisdictional facts it cannot act and any decree it makes is void.<sup>14</sup> " . . . the method of effecting corporate dissolution, when prescribed by statute as in this state, is exclusive, and must be substantially followed . . . The statute now regulating the subject consists of sections 2419 to 2432 of the Code of Civil Procedure . . . in the opinion of the legislature dissension as to the management, especially when it might result in a deadlock, so that business could not be done efficiently, was sufficient to authorize action by the courts. . . . when the interests of the stockholders of a corporation are so discordant as to prevent efficient management and a large majority of both trustees and members wish to wind up its affairs, a dissolution thereof will be beneficial to the interests of the stockholders, because the object of its corporate existence cannot be attained."<sup>15</sup> The statutory provisions, on dissolution of a corporation, have for their object, as they say, to secure "a just and fair distribution of the property of the corporation, and of the proceeds thereof, among its fair and honest creditors;" and mean "not a distribution among those whose diligence has given direction to the conduct of the proceeding,

<sup>11</sup> Gen. Corp. L. § 114 (L. 1909, c. 28).

<sup>12</sup> Gen. Corp. L. § 115 (L. 1916, c. 163).

<sup>13</sup> Bradt v. Benedict, 17 N. Y. 93 (1858).

<sup>14</sup> Osborn v. Montelac Park, 89

Hun, 167, 35 N. Y. Supp. 610 (1895); aff'd 153 N. Y. 672, 48 N. E. 1106; C. C. P. §§ 1785, 1786,

see now Gen. Corp. L. § 101 *et seq.*

<sup>15</sup> Hitch v. Hawley, 132 N. Y. 212, 30 N. E. 401 (1892).

but among all who are within the descriptive terms of the statute.”<sup>16</sup> “. . . it was not intended by the legislature that the voluntary proceedings for the dissolution of the [a] corporation should preclude the People, by the Attorney-General, from commencing an action to procure a dissolution of a corporation for any of the grounds stated ” in the statute.<sup>17</sup> No action towards the compulsory dissolution of a corporation can be taken if it has been duly dissolved voluntarily.<sup>18</sup> A court of equity, at the instance of a creditor of a dissolved corporation, will enjoin many actions at law begun to hold its various stockholders liable for its debts pursuant to the statute, and will in the equitable suit adjudge the rights of all creditors and the liabilities of all stockholders.<sup>19</sup> Stockholders and directors unable to secure the consent of a two-thirds majority of the stockholders to the corporation’s dissolution cannot accomplish their purpose by reducing the capital and turning over the business and good will without compensation to a new corporation, as this in effect terminates the corporate existence as against dissenting stockholders.<sup>20</sup> No proceeding taken under the statute permitting a stock corporation to reorganize so that it may have all the rights and be subject to all the liabilities of a corporation organized to have stock, other than preferred, without nominal or par value, is deemed to work a dissolution or to create a new corporation or to interrupt in any way the continuity of existence of the corporation affected.<sup>20a</sup>

**§ 471-a. Id.: Forfeiture For Maintaining Nuisance.**—Any corporation organized under the laws of New York State which so conducts its business, without the State, by the emission or discharge of dust, smoke, gas, steam or offensive,

<sup>16</sup> *People v. American Loan & Trust Co.*, 177 N. Y. 231, 69 N. E. 420 (1904); C. C. P. § 1793, see now Gen. Corp. L. § 112.

<sup>17</sup> *People v. Seneca Lake Grape & Wine Co.*, 52 Hun, 174, 5 N. Y. Supp. 136 (1889); C. C. P. § 1785, see now Gen. Corp. L. § 101. Before the attorney-general started his action to dissolve for non-user the corporation had petitioned for voluntary dissolution.

<sup>18</sup> *Knickerbocker v. Groton Bridge & Mfg. Co.*, 111 A. D. 145, 97 N. Y. Supp. 595 (1906); St. Corp. L. § 57 (L. 1900, c. 760), see now Gen. Corp. L. § 221; C. C. P. § 1785, subd. 3, see now Gen. Corp. L. § 101.

<sup>19</sup> *Bagley & Sewall Co. v. Ehrlicher*, 8 A. D. 581, 40 N. Y. Supp. 922 (1896). Fifteen creditors had brought separate actions at law under the statute against stockholders; others were likely to be brought; many transfers of stock were made during the period when the debts were incurred.

<sup>20</sup> *Godley v. Crandall & Godley Co.*, 212 N. Y. 121, L.R.A.1915D, 632, 105 N. E. 818 (1914).

<sup>20a</sup> St. Corp. L. § 24-d (L. 1917, c. 484).

As to power of majority of stockholders to dissolve corporation, see note in 2 L.R.A.(N.S.) 493.

noisome or noxious odors or fumes, so as unreasonably to injure or endanger the health or safety in this State of any considerable number of the people of this State, is deemed guilty of a nuisance and its charter is deemed forfeited in the manner prescribed in the statute and cannot be revived except as prescribed in the statute.<sup>1</sup> Complaints may be made to the State Commissioner of Health by any person, association or corporation aggrieved, by petition or complaint in writing setting forth any act or thing done or omitted to be done, claimed to constitute a nuisance within the provisions of the statute.<sup>2</sup> Upon the presentation of such a complaint, the State Commissioner of Health must cause a copy thereof to be served upon the corporation complained of, in the manner provided by law for the service of a summons, accompanied by a notice directed to such corporation requiring that the matters complained of be abated, or that the charges be answered in writing within a time to be specified by such commissioner.<sup>3</sup> If the charges contained in such complaint be not thus satisfied and it appears to such commissioner that there are reasonable grounds therefor, he must cause such charges to be investigated in such manner and by such means as he deems proper; and fix a time for a hearing upon such complaint, and cause notice thereof to be forwarded to the complainant and the corporation complained of.<sup>4</sup> If such commissioner, or his successor, after such notice to such corporation and an opportunity for a hearing being given it, finds it is so conducting its business without the State as unreasonably to injure or endanger the health or safety in this State of any considerable number of people of this State, he must file such findings in duplicate in the offices of the Secretary of State and the Attorney-General.<sup>5</sup> A certificate of the Secretary of State giving notice of the filing of such findings must be served upon the corporation and thereupon its charter is suspended for the period of thirty days.<sup>6</sup> Any person who exercises or attempts to exercise any powers under the charter of any corporation which has been so suspended, during the period of such suspension, is deemed guilty of a misdemeanor.<sup>7</sup> If at the expiration of such period

<sup>1</sup> Gen. Corp. L. § 200 (L. 1917, c. 292).

<sup>2</sup> Gen. Corp. L. § 200 (L. 1917, c. 292).

<sup>3</sup> Gen. Corp. L. § 200 (L. 1917, c. 292).

<sup>4</sup> Gen. Corp. L. § 200 (L. 1917, c. 292).

<sup>5</sup> Gen. Corp. L. § 200 (L. 1917, c. 292).

<sup>6</sup> Gen. Corp. L. § 200 (L. 1917, c. 292).

<sup>7</sup> Gen. Corp. L. § 200 (L. 1917, c. 292).

the State Commissioner of Health, upon further proof and opportunity to such offending corporation to be heard, finds and determines that such corporation continues to conduct its business so as to constitute such nuisance, he must cause a notice of such determination to be served upon the corporation and published once a week for two successive weeks in the official State paper; and on the tenth day after such service and publication the charter of such corporation is deemed forfeited.<sup>8</sup> Any person who exercises or attempts to exercise any powers under the charter of any corporation which has been so forfeited is guilty of a misdemeanor.<sup>9</sup> If a charter be so forfeited the Attorney-General must forthwith apply to the Supreme Court for the appointment of a receiver of its property, who has all the powers and duties, so far as practicable, prescribed by articles ten-a and eleven of the General Corporation Law.<sup>10</sup> When any corporation has ceased to perform the acts or to maintain the nuisance by reason of which its charter has been forfeited and satisfactorily guarantees that it will not perform such acts or maintain such nuisance in the future, its charter may be revived in the manner prescribed by the statute with the same force and effect as if such charter had not been forfeited.<sup>11</sup> If such corporation files a petition in writing with the State Commissioner of Health setting forth that the nuisance in fact no longer exists, and it appears that there are reasonable grounds therefor, such commissioner must cause an investigation to be made in such manner and by such means as he deems proper; and if after such investigation he finds and certifies that such corporation has ceased to conduct its business so as to constitute such nuisance and files such findings in duplicate in the offices of the Secretary of State and Attorney-General, such corporation's charter must be deemed to be revived with full force and effect.<sup>12</sup> A supplemental certificate of the Secretary of State must be served and published in like manner; and upon such service and publication such revival becomes effective.<sup>13</sup> Such revival does not, however, prevent a subsequent forfeiture or revocation of the charter of the same corporation for the same or a similar offense.<sup>14</sup> This statute

<sup>8</sup> Gen. Corp. L. § 200 (L. 1917, c. 292).

<sup>9</sup> Gen. Corp. L. § 200 (L. 1917, c. 292).

<sup>10</sup> Gen. Corp. L. § 200 (L. 1917, c. 292).

<sup>11</sup> Gen. Corp. L. § 201 (L. 1917, c. 292).

<sup>12</sup> Gen. Corp. L. § 201 (L. 1917, c. 292).

<sup>13</sup> Gen. Corp. L. § 201 (L. 1917, c. 292).

<sup>14</sup> Gen. Corp. L. § 201 (L. 1917, c. 292).

is not to be deemed to apply to a corporation organized and existing under the laws of the State of New York and subject to the jurisdiction of the Public Service Commission under the Public Service Commissions Law, or principally engaged in furnishing power to such public service corporation.<sup>15</sup>

**§ 472. Id.: Voluntary Dissolution, Before Payment of Capital Stock.**—Surrender of all a domestic corporation's rights and franchises before payment of any part of the capital and before beginning business may be made by the incorporators named in any certificate of incorporation filed for the purpose of creating such corporation by their signing, verifying and filing in the office of the Secretary of State and clerk of the county where the certificate of incorporation is filed a certificate setting forth (a) the names of the incorporators, (b) that no part of the capital has been paid, (c) that there are no liabilities, (d) that such business has not been begun, and (e) a surrender of all rights and franchises.<sup>1</sup> Proof of the facts set forth in such certificate must be made to the satisfaction of the Secretary of State and thereupon the corporation must be dissolved and its corporate existence and power cease.<sup>2</sup>

**§ 473. Id.: By Unanimous Consent.**—Any stock corporation may be dissolved before the expiration of the time limited in its certificate of incorporation or in its charter by having (1) a meeting of its board of directors, (2) a meeting of stockholders, (3) a written consent by stockholders, (4) a filing of such consent with the Secretary of State, (5) an issue by the latter of a certificate of such dissolution, (6) a filing of such certificate with the county clerk, (7) a publication of such certificate, and (8) a winding up of the corporation by its directors.<sup>3</sup> The meeting of the board of directors to dissolve the corporation must (1) be called for that purpose, (2) be called upon at least three days' notice to each director, (3) result in a vote by a majority of the whole board adopting a resolution that it is in their opinion advisable to dissolve such

<sup>15</sup> Gen. Corp. L. § 201 (L. 1917, c. 292).

<sup>1</sup> Gen. Corp. L. § 220 (L. 1909, c. 28). "In case any incorporator of such a corporation shall be deceased, then the aforesaid certificate may be made by the surviving incorporators providing two years shall have elapsed since the date of its incorporation, but in such case the certificate shall set forth the fact

that one or more of said incorporators is deceased."

<sup>2</sup> Gen. Corp. L. § 220 (L. 1909, c. 28).

On right of minority stockholders to restrain voluntary dissolution of corporation by the directors or majority stockholders, see note in 23 L.R.A.(N.S.) 1177.

<sup>3</sup> Gen. Corp. L. § 221 (L. 1909, c. 28).

corporation forthwith, and (4) result in a call for a meeting of the stockholders for the purpose of voting upon a proposition that such corporation be forthwith dissolved.<sup>4</sup> The meeting of stockholders to dissolve the corporation must (1) be held not less than thirty nor more than sixty days after the adoption of the directors' resolution, (2) be after publication of the notice of the time and place of such meeting so called by the directors in one or more newspapers published and circulated in the county wherein such corporation has its principal office at least once a week for three weeks successively next preceding the time appointed for holding such meeting; (3) be after personal service on each stockholder, or mailing to each stockholder at his last-known postoffice address, on or before the day of the first publication of such notice, of a copy of such notice; (4) be held in the city, town or village in which the last preceding annual meeting of the corporation was held.<sup>5</sup> The stockholders' meeting may on the day so appointed be adjourned from time to time by the consent of a majority in interest of the stockholders present; and notice of such adjournment must be published in the newspapers in which the notice of the meeting is published.<sup>6</sup> If at any such stockholders' meeting the holders of two-thirds in amount of the stock of the corporation then outstanding in person or by attorney consent that such dissolution take place and signify such consent in writing, then such corporation must file such consent, attested by its secretary or treasurer, and its president or vice-president, together with the powers of attorney signed by such stockholders executing such consent by attorney, with a statement of the names and residences of the then existing board of directors of such corporation and the names and residences of its officers duly verified by the secretary or treasurer or president of such corporation, in the office of the Secretary of State.<sup>7</sup> The Secretary of State must then issue to such corporation, in duplicate, a certificate of the filing of such papers and that it appears therefrom that such corporation has complied with the statute in order to be dissolved, and one of such duplicate certificates must be filed by such corporation in the office of the clerk of the county in which it has its principal office.<sup>8</sup> Thereupon such corporation

<sup>4</sup> Gen. Corp. L. § 221 (L. 1909, c. 28).

<sup>5</sup> Gen. Corp. L. § 221 (L. 1909, c. 28).

<sup>6</sup> Gen. Corp. L. § 221 (L. 1909, c. 28).

<sup>7</sup> Gen. Corp. L. § 221 (L. 1909, c. 28).

<sup>8</sup> Gen. Corp. L. § 221 (L. 1909, c. 28).

is dissolved and must cease to carry on business except for the purpose of adjusting and winding up its business.<sup>9</sup> The board of directors must cause a copy of such certificate to be published at least once a week for two weeks in one or more newspapers published and circulating in the county in which the principal office of such corporation is located, and at the expiration of such publication the corporation by its board of directors must proceed to adjust and wind up its business and affairs with power to carry out its contracts and sell its assets at public or private sale, and to apply the same in discharge of debts and obligations of such corporation, and, after paying and adequately providing for the payment of such debts and obligations, to distribute the balance of assets among the stockholders according to their respective rights and interests.<sup>10</sup> The corporation nevertheless continues in existence for the purpose of paying, satisfying and discharging any existing debts or obligations, collecting and distributing its assets and doing all other acts required in order to adjust and wind up its business and affairs, and may sue and be sued for the purpose of enforcing such debts or obligations, until its business and affairs are fully adjusted and wound up.<sup>11</sup> After paying or adequately providing for the debts and obligations of the corporation the directors may with the written consent of the holders of two-thirds in amount of the capital stock sell the remaining assets or any part thereof to a corporation organized under the laws of New York or any other State and engaged in a business of the same general character, and take in payment therefor the stock or bonds or both of such corporation and distribute them among the stockholders in lieu of money in proportion to their interest therein; but no such sale is valid as against any stockholder who within sixty days after the mailing of notice to him of such sale applies to the Supreme Court in the manner provided by the seventeenth section of the Stock Corporation Law for an appraisal of the value of his interest in the assets so sold; unless within thirty days after such appraisal the stockholders consenting to such sale or some of them pay to such objecting stockholder or deposit for his account in the manner directed by the court the amount of such appraisal; and upon such payment or deposit the interest of such objecting stockholder vests in the person or persons making

<sup>9</sup> Gen. Corp. L. § 221 (L. 1909, c. 28).

<sup>11</sup> Gen. Corp. L. § 221 (L. 1909, c. 28).

<sup>10</sup> Gen. Corp. L. § 221 (L. 1909, c. 28).

such payment or deposit.<sup>12</sup> Stockholders of a corporation dissolved by agreement may hold those persons appointed by the agreement trustees to dissolve it for moneys declared by them as a dividend from assets over the corporation's indebtedness but never paid, even though the trustees be not acting strictly under the statute making provision for voluntary corporate dissolution.<sup>13</sup>

**§ 474. Id.: By Court Proceedings, Petition and Grounds.—**

A petition for a final order dissolving a corporation may be presented, (1) to the Supreme Court, (2) by a majority of the directors, trustees, or other officers having the management of the concerns of a domestic corporation, (3) for these grounds: (a) if they discover that the stock, effects and other property thereof are not sufficient to pay all just demands for which it is liable or to afford a reasonable security to those who may deal with it, or (b) if for any reason they deem it beneficial to the interests of the stockholders that the corporation should be dissolved; and such a petition must be presented by them (c) whenever directed so to do by a majority in interest of its stockholders; and such a petition may be presented by any one or more of the directors, trustees or stockholders (d) if the corporation (whether created under domestic general statute or special act or charter) has an even number of trustees or directors who are equally divided respecting the management of its affairs, or (e) if the stock of such corporation is equally divided into not more than two independent ownerships or interests, or (f) if the entire stock of the corporation is at that time owned by the trustees or directors who are even in number or equally divided representing the management of its affairs, or (g) if the stock is so divided that one-half thereof is owned or controlled by persons favoring the course of part of the trustees or directors and one-half thereof is owned by persons favoring the course of the other trustees or directors.<sup>14</sup> The petition must (1) show that it is made by a person or persons and upon a ground or grounds prescribed by the statute, (2) state the reasons which induce the petitioner or petitioners to desire the dissolution of the corporation, (3) be accompanied by (a) a schedule

<sup>12</sup> Gen. Corp. L. § 221 (L. 1909, c. 28).

<sup>13</sup> *Janeway v. Burn*, 91 A. D. 165, 86 N. Y. Supp. 628 (1904); *aff'd* 180 N. Y. 560, 73 N. E. 1125; *St.*

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Corp. L. § 57 (L. 1900, c. 760), see now Gen. Corp. L. § 221.

<sup>14</sup> Gen. Corp. L. §§ 170, 171, 172 (L. 1909, c. 28).

and (b) affidavit.<sup>15</sup> A petition for dissolution of a corporation signed by a majority of a reduced number of directors but not by a majority before the reduction is invalid if the corporate minutes of the stockholders' meeting reducing the number have not been filed with the Secretary of State and the County Clerk before the petition is signed.<sup>16</sup> That directors signing a petition for voluntary dissolution of their corporation were not such *de jure* because not stockholders does not disqualify them from signing if the situation was known to all the stockholders at the time of their election.<sup>17</sup> There is no general power in a court of equity for sustaining an action by a portion of a corporation's stockholders to dissolve it.<sup>18</sup> ". . . the owners of fifty per cent of the stock have the right to present a petition to the court for a dissolution under section one hundred and seventy-two . . . without regard to any action of a majority of the directors under section one hundred and seventy, and . . . similarly a majority of the directors may file a petition for dissolution irrespective of any of the provisions of section one hundred and seventy-two."<sup>19</sup> In proceedings for the voluntary dissolution of a corporation it is insufficient for the petition to state that the petitioners, owning half the stock, are convinced that, if the methods and plans advocated by those owning the other half are carried out, the result will be the financial ruin of the corporation; but these must be stated and the reason why it would be beneficial to the stockholders that the corporation be dissolved must also be shown.<sup>20</sup>

**§ 475. Id.: Schedule and Affidavit.**—The schedule annexed to the petition must contain, as far as the petitioner knows or the petitioners know, or have the means of knowing them, the following matters: (1) A full and true account of all the creditors of the corporation; (2) a full and true account of all unsatisfied engagements entered into by and subsisting

<sup>15</sup> Gen. Corp. L. §§ 174, 175 (L. 1909, c. 28).

<sup>16</sup> Matter of Dolgeville El. L. & P. Co., 160 N. Y. 500, 55 N. E. 287 (1899); C. C. P. §§ 2419, 2422, see now Gen. Corp. L. § 170 *et seq.*; Stock Corp. L. § 21, now § 26.

<sup>17</sup> Matter of Manoca Temple Assn., 128 A. D. 796, 113 N. Y. Supp. 172 (1908).

<sup>18</sup> Denike v. New York and Rosendale Lime and Cement Co., 80 N. Y. 599 (1880).

<sup>19</sup> Matter of McLoughlin, 176 A. D. 653, 163 N. Y. Supp. 547 (1917); Gen. Corp. L. §§ 170 *et seq.* ". . . we must construe section 174 as if it read . . . : 'The petition must show that the case is one of those specified in sections one hundred and seventy or one hundred and seventy-two . . .'"

<sup>20</sup> Matter of Pyrolusite Manganese Co., 29 Hun, 429 (1883); C. C. P. § 2419, see now Gen. Corp. L. § 170.

against the corporation; (3) a statement of (a) the name and (b) the place of residence of each creditor and each person with whom such an engagement was made and to whom it is to be performed, (if known), or, if either is not known, a statement of that fact; (4) a statement (a) of the sum owing to each creditor or each person with whom the corporation is engaged and (b) the nature of each debt, demand or other engagement; (5) a statement of the true cause and consideration of each indebtedness to each creditor; (6) a full, just and true inventory of all the property of the corporation and of all books, vouchers and securities relating thereto; (7) a statement of each incumbrance upon the property of the corporation by judgment, mortgage, pledge or otherwise; (8) a full, just and true account of the capital stock of the corporation specifying (a) the name of each stockholder; (b) his residence, (if it is known and if not known stating that fact); (c) the number of shares belonging to him; (d) the amount paid in upon his shares, and (e) the amount still due thereupon.<sup>1</sup> Annexed to the petition and schedule must be an affidavit (1) made by each of the petitioners (2) to the effect that the matters of fact stated in the petition and schedule are just and true so far as the affiant knows or has the means of knowing the same.<sup>2</sup> The court, at any stage of the proceedings before final order, may, on the application of the petitioners or of a majority of them or of the temporary receiver, grant an order amending the schedules annexed to the original petition by the insertion of additional items, or by making the statements or inventory fuller and in greater detail than as originally filed, with the like effect as though such petition and schedules has been originally presented and filed as amended.<sup>3</sup>

**§ 476. Id.: Practice: Notice to Attorney-General; Order to Show Cause; Receivers, Injunction, Referee, Report, Decision, Final Order.**—In every proceeding for the dissolution of a corporation or a distribution of its assets, a copy of all motions and all motion papers and of any other application to the court, together with a copy of the order or judgment to be proposed thereon to the court, must in all cases be served on the Attorney-General in the same manner as provided by law for the service of papers on attorneys who have appeared in actions, whether the applications otherwise would be *ex*

<sup>1</sup> Gen. Corp. L. § 174 (L. 1909, c. 28).

<sup>3</sup> Gen. Corp. L. § 189 (L. 1909, c. 28).

<sup>2</sup> Gen. Corp. L. § 175 (L. 1909, c. 28).

*parte* or upon notice, and no order or judgment granted can vary in any material respect from the relief specified in such copy, order or judgment unless the Attorney-General appears on the return day and has been heard in relation thereto; and any order or judgment granted in any such action or proceeding is void without such service of such papers upon the Attorney-General, and no receiver of any such corporation may pay to any person any money directed to be paid by any order or judgment made in any such proceeding until the expiration of eight days after a certified copy of such order or judgment has been served as already stated upon the Attorney-General.<sup>4</sup> It is jurisdictional in a proceeding for the voluntary dissolution of a corporation that notice of the presentation of the petition and schedules of the application for the order to show cause why dissolution should not be had and of the motion papers and proposed order be served on the Attorney-General.<sup>5</sup> In proceedings for voluntary dissolution of a corporation, notice must be served on the Attorney-General.<sup>6</sup> The omission to serve upon the Attorney-General the motion papers on which an order, in a proceeding for dissolution of a corporation, restraining actions against it is made, is a fatal defect.<sup>7</sup> “. . . there is no reason for denying the Attorney-General the power to accept short notice of proceedings referred to in the statute” governing the dissolution of a corporation.<sup>8</sup> While the Attorney-General may confer jurisdiction on the court in an application for dissolution of a corporation by waiving service before the motion is brought on of all motion papers, application, proposed order or judgment required by statute to be served on him, yet he cannot admit due and timely service thereof after the entry of the order to show cause and after the motion is made.<sup>9</sup>

<sup>4</sup> Gen. Corp. L. § 312 (L. 1909, c. 28).

<sup>5</sup> Knickerbocker Trust Co. v. Tarrytown, White Plains & Mamaroneck Ry. Co., 133 A. D. 285, 117 N. Y. Supp. 871 (1909).

<sup>6</sup> People v. Seneca Lake Grape & Wine Co., 52 Hun, 174, 5 N. Y. Supp. 136 (1889); L. 1883, c. 378, § 8, see now Gen. Corp. L. § 312.

<sup>7</sup> Dohn v. Buffalo Amusement Co., 66 A. D. 446, 73 N. Y. Supp. 95 (1901); L. 1883, c. 378, § 8, see now Gen. Corp. L. § 312. “Under the amendment of chapter 378 of the Laws of 1883, being chapter 282 of

the Laws of 1896, it seems to be necessary that notice of an application for the dissolution of a corporation should be given to the Attorney-General whether such corporation is solvent or insolvent.” Matter of Broadway Insurance Co., 23 A. D. 282, 48 N. Y. Supp. 299 (1897).

<sup>8</sup> Matter of Peekamose Fishing Club, 151 N. Y. 511, 45 N. E. 1037 (1897); C. C. P. § 2420, see now Gen. Corp. L. § 171 *et seq.*

<sup>9</sup> Matter of Strong Co., No. 1, 128 A. D. 208, 112 N. Y. Supp. 557 (1908); L. 1883, c. 378, § 8, see now Gen. Corp. L. § 312 *et seq.*

On an order to show cause why an order should not be made vacating an order dissolving a corporation, stockholders and creditors need not be served or heard if the Attorney-General, the corporate receiver and the only stockholder who appeared in the dissolution proceeding are before the court.<sup>10</sup>

The papers must be presented at a special term of the Supreme Court held within the judicial district embracing the county wherein the principal office of the corporation is located and the court may in its discretion entertain or dismiss the application, and if it entertains it, or the cause for the dissolution is either that the corporation's stock, effects and other property are insufficient to pay all just demands for which it is liable or to afford a reasonable security to those who may deal with it, or that the directors deem it beneficial to the interests of the stockholders that it should be dissolved, the court must make an order requiring all persons interested in the corporation to show cause before it or a referee designated in the order at a time and place therein specified not less than six weeks after the granting of the order, why the corporation should not be dissolved.<sup>11</sup> A copy of the order must be published as prescribed therein at least once in each of the three weeks immediately preceding the time fixed therein for showing cause, in one or more newspapers specified in the order and published in the city or county wherein the order is entered; and a copy of the order must also be served upon each of the persons specified in the schedule as a creditor or stockholder of the corporation or as a person to whom an engagement of the corporation is to be performed, other than a person whose residence is stated to be unknown or to be without the United States, and such service must be made either personally at least ten days before the time appointed for the hearing or by depositing a copy of the order at least twenty days before the time so appointed in the post-office enclosed in a post-paid wrapper, addressed to the person to be served at his residence as stated in the schedule.<sup>12</sup> The order must be entered and the papers filed within ten days after the order is made with the Clerk of the County where the principal office of the corporation is located.<sup>13</sup> An order to show cause returnable in more than eight days based on

<sup>10</sup> *Matter of Automatic Chain Co.*, 134 A. D. 863, 119 N. Y. Supp. 379 (1909); *aff'd* 198 N. Y. 618, 92 N. E. 1078.

<sup>11</sup> Gen. Corp. L. §§ 176, 178 (L. 1909, c. 208 and 240, respectively).

<sup>12</sup> Gen. Corp. L. §§ 179; 180 (L. 1909, c. 28).

<sup>13</sup> Gen. Corp. L. § 182 (L. 1909, c. 28).

a petition for it and for voluntary dissolution of a corporation instead of an affidavit is sufficient.<sup>14</sup> An order published and served pursuant to statute in a proceeding for voluntary dissolution of a corporation which simply requires those interested to show cause "why the prayer of the petitioners should not be granted" is legally insufficient; because no copy of the petition is served in such a proceeding and those interested would, therefore, not get the information it is intended they should get.<sup>15</sup>

The statute also permits and provides for the appointment of temporary receivers and permanent receivers; but these points are hereinafter discussed in the chapter of this work on "Receivers."<sup>16</sup> If a temporary receiver be appointed, the court may in its discretion, on notice to the Attorney-General or on his motion on notice to the corporation, with or without security, at any stage of the proceeding before the final order, grant an injunction restraining the creditors of the corporation from beginning any action against the corporation for the recovery of a sum of money or from taking any further proceedings in such an action theretofore commenced, and such injunction has the same effect and is subject to the same provisions of law as if each creditor upon whom it is served was named therein.<sup>17</sup> If a referee was not designated in the order to show cause the court may in its discretion appoint a referee when or after the order is returnable.<sup>18</sup> The court or the referee must hear the allegations and proofs of the parties at the time and place specified in the order or at the time and place to which the hearing is adjourned; must determine the facts; must in writing make its decision or report, as the case may be, which must contain a statement of the effects, credits and other property, and of the debts and other engagements of the corporation, and of all other matters pertaining to its affairs; and must file such decision or report with all convenient speed.<sup>19</sup> The court or the referee is entitled to use upon the hearing the original petition and the schedules annexed thereto, and the clerk must transmit them accordingly upon the written order of the judge or of

<sup>14</sup> Matter of Geneva Basket Co., 71 Misc. 156, 127 N. Y. Supp. 943 (1911); C. C. P. § 3343, subd. 11; G. R. P. 37.

<sup>15</sup> Matter of Pyrolusite Manganese Co., 29 Hun, 429 (1883), tit. 2, c. 17, C. C. P.

<sup>16</sup> Gen. Corp. L. § 182 *et seq.*, as to temporary receivers; Gen. Corp.

L. § 191 *et seq.*, as to permanent receivers; § 514 *et seq.*, *infra*, as to "Receivers."

<sup>17</sup> Gen. Corp. L. § 184 (L. 1909, c. 28).

<sup>18</sup> Gen. Corp. L. § 185 (L. 1909, c. 28).

<sup>19</sup> Gen. Corp. L. §§ 186, 187 (L. 1909, c. 28).

the referee, and in that case they must be returned with the decision or report.<sup>20</sup> When the hearing is before a referee, a motion for a final order must be made to the court upon notice to each person who has made himself a party to the proceedings by filing with the clerk before the close of the hearing a notice of his appearance in person or by attorney specifying a post-office within New York State where such notice may be served; and the notice may be served as prescribed in the Code of Civil Procedure for the service of a paper upon an attorney in an action; but when the hearing was before the court, a motion for a final order may be made immediately or at such a time and upon such a notice as the court prescribes.<sup>1</sup> A reference cannot be made of course upon the consent of the parties in an action against a corporation to obtain a dissolution thereof, unless it is brought by the Attorney-General; and if the parties consent to a reference the court may in its discretion grant or refuse a reference, and if a reference is granted the court must designate the referee and if the referee refuses to serve or a new trial of the action is granted the court must upon the application of either party appoint another referee.<sup>2</sup>

**§ 477. Id.: In General.**—The interests of the minority as well as of the majority stockholders are entitled to be considered on the question of whether it is beneficial to the interests of the stockholders that the corporation should be dissolved in a voluntary proceeding therefor, as such benefit must be shown to permit dissolution.<sup>3</sup> A petition by the majority of the directors of a corporation for its dissolution will be denied if certain creditors appear and oppose it and it is plain that the corporation has at least an apparent cause of action against some of its officers and directors for maladministration of its affairs.<sup>4</sup> Proceedings looking to the dissolution of a corporation and instituted by three of its seven directors will be discountenanced by the court when it appears that when begun a stockholders' meeting had been

<sup>20</sup> Gen. Corp. L. § 188 (L. 1909, c. 28).

<sup>1</sup> Gen. Corp. L. § 190 (L. 1909, c. 28).

<sup>2</sup> C. C. P. § 1012.

<sup>3</sup> Matter of Rateau Sales Co., 201 N. Y. 420, 94 N. E. 869 (1911); Gen. Corp. L. § 170. The complaint and demurrer in an equitable action by the minority begun after the petition for voluntary dissolution should

be considered in determining upon the dissolution when they showed a *prima facie* cause of action to avoid an alleged rescission of an allegedly valuable contract by the corporation not mentioned in the dissolution proceedings.

<sup>4</sup> Matter of Great Northern Trading Co., 168 A. D. 536, 153 N. Y. Supp. 213 (1915).

called to effectuate such changes in the corporation's workings as would obviate the dissolution.<sup>5</sup> ". . . the application for a final order in a proceeding [for voluntary dissolution of a corporation] . . . is to be made by the petitioner. . . . But where in a proceeding to dissolve a corporation the petitioner, after a referee has been appointed, neglects or refuses to proceed, . . . it is competent for the court on special application of any person interested, to direct the petitioner to move, so that the interests of all may be protected. So, also . . . if all the parties appear before the court for the purpose of procuring a final order, the court would be authorized to dispose of the matter, although no formal notice had been given by the petitioner."<sup>6</sup> On presentation to it of a petition by all the directors of a corporation for its voluntary dissolution the court may appoint a referee to hear and report on the conflicting claims of stockholders which the petition recites have arisen on a controversy between them, as an incident to the court's statutory power to provide by final order for the distribution of the corporate assets.<sup>7</sup> The Supreme Court cannot in a proceeding for the voluntary dissolution of a corporation by order restrain the prosecution by a trustee of its mortgage of an action to foreclose or grant an extra allowance to the petitioners in such proceeding.<sup>8</sup> In a proceeding for voluntary corporate dissolution on petition of the majority of the corporation's directors the court cannot make any binding adjudication as to the existence or extent of a liability of corporate officers and directors for maladministration alleged by objecting creditors to exist.<sup>9</sup> A final order dissolving a corporation in voluntary proceedings for its dissolution is void if the referee appointed to take proof does not in his report give, in the words of the statute, "a statement of the effects, credits and other property, and of the debts and other engagements of the corporation and of other matters pertaining to its affairs."<sup>10</sup> In a proceeding

<sup>5</sup> Matter of Colton, 26 Misc. 571, 57 N. Y. Supp. 556 (1899).

<sup>6</sup> Matter of Peekamoose Fishing Club, 151 N. Y. 511, 45 N. E. 1037 (1897); C. C. P. § 2420, see now Gen. Corp. L. § 171 *et seq.*

<sup>7</sup> Matter of Seneca Oil Co., 153 A. D. 594, 138 N. Y. Supp. 78 (1912); *aff'd*, no opinion, 208 N. Y. 545, 101 N. E. 1121; Gen. Corp. L. § 191.

<sup>8</sup> Matter of Tarrytown, White

Plains & Mamaroneck Ry. Co., 133 A. D. 297, 117 N. Y. Supp. 695 (1909); C. C. P. §§ 2423, 3333, 3334, see now Gen. Corp. L. § 170 *et seq.*

<sup>9</sup> Matter of Great Northern Trading Co., 168 A. D. 536, 153 N. Y. Supp. 213 (1915).

<sup>10</sup> Matter of E. M. Boynton Saw & File Co., 34 Hun, 369 (1884); C. C. P. § 2426; see now Gen. Corp. L. §§ 185-187.

voluntarily to dissolve a corporation a report by the referee which contains no statement of the corporation's debts but simply states generally that the schedules annexed to the petition were correct is not a compliance with the state.<sup>11</sup> A sale, assignment, mortgage, conveyance or other transfer of any property of a corporation made after the filing of a petition for its voluntary dissolution in payment of or as security for an existing or prior debt or for any other consideration; or a judgment thereafter rendered against the corporation by confession or upon the acceptance of an offer is absolutely void as against the receiver appointed in the special proceeding and as against the creditors of the corporation.<sup>12</sup>

**§ 478. Id.: Compulsory Dissolution, Governing Statutes.**—An action to procure a judgment dissolving a domestic corporation and forfeiting its corporate rights, privileges and franchises may be maintained by the Attorney-General in the name and in behalf of the People, and, on leave given by court, by a creditor or stockholder whose verified written statement of facts showing grounds for such action, submitted to the Attorney-General, has not resulted in his commencing such an action for sixty days after such submission: (1) when the corporation has remained insolvent for at least one year; (2) when the corporation has neglected or refused for at least one year to pay and discharge its notes or other evidences of debt; and (3) when the corporation has suspended its ordinary and lawful business for at least one year.<sup>13</sup>

**§ 479. Id.: In General.**—"The provisions of the Code of Civil Procedure, permitting the sale of lands in partition free of all liens, are not applicable to the dissolution of corporations on the ground of insolvency."<sup>14</sup> A sufficient answer to a suit to dissolve a corporation being brought by a person in order to leave his company of the same name the only one in existence is that the suit is instituted by the Attorney-General in the name of the People under a statute authorizing him to do so.<sup>15</sup>

<sup>11</sup> *Matter of Pyrolusite Manganese Co.*, 29 Hun, 429 (1883); C. C. P. § 2426; see now Gen. Corp. L. §§ 185-187.

<sup>12</sup> Gen. Corp. L. § 193 (L. 1909, c. 28).

<sup>13</sup> Gen. Corp. L. §§ 101, 102 (L. 1909, c. 28). "4. If it has banking powers, or powers to make loans on pledges or deposits, or to make insurances, where it becomes insolvent

or unable to pay its debts, or has violated any provision of the act, by or under which it was incorporated, or of any other act binding upon it."

<sup>14</sup> *Matter of Coleman*, 174 N. Y. 373, 66 N. E. 983 (1903).

<sup>15</sup> *People v. Troy Chemical Co.*, 118 A. D. 437, 103 N. Y. Supp. 22 (1907); C. C. P. § 1786; now Gen. Corp. L. § 102.

§ 480. **Id.: Grounds.**—An action to procure a judgment dissolving a domestic corporation and forfeiting its corporate rights, privileges and franchises may be maintained (1) when it has remained insolvent for at least one year; (2) when it has neglected or refused for at least one year to pay and discharge its notes or other evidences of debt; (3) when it has suspended its ordinary and lawful business for at least one year.<sup>16</sup> “It is a general principle that a cause of forfeiture can not be taken advantage of, or enforced against a corporation collaterally, or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation so that it may have an opportunity to answer.”<sup>17</sup> The statute providing that whenever a corporation for one year has remained insolvent or has refused to pay its evidences of debt or has suspended its ordinary business it shall be deemed to have surrendered its franchise is not a substitute for the common law rule that a virtual surrender of its franchise may be inferred from its condition and its manner of conducting its affairs, but is merely cumulative thereto, adding a rule by which circumstances are made equivalent to a surrender, which before had no such effect.<sup>18</sup> “A surrender of corporate franchises cannot be inferred even from insolvency and suspension of business for a less period than that designated by statute to consummate it, unless the circumstances are such as to make it appear that the corporation has not power to continue or resume its business.”<sup>19</sup> A statute that a corporation shall be dissolved which for one year has suspended its ordinary business “proceeds upon the idea that it has once been in the exercise of its ordinary (authorized) business; for it can scarcely be said to have *suspended* such business unless it has at some time exercised it.”<sup>20</sup> The statute permitting the Attorney-General to bring an action against a corporation when it has failed to exercise its powers and vacate its charter is available only when it has violated the statute permitting an action to dissolve it for suspension of its ordinary and lawful business for at least one year; “it is to that section the Attorney-General must look for a declaration as to what constitutes a forfeiture of a franchise by a

<sup>16</sup> Gen. Corp. L., § 101 (L. 1909, c. 28).

<sup>17</sup> Towar v. Hale, 46 Barb. 361 (1866).

<sup>18</sup> Bradt v. Benedict, 17 N. Y. 93 (1858); 2 R. S. 463, § 38. See now Gen. Corp. L. § 100 *et seq.*

<sup>19</sup> People v. Oriental Bank, 124 A. D. 741, 109 N. Y. Supp. 509 (1908).

<sup>20</sup> The People v. Troy House Company, 44 Barb. 625 (1865); 1 N. Y. Stats. at Large, 560.

failure to exercise its powers.”<sup>1</sup> A stockholder seeking compulsorily to dissolve his corporation because the Attorney-General has refused to do so and because a prior voluntary dissolution of it was fraudulent and should be vacated cannot base his demand for vacation of the voluntary dissolution on failure of the directors to account or on an allegation that no notice was given of the voluntary dissolution: he must allege failure of the directors to publish and serve or mail the notice required by law.<sup>2</sup> An admission in an answer by a corporation to a complaint by the People to dissolve it that its business has not been conducted since the time of the filing of a petition for its bankruptcy, over a year past, is ground for its dissolution.<sup>3</sup> That a corporation has not discharged its notes and has allowed them to remain outstanding and unpaid for more than one year is ground for its dissolution at the suit of the People, and “the fact that it has received a discharge in bankruptcy cannot avail to save its corporate life.”<sup>4</sup> A stockholder will not succeed in his action to dissolve his corporation on the ground that it had suspended its ordinary and lawful business for at least one year if what it did was simply to settle with another competing corporation their dispute as to which was entitled to the patent under which they were both operating by taking a certain part of the stock of a new corporation formed to operate under such patent.<sup>5</sup>

**§ 481. Id.: Who May Initiate.**—Such an action for dissolution of a corporation may be maintained either by the Attorney-General in the name and in behalf of the People, or by a creditor or stockholder who (a) has submitted to the Attorney-General a written statement of facts verified by oath showing grounds for such an action, if (b) the Attorney-General omits for sixty days after this submission to commence such an action, who (c) has applied to the proper court for leave to commence such an action, and who (d) has obtained such leave accordingly.<sup>6</sup> When the Attorney-

<sup>1</sup> *People v. Atlantic Avenue R. R. Co.*, 57 Hun, 378, 10 N. Y. Supp. 907 (1890); *aff'd* 125 N. Y. 513, 26 N. E. 622; C. C. P. §§ 1785, 1798; see now Gen. Corp. L. §§ 131 and 101.

<sup>2</sup> *Knickerbocker v. Groton Bridge & Mfg. Co.*, 111 A. D. 145, 97 N. Y. Supp. 595 (1906); St. Corp. L. § 57 (L. 1900, c. 760); C. C. P. § 1785; now Gen. Corp. L. § 101.

<sup>3</sup> *People v. Troy Chemical Co.*, 118

A. D. 437, 103 N. Y. Supp. 22 (1907); C. C. P. § 1786; now Gen. Corp. L. § 102.

<sup>4</sup> *People v. Troy Chemical Co.*, 118 A. D. 437, 103 N. Y. Supp. 22 (1907); C. C. P. § 1785, subd. 2; now Gen. Corp. L. § 101.

<sup>5</sup> *Kelsey v. Pfandler Process Co.*, 45 Hun, 10 (1887).

<sup>6</sup> Gen. Corp. L., § 102 (L. 1912, c. 204).

General has good reason to believe that an action can be maintained in behalf of the People of the State to dissolve the corporation and to forfeit its franchises on the ground that for a year it has remained insolvent or neglected to pay its evidences of debt or suspended its business, he must bring an action accordingly or apply to a competent court for leave to bring an action, as the case requires, if in his opinion, the public interest requires that an action should be brought; and if the case be one in which the action can be brought only by the Attorney-General in behalf of the People, if a creditor, stockholder, director or trustee of the corporation applies to him for that purpose and furnishes the security required by law, he must bring the action, or apply for leave to bring it, if he has good reason to believe that it can be maintained, and when such an application is made section nineteen hundred and eighty-six of the Code of Civil Procedure applies thereto and to the action brought in pursuance thereof.<sup>7</sup> "A corporation may be dissolved by forfeiture through abuse or neglect of its franchises; but such forfeiture, unless there be special provisions by statute, can only be enforced by the sovereign in some proceeding instituted in its behalf."<sup>8</sup> If a complaint by a stockholder allege that the ordinary and lawful business of his corporation has been suspended for at least a year, the submission of a written verified statement of the facts to the Attorney-General, the latter's failure to institute an action within sixty days, and leave of court to commence the action, the stockholder is entitled to maintain an action to dissolve the corporation, unless other facts alleged are a bar to the action.<sup>9</sup> One who is stockholder and director of a corporation may maintain an action for its dissolution if it has been insolvent for more than a year before the suit was begun; and may have a receiver *pendente lite*

<sup>7</sup> Gen. Corp. L. § 304 (L. 1909, c. 28).

<sup>8</sup> *Denike v. New York and Rosendale Lime and Cement Co.*, 80 N. Y. 599 (1880).

<sup>9</sup> *Knickerbocker v. Groton Bridge & Mfg. Co.*, 111 A. D. 145, 97 N. Y. Supp. 595 (1906); C. C. P. § 1785, subd. 3; now Gen. Corp. L., § 101. See, however, *Wilmersdoerffer v. Lake Mahopac Improvement Co.*, 18

*Hun*, 387 (1879); under L. 1870, c. 151, § 2, in which it was held that an action to have a corporation dissolved, under a statute permitting such a course when it has remained insolvent a year, refused to pay its evidences of debt, or suspended business for a year, may be brought by the Attorney-General only, and not even by a stockholder.

appointed to preserve the corporation's property.<sup>10</sup> A creditor at large cannot sue to wind up his corporate debtor.<sup>11</sup>

**§ 482. Id.: Where to be Initiated.**—An action or proceeding brought by the Attorney-General on behalf of the People of the State against any corporation for the purpose of procuring its dissolution may be brought in any county of the State to be designated by the Attorney-General.<sup>12</sup>

**§ 483. Id.: Trial and Testimony.**—In an action brought to procure a judgment dissolving a corporation and forfeiting its franchises because of its year-long insolvency, year-long refusal or neglect to discharge its evidences of debt, or year-long suspension of business, a stockholder, officer, alienee or agent of the corporation is not excused from answering a question relating to the management of the corporation or the transfer or disposition of its property on the ground that his answer may expose the corporation to a forfeiture of any of its corporate rights or will tend to convict him of a criminal offense, or to subject him to a penalty or forfeiture; but his testimony cannot be used as evidence against him in a criminal action or special proceeding.<sup>13</sup>

**§ 484. Id.: Practice, Process, Notice, Injunction, Receivers; Contribution by Stockholders, Directors and Officers.**—If there be no person in existence upon whom service of the summons can be made under the provisions of section four hundred and thirty-one of the Code of Civil Procedure, service of the summons in such an action may be made in such manner as the court upon application by petition may direct.<sup>14</sup> In every action for the dissolution of a corporation or a distribution of its assets, a copy of all motions and all motion papers and of any other application to the court, together with a copy of the order or judgment to be proposed thereon to the court, must in all cases be served on the Attorney-General in the same manner as provided by law for the service of papers on attorneys who have appeared in actions, whether the applications otherwise would be *ex parte* or upon notice, and no order or judgment granted can vary in any material respect from the relief specified in such copy, order

<sup>10</sup> Medbury v. Rochester Frear Stone Co., 19 Hun, 498 (1880); 2 R. S. 463, § 38.

<sup>11</sup> Cole v. Knickerbocker Life Ins. Co., 23 Hun, 255 (1880); *dism'd* 91 N. Y. 255; 2 R. S. 463, § 35. The editor should reduce his claim to judgment.

<sup>12</sup> Gen. Corp. L. § 315 (L. 1909, c. 28).

<sup>13</sup> Gen. Corp. L. § 301 (L. 1909, c. 28).

<sup>14</sup> Gen. Corp. L. § 102 (L. 1912, c. 204).

or judgment unless the Attorney-General appears on the return day and has been heard in relation thereto, and any order or judgment granted in any such action or proceeding is void without such service of such papers upon the Attorney-General, and no receiver of any such corporation must pay to any person any money directed to be paid by any order or judgment made in any such action until the expiration of eight days after a certified copy of such order or judgment has been served as already stated upon the Attorney-General.<sup>15</sup> In an action brought to procure a judgment dissolving a corporation and forfeiting its franchises because for one year it has been insolvent or refused or neglected to discharge its evidences of debt, or has suspended its business, the court may in its discretion on the application of either party at any stage in the action, before or after final judgment, and with or without security, grant an injunction order restraining the creditors of the corporation from bringing actions against the defendants or any of them for the recovery of a sum of money or from taking any further proceedings in such actions theretofore commenced; and such an injunction has the same effect and is subject to the same provisions of law as if each creditor upon whom it is served was named therein and was a party to the action in which it is granted.<sup>16</sup> In an action for such dissolution the court may, upon proof of the facts authorizing the action to be maintained, grant an injunction order restraining the corporation, its trustees, directors, managers and other officers during the pendency of the action except by express permission of the court, (a) from collecting or receiving any debt or demand, and (b) from paying out or in any way transferring or delivering to any person any money, property or effects of the corporation, and (c) from exercising any of its corporate rights, privileges or franchises.<sup>17</sup> Except that it can be granted only by the court, the granting, vacating or modifying of an injunction order so granted is governed by the provisions of title second of chapter seventh of the Code of Civil Procedure.<sup>18</sup> The subject of receivers on dissolution is considered in the subsequent chapter on "Receivers."<sup>19</sup> When the action is brought by a creditor of a corporation and the stockholders, directors,

<sup>15</sup> Gen. Corp. L. § 312 (L. 1909, c. 28).

<sup>16</sup> Gen. Corp. L. § 302 (L. 1909, c. 28).

<sup>17</sup> Gen. Corp. L. § 103 (L. 1909, c. 28).

<sup>18</sup> Gen. Corp. L. § 103 (L. 1909, c. 28).

<sup>19</sup> See § 513 *et seq.*, *infra*.

trustees or other officers, or any of them, are made by law liable, in any event or contingency, for the payment of the creditor's debt, the persons so made liable may be made parties defendant by the original or by a supplemental complaint and their liability may be declared and enforced by the judgment in the action; and if they are not made parties defendant, the plaintiff may maintain a separate action against them to procure a judgment declaring, apportioning and enforcing their liability; and in either case the court, when it is necessary, must cause an account to be taken of the property and of the debts of the corporation, and thereupon the defendants' liability must be apportioned accordingly; but if it affirmatively appears that the corporation is insolvent and has no property to satisfy its creditors the court may without taking such an account ascertain and determine the amount of each defendant's liability and enforce the same accordingly.<sup>20</sup>

**§ 485. Id.: Creditors.**—In an action brought to procure a judgment dissolving a corporation and forfeiting its franchises because for one year it has been insolvent, or refused or neglected to discharge its evidences of debt, or has suspended its business, the court may at any stage of the action, before or after final judgment, make an order requiring all the creditors of the corporation to exhibit and prove their claims, and thereby make themselves parties to the action, in such manner and in such a reasonable time, not less than six months, from the first publication of notice of the order, as the court directs; and that the creditors who make default in so doing shall be precluded from all benefit of the judgment and from any distribution which may be made thereunder; except that, notwithstanding such order any such creditor who may exhibit and prove his claim in the manner directed by the order, with proof by affidavit or otherwise that he has had no notice or knowledge thereof in time to comply therewith, is entitled at any time before an order is made directing a final distribution of the assets of such corporation to have his claim received, and has the same rights and benefits thereon, so far as the assets of such corporation then remaining undistributed may render possible, as if his claim had been exhibited and proved within the time limited by such order.<sup>1</sup> Notice of the order must be given by publication in such newspapers and for such length of time as the court

<sup>20</sup> Gen. Corp. L. §§ 109, 110, 111 (L. 1909, c. 28).

<sup>1</sup> Gen. Corp. L. § 303 (L. 1909, c. 28).

directs.<sup>2</sup> "In an action brought by the People to dissolve an insolvent corporation and distribute its assets among its creditors, the distribution is to take place first among the creditors whose claims represent a fixed liability at the time of the commencement of the action and the order of sequestration. A contingent claim, where the liability is not fixed and certain at that time, but depends upon the happening thereafter of an uncertain event, can only share in the surplus remaining after the fixed liabilities and the expenses of administration have been paid."<sup>3</sup> A creditor of a corporation being dissolved by action cannot prove against it both its obligations and coupon notes held as collateral security for such obligations, unless, possibly, such notes carry some lien on the corporation's property.<sup>4</sup> In decreeing ratable division of a fund on dissolution of a corporation among all unpreferred creditors *before the court*, those whose claims have been admitted in the dissolution proceeding but who are not represented by their own attorneys, are included on the theory that the receiver represents them.<sup>5a</sup> "When a corporation has been legally organized its existence may continue after an event which would be a sufficient cause for its dissolution by the court; and when dissolved for violating the laws under which it exists, the rights of the creditors, who have become such since the time when it had, by some act of commission or omission, forfeited its right to exist, cannot be ignored, and the assets, which have been seized by the court, must be distributed among the creditors (in the absence of statutory directions) according to the principle of equity."<sup>5</sup>

**§ 486. Id.: Judgment; Distribution, and Subsequent Practice.**

—A final judgment in the action against the corporation separately or in conjunction with its stockholders, directors, trustees or other officers, must provide for a just and fair distribution of the property of the corporation and of the proceeds thereof among its fair and honest creditors in the order and in the proportions prescribed by law in case of the voluntary dissolution of a corporation; and the interlocutory or final judgment, as the case requires, must, if the stock-

<sup>2</sup> Gen. Corp. L. § 303 (L. 1909, c. 28).

<sup>3</sup> *People v. Metropolitan Surety Co.*, 171 A. D. 15, 156 N. Y. Supp. 1027 (1916).

<sup>4</sup> *People v. Remington & Sons*, 54 Hun, 480, 8 N. Y. Supp. 31 (1889); *aff'd* 121 N. Y. 675, 24 N. E. 1095.

<sup>5a</sup> *People v. American Loan & Trust Co.*, 177 N. Y. 467, 69 N. E. 1105 (1904); C. C. P. § 173; now Gen. Corp. L. § 112.

<sup>5</sup> *Welch v. Importers' & Traders' Nat. Bk.*, 122 N. Y. 177, 25 N. E. 269 (1890).

holders are parties to the action and the property of the corporation is not sufficient to discharge its debts, adjudge that each stockholder pay into court the amount due and remaining unpaid on the shares of the stock held by him, or so much thereof as is necessary to satisfy the debts of the corporation; and the court must, if the property of the corporation and the sums collected or collectible from the stockholders upon their unpaid stock subscriptions are or will be insufficient to pay the corporate debts, ascertain the several sums for which the directors, trustees, or other officers, or the stockholders, being parties to the action, are liable, and adjudge that the same be paid into court to be applied in such proportions and in such order as justice requires to the payment of the debts of the corporation.<sup>6</sup> The final judgment in an action to dissolve a corporation must be entered in the office of the clerk of the county in which the principal business office or the principal place of business of the corporation is located, and if it is adjudged that such corporation be dissolved, a certified copy of such judgment must be filed in the office of the Secretary of State.<sup>7</sup> A judgment entered on a referee's report in an uncontested proceeding by the Attorney-General to dissolve a corporation that certain stockholders pay a stated amount as the value of assets of the corporation in their hands, though not entered upon proper legal proceedings will nevertheless bind the stockholders if they made no objection to the course followed and had full opportunity to, and did present their side of the claim against them.<sup>8</sup> While a court may, on dissolution of a corporation, decree distribution of its funds among those entitled thereto, it may not take away from a trustee funds placed with it for a specific purpose by the dissolved corporation and itself distribute them, but can only require its receiver who has accepted such funds to pay them back to the trustee.<sup>9</sup> Under a statute providing that on dissolution of a corporation the residue of its assets left after paying the expenses of the receivership and its debts and liabilities shall be distributed among the stockholders in proportion to their several interests therein, "if the distribution can be properly made without a sale, then it should not be made; but when a sale

<sup>6</sup> Gen. Corp. L. §§ 112, 113, 114 (L. 1909, c. 28).

<sup>7</sup> Gen. Corp. L. § 115 (L. 1916, c. 163).

<sup>8</sup> *People v. Hydrostatic Paper Co.*, 88 N. Y. 623 (1882).

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<sup>9</sup> *Matter of Home Provident Safety Fund Assn.*, 129 N. Y. 288, 29 N. E. 323 (1891).

may become necessary to give each one of the stockholders his full interest in the assets, then, clearly, it should be ordered by the court.”<sup>10</sup>

§ 487. **Id.: Effect of Dissolution, In General.**—The only effect of a resolution by a corporation’s board of directors that it “be and the same is hereby dissolved, to take effect upon the sale and transfer of its property, the settling of its business and the division of its capital stock” is “to deprive the corporation of the power of engaging in new business, and to leave it clothed with full power, so far as necessary to close up all its affairs, pay off its debts and distribute its property, and it . . . continued to have authority to fill any vacancy occasioned by death, resignation or otherwise.”<sup>11</sup> The Supreme Court has the same power over its order dissolving a corporation as it has over any other order made by it and may, therefore, resuscitate a corporation it has by order dissolved.<sup>12</sup> The court has power to set aside its final order of dissolution of a corporation made on application of a majority of its board of directors on the request of a stockholder; and it will exercise this power if the merits of the request appeal to it and the applicant give a sufficient and approved bond to pay creditors the amounts to which they may be entitled.<sup>13</sup> Once a petition for voluntary dissolution of a corporation is made the court acquires jurisdiction and may appoint a receiver, restrain proceedings against the corporation, etc.<sup>14</sup> The common law rule that real estate held by a corporation at the time of dissolution reverts to the grantor does not prevail in this State in respect to stock corporations, as under the statute, “upon the dissolution of a corporation, the directors or managers at that time become trustees of its property (unless some other custodian is appointed), for the purpose of paying the debts of the corporation and dividing its property among its stockholders.”<sup>15</sup>

<sup>10</sup> *Matter of Woven Tape Skirt Co.*, 8 Hun, 508 (1876); L. 1876, c. 442. The stockholders had interests in a patent and a sale of two-sixths of it, together with the agreement for its use, would bring, it was shown, a larger proportionate price than a sale of one-sixth with an undivided one-half of the agreement.

<sup>11</sup> *Ervin v. Oregon Steam Navigation Co.*, 22 Hun, 598 (1880).

<sup>12</sup> *Matter of Automatic Chain Co.*, 134 A. D. 863, 119 N. Y. Supp. 379

(1909); *aff’d* 198 N. Y. 618, 92 N. E. 1078.

<sup>13</sup> *Matter of Automatic Chain Co.*, 64 Misc. 280, 118 N. Y. Supp. 542 (1909); *aff’d* 134 A. D. 863, 119 N. Y. Supp. 379.

<sup>14</sup> *Matter of Christian Jensen Co.*, 128 N. Y. 550, 28 N. E. 665 (1891); C. C. P. § 2423.

<sup>15</sup> *Heath v. Barmore*, 50 N. Y. 302 (1872); 1 R. L. 248; 1 R. S. 600, §§ 9, 10.

After judgment has been entered dissolving a corporation and appointing a receiver, stockholders should be permitted to examine and take abstracts from its books to get information as to its condition; but they are not entitled to a court order requiring notice to them of any application to the court or action by the court or receiver.<sup>16</sup> Though the persons appealing from an order dissolving a corporation did not themselves object to the proceeding on the ground that the order therein for publication of notice was improper under the statute they may nevertheless raise the point on appeal, if they are not the only ones on whom the order published had to be served.<sup>17</sup>

§ 488. *Id.*: **On Actions.**—A cause of action for damages for negligent injury by a stock corporation should after its voluntary dissolution be brought against it and not its directors.<sup>18</sup> An action for damages for death from negligence of a corporation survives its dissolution and may be contained against its receiver, who may even appeal from the judgment therein.<sup>19</sup> The dissolution of a corporation puts an end to an action against it; and a receiver for it, in authority when judgment is rendered against the corporation, but who has not been made party to the action, cannot be affected by it unless by direction of the court he has interfered and made himself responsible for its final result, and a mere direction to argue the case on appeal does not make him responsible.<sup>20</sup> The principle that creditors may proceed against a corporation by its corporate name until it is declared dissolved by judicial decree is applicable to a dissolution in consequence of insolvency or non-user or mis-user of the corporate franchises, or some other cause of forfeiture, and not to a dissolution by expiration of the charter, in which event the corporation is *de facto* dead and no judgment can be rendered against it.<sup>1</sup> “To effect a dissolution of a corporation there must be the judgment of a court of competent jurisdiction declaring it dissolved; and until such judgment creditors may proceed by

<sup>16</sup> *People v. Cataract Bank*, 5 Misc. 14, 25 N. Y. Supp. 129 (1893).

<sup>17</sup> *Matter of Pyrolusite Manganese Co.*, 29 Hun, 429 (1883); C. C. P. tit. 2, c. 17.

<sup>18</sup> *Cunningham v. Glauber*, 61 Misc. 443 (1908); St. Corp. L. § 57. Section 30 of the General Corporation Law does not apply to a stock corporation.

<sup>19</sup> *People v. Troy Steel & Iron Co.*, 82 Hun, 303, 31 N. Y. Supp. 337 (1894); C. C. P. §§ 1784, 1785 (now Gen. Corp. L. §§ 100, 101) 755, 756, 1902.

<sup>20</sup> *People v. Knickerbocker Life Ins. Co.*, 106 N. Y. 619, 13 N. E. 447 (1887).

<sup>1</sup> *Sturges v. Vanderbilt*, 73 N. Y. 384 (1878).

suit against the corporation, unless restrained by injunction (*citations*). A corporation may by virtue of proceedings against it, or by reason of its pecuniary condition, cease to exist for all practical purposes, all the purposes for which it was created or for which a corporation may exist, but it cannot be held to be actually dissolved till so adjudged and determined, either by judicial sentence or the sovereign power."<sup>2</sup> On dissolution of a corporation, action for an admitted debt of the corporation should be against the directors as trustees, but for a contested claim which can be established and liquidated only by a judgment the action should be against the corporation.<sup>3</sup>

**§ 489. Id.: On Creditors.**—Creditors of a dissolved corporation have a lien on its assets for the payment of their debts, whether they are in the hands of one who came by them fairly or by fraud or force, unless such one has acquired a higher or better equity thereto than the creditors.<sup>4</sup> "Under the statutes of this State, on the dissolution of a corporation, its assets become a trust fund for the payment of its debts, and these include debts to mature as well as accrued indebtedness, and all engagements entered into by the corporation, which have not been fully satisfied or canceled."<sup>5</sup> In order to maintain the lien of a creditor of a corporation upon its assets after its dissolution by judgment enjoining further proceedings against it it must be shown that the lien was valid and existed before entry of the judgment.<sup>6</sup>

<sup>2</sup> Kincaid v. Dwinelle, 59 N. Y. 548 (1875); Gen. Mfg. Act, L. 1848, c. 40, §§ 18, 24.

<sup>3</sup> Cunningham v. Glauber, 133 A. D. 10, 117 N. Y. Supp. 866 (1909); old Gen. Corp. L. §§ 19, 20 (L. 1892, c. 687, § 30). The action was to recover damages for negligence.

On effect of insolvency or appointment of receiver to work dissolution which will affect right of corporation to sue, see note in 50 L.R.A.(N.S.) 383.

On effect on pending actions of expiration of statutory period permitting litigation after dissolution, see note in 32 L.R.A.(N.S.) 452.

Abatement of action by or against corporation, in the absence of a saving statute, by dissolution or expira-

tion of charter, see note in 32 L.R.A.(N.S.) 446.

On effect of proceedings for dissolution of corporation upon its rights of action, see note in 15 L.R.A. 627.

On dissolution of corporation as excusing creditor from exercising remedies against corporation, as condition of enforcing stockholder's liability on unpaid subscription, see note in 24 L.R.A.(N.S.) 628.

<sup>4</sup> Tinkham v. Borst, 31 Barb. 407 (1860).

<sup>5</sup> People v. National Trust Co., 82 N. Y. 283 (1880); R. S. art. 3, tit. 4, c. 8, pt. 3.

<sup>6</sup> People v. Mutual Benefit Life Assn., 86 Hun, 219, 33 N. Y. Supp. 191 (1895).

§ 490. *Id.*: **On Judgments.**—A judgment against a corporation which was a lien on its realty when suit to dissolve the corporation was begun, but was later reduced by the Appellate Division, is a lien which holds good for the reduced amount even though such realty be sold by the receiver appointed in the dissolution proceedings under a final decree ordering the sale subject only to certain liens mentioned of which this judgment was not one.<sup>7</sup> A judgment obtained in a foreign state against a corporation after a temporary receiver had been appointed in this State for it in proceedings for its dissolution is good and entitles the judgment creditor to share in its property sequestered in this State on introduction in evidence of an exemplified copy of the judgment and records of the foreign court showing the appearance of the corporation by attorney, unless the order appointing the temporary receiver restrained creditors from proceeding by action against the corporation and the creditor in question was served with such order.<sup>8</sup> A decree of corporate dissolution does not contemplate that the sale of the corporate realty shall be free and clear of all judgment liens unless specially reserved in the decree; and until any particular judgment is satisfied from the moneys in the hands of the receiver, it is the right of the owner of the judgment to proceed to execution and sell subject to the order of the court.<sup>9</sup> “. . . there can be no valid judgment against a dissolved corporation, unless one founded on a pending suit which the order of dissolution itself preserves from abatement, or in some manner saved. . . . That the foreign corporation, dissolved and dead in the domicile of its origin, should be deemed alive in the foreign state so far as to save the remedies of its own citizens against property within its own jurisdiction, is entirely possible and not at all unreasonable. But to . . . insist that by force of the foreign judgment and through the comity of the states the corporation, in its own jurisdiction is . . . dead as to our own citizens, but alive as to foreign creditors—is to . . . make a complete dissolution . . . impossible. . . . The foreign creditor may pursue the corporate assets in his own state but when he would reach the fund held here for distribution after the corporate death he must, in some manner, make the receiver

<sup>7</sup> *Matter of Coleman*, 174 N. Y. Supp. 117 (1896); *aff'd* 151 N. Y. 373, 66 N. E. 983 (1903).

<sup>8</sup> *People v. Commercial Alliance Life Ins. Co.*, 5 A. D. 273, 39 N. Y.

<sup>9</sup> *Matter of Coleman*, 174 N. Y. 373, 66 N. E. 983 (1903).

a party, so as to bind him by the judgment."<sup>10</sup> A judgment cannot validly be rendered against a corporation which has been dissolved by court judgment; but the receiver, if any, appointed of its property, should be brought in.<sup>11</sup> A judgment entered in a foreign state against a domestic corporation after it has been dissolved, though in an action commenced before the dissolution in which it appeared, is ineffective.<sup>12</sup>

**§ 491. Id.: On Contracts.**—"There is nothing in the statute [providing for the voluntary dissolution of a corporation] . . . authorizing the court to restrain the creditors of the corporation from disposing of its bonds held as collateral to loans under lawful contracts empowering them to sell."<sup>13</sup> When an agreement between competing ship lines provides for their combination into a corporation and division of its stock, and one interest, given control of the corporation's management, guarantees payment of stated dividends to the other for a certain term prior to the expiration of which the corporation is dissolved at the suit of the State on the instigation of the guaranteed interest, the obligation of the contract of guarantee terminates *prima facie* with the dissolution of the corporation.<sup>14</sup> A corporation guaranteeing to pay to holders of certificates of another corporation, so long as the latter's certificates should be outstanding, but not longer than the then unexpired term of the period for which the latter was incorporated, a stated dividend, is not liable on the guaranty, *per se*, after such other corporation's legal dissolution.<sup>15</sup>

<sup>10</sup> *Rogers v. Adriatic Fire Insurance Co.*, 148 N. Y. 34, 42 N. E. 515 (1895).

<sup>11</sup> *McCullough v. Norwood*, 58 N. Y. 562 (1874); L. 1832, c. 295, Code, § 121.

<sup>12</sup> *People v. Mercantile Credit Guarantee Co.*, 65 A. D. 306, 72 N. Y. Supp. 858 (1901). "It was entirely competent for the State of Illinois to direct that a judgment be entered in form against a dissolved corporation, although its courts had lost jurisdiction over it by its dissolution and to direct that such a judgment should affect property which had belonged to the corporation located within the State . . . ; but it is entirely incompetent for the State of Illinois to say that a judgment that its courts shall enter

against a non-existing corporation . . . shall be conclusive evidence as against persons not parties to the record in other States, and shall affect property which has ceased to be the property of the judgment debtor."

<sup>13</sup> *Matter of Binghamton Electric Co.*, 143 N. Y. 261, 38 N. E. 297 (1894).

<sup>14</sup> *Lorillard v. Clyde*, 142 N. Y. 456, 24 L.R.A. 113, 37 N. E. 489 (1894).

<sup>15</sup> *Mason v. Standard Distilling & Distributing Co.*, 85 A. D. 520, 83 N. Y. Supp. 343 (1903).

On right to recover for services and expenses under a running contract with a corporation ended by its dissolution, see note in 69 L.R.A. 124.

**§ 492. Id.: On Liabilities of Directors, Officers and Stockholders.**—The liability of directors and officers of a corporation on its dissolution has already been discussed.<sup>16</sup> The last sentence of section five of the Business Corporations Law, that “the dissolution of any such corporation for any cause shall not take away or impair any remedy against it, its stockholders or officers, for any liabilities incurred previous to its dissolution,” inartificial as may be its insertion in a clause providing for dissolution on failure of payment of a corporation’s capital stock, cannot be qualified by what precedes; and it reaches beyond the contingency of the particular dissolution previously referred to and applies to any, that is to say every, case of corporate dissolution.<sup>17</sup> When there is no action by a corporation with a view to the discontinuance of its business or the abandonment of its franchise and no acquiescence in such a course by its trustees or stockholders, the mere fact of an application by the attorney-general at the instance of two and in spite of the opposition of half of the trustees for its dissolution upon grounds undisclosed does not relieve them from the duty of making and filing the statutory annual report so as to relieve them from individual liability under the then statute.<sup>18</sup>

**§ 493. Id.: Voluntary Sale of Property and Franchise, In General.**—The legislation permitting voluntary sale of a corporation’s franchise and property was designed to meet two evils: “(1) The injustice to the bulk of the stockholders from want of power in a corporation to sell its business or an essential part thereof to another corporation organized for the purpose, frequently from its own membership, on terms deemed advantageous by the holders of a large majority of the stock, (2) the injustice to minority stockholders of requiring them to abandon, change or limit their business if the majority should have the power to direct such a sale. An incidental evil was the power of a dissenting stockholder to compel the majority to buy him out on his own terms in order to secure unanimous consent with no one left to question the

<sup>16</sup>As to Directors, see § 293, *supra*; as to Officers, see § 340, *supra*.

<sup>17</sup>*Marsteller v. Mills*, 143 N. Y. 398, 38 N. E. 370 (1894). The trustees on dissolution were held proper defendants in a suit based on the corporation’s negligence resulting in plaintiff’s personal injury.

<sup>18</sup>*First Nat. Bank of Jersey City*

*v. Lamon*, 130 N. Y. 366, 29 N. E. 321 (1891); *Gen. Mfg. Act*, § 12 (L. 1848, c. 40).

As to effect of dissolution of corporation on liability of directors under statutes purporting to make them liable for contracting debts in excess of a fixed limit, see note L.R.A.1915D, 1052.

transaction.”<sup>19</sup> The language of the statutory provision concerning voluntary sale by a corporation of its franchise and property “was not addressed to ordinary sales by a corporation, nor even to those extraordinary in size but still in the regular line of business;” but a sale of a whole independent and important branch of its business because of necessity by reason of lack of capital to carry it on, including good will, so as to preclude the corporation from ever again engaging in that line of business, which was authorized by its charter, is a sale or abandonment of its charter to that extent and therefore within the ban of the statute.<sup>20</sup> A manufacturing corporation has “the right, with the consent of its stockholders, to sell its plant and retire from business.”<sup>21</sup> A stockholder voting by proxy with the other stockholders of a corporation owing no debts to sell all its property to one of their number and dissolve, since which time it has done no business, cannot claim that this is not equivalent to a surrender of its franchises, if all the conditions of the offer of purchase have been fulfilled save those which he himself has not fulfilled.<sup>2</sup> “. . . a domestic corporation, whose principal tangible property is located within a State adjoining the State of New York and the principal business of which is carried on in such adjoining State, may, with the consent of the holders of ninety-five per cent. of its capital stock, sell and convey its property situated without the State of New York, not including its franchises, to a corporation organized under the laws of such adjoining State, vesting the rights and property sold in the corporation to which they are conveyed for the term of its corporate existence, subject to the provisions and restrictions applicable to the corporation conveying them.”<sup>3</sup>

<sup>19</sup> Matter of Timmis, 200 N. Y. 177, 93 N. E. 522 (1910); St. Corp. L., § 16.

<sup>20</sup> Matter of Timmis, 200 N. Y. 177, 93 N. E. 522 (1910); St. Corp. L. § 16. “. . . the trustees of a mining company incorporated under the act of 1848 cannot, even with the consent of a majority of its stockholders, transfer all of its property and assets to another corporation avowedly incorporated for the purpose of acquiring the same and carrying on its business, and receive in payment therefor the stock of the latter corporation;” but it may be that the rule is different if the cor-

poration is non-paying and its business is being conducted at a loss. *People v. Ballard*, 136 N. Y. 639, 32 N. E. 611 (1892); C. C. P. §§ 1781, 1782; now Gen. Corp. L. §§ 90, 91. See also 134 N. Y. 269, 17 L.R.A. 737, 32 N. E. 54.

<sup>21</sup> *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.*, 127 N. Y. 252, 27 N. E. 831 (1891).

<sup>2</sup> *Webster v. Turner*, 12 Hun, 264 (1877).

<sup>3</sup> *Barney v. Whalen*, 56 Misc. 278, 106 N. Y. Supp. 434 (1907); St. Corp. L. § 33 (L. 1890, c. 564); now § 16.

§ 494. **Id.: To What Corporation, and of What.**—A domestic stock corporation is permitted by statute to sell its property, rights, privileges and franchises to another domestic corporation, or its property outside New York State, not including its franchises, to a corporation organized under the laws of an adjoining state in which the selling corporation carries on its principal business and in which its principle tangible property is located.<sup>4</sup> If the sale is to a domestic corporation the latter must be engaged in a business of the same general character as the selling corporation, or engaged in a business which might be included in the certificate of incorporation of a corporation organizing under any general law of New York State for a business of the same general character as the selling corporation; and if to a foreign corporation the latter must be organized under the laws of an adjoining state to the selling corporation in which the seller carries on its principal business and in which the seller's principal tangible property is located.<sup>5</sup> If the sale is to a domestic corporation it may be of any interest in or part of the property, rights, privileges and franchises of the selling corporation.<sup>6</sup> On dissolution of a stock corporation before the time limited in its certificate of incorporation by voluntary action of its directors and stockholders, the former, after paying or adequately providing for the debts and obligations of the corporation, may with the written consent of the holders of two-thirds in amount of the capital stock sell the remaining assets or any part thereof to a corporation organized under the laws of this or any other state and engaged in a business of the same general character, and take in payment therefor the stock or bonds or both of such corporation, and distribute them among the stockholders in lieu of money in proportion to their interest therein, but no such sale is valid as against any stockholder who within sixty days after the mailing of notice to him of such sale applies to the Supreme Court in the manner provided by the seventeenth section of the Stock Corporation Law for an appraisal of the value of his interest in the assets so sold; unless within thirty days after such appraisal the stockholders consenting to such sale or some of them pay to such objecting stockholder or deposit for his account in the manner directed by the court the amount of such appraisal, and upon such payment or deposit the interest of such objecting stockholder vests in the person or persons making such payment or deposit.<sup>7</sup>

<sup>4</sup> St. Corp. L. § 16 (L. 1909, c. 61).

<sup>5</sup> St. Corp. L. § 16 (L. 1909, c. 61).

<sup>6</sup> St. Corp. L. § 16 (L. 1909, c. 61).

<sup>7</sup> Gen. Corp. L. § 221 (L. 1909,

c. 28).

**§ 495. Id.: Stockholders' Consent.**—If the sale is of both property and rights, privileges and franchises to a domestic corporation, it must be with the consent of two-thirds of the selling corporation's stock; and if of only property situate outside New York, to a foreign corporation, it must be with the consent of the holders of ninety-five per centum of the selling corporation's capital stock.<sup>8</sup> Before a sale or conveyance can be made either to a domestic or foreign corporation the consent of the two-thirds of stock or ninety-five per centum of the holders of the stock, respectively, must be obtained at a meeting of the stockholders called upon like notice as that required for an annual meeting.<sup>9</sup>

**§ 496. Id.: Stockholders' Dissent and Procedure Thereon.**—A stockholder may within sixty days after the meeting held to authorize sale to a domestic or foreign corporation apply to the Supreme Court for the appointment of three persons to appraise the value of his stock if (1) he did not vote in favor of the proposed sale at such meeting, or (2) within twenty days after such meeting objected to such sale and demanded payment for his stock.<sup>10</sup> The statutory provision that a stockholder objecting to sale of his corporation's franchise and property to another corporation by consent of two-thirds of its stockholders may apply to the court "within sixty days" after the stockholders' meeting for the appointment of appraisers of his stock means that the notice of application must be served within sixty days—not that the court hearing must be had within the sixty days.<sup>11</sup> The application may be made at any special term held in the district in which the principal place of business of the corporation is situated and upon eight days' notice to the corporation.<sup>12</sup> The court must appoint three appraisers as asked and designate the time and place of their proceedings as is deemed proper and also direct the manner in which payment for such stock is to be made to the applying stockholders.<sup>13</sup> The court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise.<sup>14</sup> The appraisers must meet at the time and place designated and they or any

<sup>8</sup> St. Corp. L. § 16 (L. 1909, c. 61).

<sup>9</sup> St. Corp. L. § 16 (L. 1909, c. 61).

On power of officers or majority stockholders against consent of minority to sell property of corporation essential to its corporate existence as a giving concern, see note in 35 L.R.A.(N.S.) 396.

<sup>10</sup> St. Corp. L. § 17 (L. 1909, c. 61).

<sup>11</sup> *Matter of Ennis v. Federal Brewing Co.*, 123 A. D. 691, 108 N. Y. Supp. 230 (1908); *aff'd* 192 N. Y. 570, 85 N. E. 1109; St. Corp. L. § 33; now § 17.

<sup>12</sup> St. Corp. L. § 17 (L. 1909, c. 61).

<sup>13</sup> St. Corp. L. § 17 (L. 1909, c. 61).

<sup>14</sup> St. Corp. L. § 17 (L. 1909, c. 61).

two of them after being duly sworn honestly and faithfully to discharge their duties must estimate and certify the value of such stock at the time of such dissent and deliver one copy to such corporation and another to such stockholder, if demanded; and the charges and expenses of the appraisers must be paid by the corporation.<sup>15</sup>

**§ 497. Id.: Effect of Sale Pursuant to Statute.**—The sale and conveyance, in the case of a sale to a domestic corporation, vest the rights, property and franchises thereby transferred, and in the case of a sale to a foreign corporation, vests the property sold, in the transferee-corporation for the term of its corporate existence, subject to the provisions and restrictions applicable to the corporation conveying.<sup>16</sup> When the corporation has paid the amount of such appraisal, as directed by the court, such stockholders cease to have any interest in such stock and in the corporate property of such corporation and such stock may be held or disposed of by such corporation.<sup>17</sup> The duty of a corporation having a dissenting stockholder to pay the value of his holdings within thirty days of its appraisal involves the performance of a condition subsequent to the sale of its assets, and the sale itself is effectual, so far as the buyer is concerned, until invalidated by failure to pay.<sup>18</sup>

**§ 498. Id.: Merger and Consolidation, Distinction.**—“ The legislature has provided two ways of uniting two or more corporations by transfer of their property to a single corporation: ” (1) consolidation (Bus. Corps. L., § 7); and (2) merger (Stock Corp. L., § 15); “ and it made a corporation accepting the assets of other corporations under the statute authorizing the consolidation of corporations liable for the indebtedness of the corporations so consolidated. It declined to do so in the case of corporations transferring assets under the merger statute. The rights of creditors were not overlooked, as the legislature expressly provided that the rights of such creditors should be preserved and that the merger should be without prejudice as to them.”<sup>19</sup>

**§ 499. Id.: Merger.**—Either (a) any domestic corporation or (b) any foreign stock corporation authorized to do business in New York State, which lawfully owns all the stock of

<sup>15</sup> St. Corp. L. § 17 (L. 1909, c. 61).

<sup>16</sup> St. Corp. L. § 16 (L. 1909, c. 61).

<sup>17</sup> St. Corp. L. § 17 (L. 1909, c. 61).

<sup>18</sup> *Horner & Co. v. Lawrence*, 86 Misc. 95, 149 N. Y. Supp. 82 (1914); *aff'd* 166 A. D. 920, 150

N. Y. Supp. 1105; Gen. Corp. L. § 221.

<sup>19</sup> *Irvine v. New York Edison Co.*, 207 N. Y. 425, 101 N. E. 358 (1913); St. Corp. L. § 15; Bus. Corp. L. § 7.

any other stock corporation organized for or engaged in business similar or incidental to that of the possessor corporation, may merge such other corporation.<sup>20</sup> The possessor corporation accomplishes the merger by filing in the office of the Secretary of State a certificate — which must be under its common seal — (1) of its ownership of all the other corporation's stock, and (2) of the resolution of its (the possessor-corporation's) board of directors to merge such other corporation.<sup>1</sup> Thereupon the possessor-corporation acquires, becomes and is possessed of all the estate, property, rights, privileges and franchises of such other corporation, and they vest in and are held and enjoyed by it as fully and entirely, and without change or diminution, as they were before held and enjoyed by such other corporation; and the latter is managed and controlled by the board of directors of such possessor-corporation and in its name, but without prejudice to any liabilities of such other corporation or the rights of any creditors thereof.<sup>2</sup> The Secretary of State collects a fee of twenty-five dollars for filing a certificate of merger pursuant to section fifteen of the Stock Corporation Law.<sup>3</sup> A creditor of a corporation merged into another, rather than consolidated, must hold not the possessor-corporation, but the merged corporation for the debt, as the statute retains the merged corporation's existence for the one purpose of carrying out in good faith the reservation in the statute of the rights of creditors thereof. If the merged corporation's property is not of such nature that it can be reached directly by execution or otherwise, it constitutes a trust fund for benefit of such creditors and can be reached as such precisely as if a merger had not taken place.<sup>4</sup> One suing a corporation which becomes merged in another is entitled to have the latter substituted for the former.<sup>5</sup> A plaintiff, by accepting an answer from a successor corporation to the one originally sued into which the latter has been merged since the suit was begun, waives any objection to its having been made by a party not named in the summons, and cannot move at the trial to have the case stricken from the calendar.<sup>6</sup> Solely by virtue of the

<sup>20</sup> St. Corp. L. § 15 (L. 1909, c. 61).

<sup>1</sup> St. Corp. L. § 15 (L. 1909, c. 61).

<sup>2</sup> St. Corp. L. § 15 (L. 1909, c. 61).

<sup>3</sup> Executive L. § 26 (L. 1917, c. 69).

<sup>4</sup> *Irvine v. New York Edison Co.*, 207 N. Y. 425, 101 N. E. 358 (1913); St. Corp. L. § 15; Bus. Corp. L. § 7.

<sup>5</sup> *Burrow v. Merceau*, 132 A. D. 797, 117 N. Y. Supp. 537 (1909); C. C. P. § 756.

<sup>6</sup> *Klein v. East River Electric Light Co.*, 37 Misc. 490, 75 N. Y. Supp. 1000 (1902); former Bus. Corp. L. § 12.

statute permitting merger of corporations, the merged corporation — without any assignment thereof — becomes possessed of all rights under a guaranty made to the merging one by an individual.<sup>7</sup>

**§ 500. Id.: Consolidation, In General.**—Consolidation pursuant to statute is permitted to corporations; but not transfer by one of all its assets to another, insofar as creditors are concerned, even though the transferee-corporation assume the other's debts, because a creditor cannot be forced to change his debtor against his will.<sup>8</sup> Corporations cannot consolidate without legislative authority.<sup>9</sup> The courts cannot legalize a consolidation of corporations for which there is no legislative sanction.<sup>10</sup> There can be no corporate consolidation except as provided by the legislature; and any agreement to consolidate in any other way is void and ineffective to transfer any of the property of the constituent corporations to the consolidated company.<sup>11</sup> When a revision of existing laws provides that its repeal clauses shall not affect or impair any act done and right accrued before a certain date, it does not invalidate proceedings for a consolidation of corporations in which the directors' meeting was held and the stockholders' meeting was called before the repeal of the laws empowering such consolidation, even though the stockholders' meeting was not held till after the repeal.<sup>12</sup> “. . . in this State there can be no partnerships of separate and independent corporations, whether directly, or indirectly, through the medium of a trust; no substantial consolidations which avoid and disregard the statutory permissions and restraints, but . . . manufacturing corporations must be and remain several as they were created, or one under the statute.”<sup>13</sup>

<sup>7</sup> *McElwain Co. v. Premiere*, 180 A. D. 288, 167 N. Y. Supp. 815; St. Corp. L. § 15.

On rights of life tenant or remainderman in distribution by corporation in process of consolidation or merger with other corporation, see note in 12 L.R.A.(N.S.) 805.

<sup>8</sup> *Cole v. Millerton Iron Co.*, 133 N. Y. 164, 30 N. E. 847 (1892).

<sup>9</sup> *Chevra Bnai Israel v. Chevra Bikur Cholim*, 24 Misc. 189, 52 N. Y. Supp. 712 (1898).

<sup>10</sup> *Selkir v. Klein*, 50 Misc. 194, 100 N. Y. Supp. 449 (1906).

<sup>11</sup> *Congregation Anshe Yosher v. First United Royatiner Sokolower*

*Verein*, 32 Misc. 269, 66 N. Y. Supp. 356 (1900).

<sup>12</sup> *Cameron v. New York & Mt. Vernon Water Co.*, 133 N. Y. 336, 31 N. E. 104 (1892); Gen. Corp. L. (L. 1890, c. 563), repealing L. 1867, c. 960, as amended L. 1877, c. 374, with saving clause embodied in § 24.

<sup>13</sup> *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 9 L.R.A. 33, 24 N. E. 834 (1890); C. C. P. § 1798; now Gen. Corp. L. § 131.

For a note on the question of right of corporation to consolidate, see 52 L.R.A. 369.

As to what unsecured claims are covered by the express assumption

**§ 501. Id.: What Corporations May Consolidate.**—Any two or more corporations organized under the law of New York State for the purpose of carrying on any kind of business of the same or of a similar nature, which a corporation organized under the Business Corporations Law might carry on, may consolidate such two or more corporations into a single corporation.<sup>14</sup>

**§ 502. Id.: The Agreement of Consolidation.**—The consolidation is accomplished by the respective corporations entering into and making an agreement for the consolidation of such corporations (1) signed by a majority of the respective boards of directors and (2) under their respective corporate seals, (3) prescribing (a) the terms and conditions of the consolidation, (b) the mode of carrying it into effect, (c) the name of the new corporation, (d) the number of directors who are to manage its affairs (not less than three), (e) the names and postoffice addresses of the directors for the first year, (f) the term of its existence (not exceeding fifty years), (g) the name of the town or towns, county or counties, in which its operations are to be carried on, (h) the name of the town or city and county in New York State in which its principal place of business is to be situated, (i) the amount of its capital stock (which must not be larger in amount than the fair aggregate value of the property, franchises and rights of such corporations), (j) the number of shares into which such capital stock is to be divided, (k) the manner of distributing such capital stock among the holders thereof, (l) if such corporations or any or either of them have been organized for the purpose of carrying on any part of its business in any place outside of New York State, such fact, and (m) such other particulars as they may deem necessary.<sup>15</sup>

**§ 503. Id.: Stockholders' Consent.**—The consolidation agreement must be submitted to the stockholders of each consolidating corporation at a meeting thereof to be called (1) upon notice of (a) at least two weeks, specifying (b) the time, (c) place and (d) object thereof, and (e) addressed to each

by one corporation of the indebtedness of another, upon consolidation, merger, or absorption, see note in 26 L.R.A.(N.S.) 1101.

<sup>14</sup> Bus. Corp. L. § 7 (L. 1909, c. 12).

<sup>15</sup> Bus. Corp. L. § 7 (L. 1909, c. 12).

On lien of holders of bonds of one of two or more consolidating corporations on property of corporation which issued the bonds where the new corporation had agreed to protect them, see note in 47 L.R.A.(N.S.) 190.

(f) at his last known postoffice address, and (2) deposited in the postoffice, postage prepaid, and (3) published for at least two successive weeks in one of the newspapers in each of the counties of New York State in which either or any of such corporations has its place of business.<sup>16</sup> If the consolidation agreement is approved at each of the stockholders' meetings of the several consolidating companies, separately, by the vote by ballot of the stockholders owning at least two-thirds of the stock it is the agreement of such corporations.<sup>17</sup> A vote by stockholders for consolidation of two corporations does not effect a consolidation; but the laws regulating such action must first be complied with.<sup>18</sup>

**§ 504. Id.: Stockholders' Dissent or Failure to Surrender Stock, and Procedure Thereon.**—Any stockholder may apply to the Supreme Court at any special term thereof held in the district in which any county is situated in which the new corporation may have its place of business for the appointment of three persons to appraise the value of his stock if (1) he did not vote in favor of such agreement to consolidate; (2) he objected either at such meeting or within twenty days thereafter to such consolidation and demanded payment for his stock; (3) the consolidation has taken effect after such objection and demand; (4) he applies within sixty days after such meeting; and (5) he gives at least eight days' notice to the new corporation.<sup>19</sup> The court must appoint three such appraisers; designate the time and place of their first meeting; give such directions in regard to their proceedings as are deemed proper; and direct the manner in which payment for such stock shall be made to such stockholder.<sup>20</sup> The court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise.<sup>1</sup> The appraisers must meet at the time and place designated, and they or any two of them, after being duly sworn honestly and faithfully to discharge their duties, must estimate and certify the value of such stock at the time of such dissent, and deliver one copy to such new corporation, and another to such stockholder if demanded; and the charges and expenses of the appraisers must be paid by the new corporation.<sup>2</sup> When the new corpo-

<sup>16</sup> Bus. Corp. L. § 8 (L. 1909, c. 12).

<sup>17</sup> Bus. Corp. L. § 8 (L. 1909, c. 12).

<sup>18</sup> *Halliday v. Nicholas*, 13 Misc. 111, 34 N. Y. Supp. 104 (1895).

<sup>19</sup> Bus. Corp. L. § 8 (L. 1909, c. 12).

<sup>20</sup> Bus. Corp. L. § 8 (L. 1909, c. 12).

<sup>1</sup> Bus. Corp. L. § 8 (L. 1909, c. 12).

<sup>2</sup> Bus. Corp. L. § 8 (L. 1909, c. 12).

ration has paid the amount of such appraisal, as directed by the court, such stockholder ceases to have any interest in such stock and in the corporate property of such corporation; and such stock may be held or disposed of by such new corporation.<sup>3</sup> In determining the value of the good will of a corporation in order to fix the value of the holdings of a dissenting stockholder on consolidation of the corporation with another the average net profits for a number of years may be multiplied by three, after deducting from the average net profits interest on the capital invested in the business.<sup>4</sup> In ascertaining the value of taxicabs of a corporation which has been consolidated with another in order to fix the value of the stockholdings of a dissenting stockholder, it is proper to ascertain their value when the company began business and to deduct from such value at the rate of twenty per cent per annum for depreciation and obsolescence.<sup>5</sup> When any consolidation has been or is effected pursuant to the laws of New York State and the holders of ninety per centum of the capital stock of each of such corporations has voted in favor of such agreement to consolidate, if any stockholder not voting in favor of such consolidation fail to exchange his stock for stock of such new corporation within sixty days after the statute regulating consolidation became effective or within sixty days after he has become entitled by such statute to make such exchange, as the case may be, such new corporation may apply to the court for the appointment of three persons to appraise the value of such stock at the time of the expiration of such sixty days: (1) At any time thereafter, (2) upon notice of eight days to such stockholder, either (a) given personally within the state if possible; and (b) if not possible then in such manner as the court may direct.<sup>6</sup> Upon the completion of the appraisal, in the manner provided for when the stockholder instead of the corporation applies therefor, and the payment by such new corporation of the amount of such appraisal, as directed by the court, such stockholder ceases to have any interest in such stock and in the corporate property of such corporation, and such stock may be held or disposed of by such new corporation.<sup>7</sup>

<sup>3</sup> Bus. Corp. L. § 8 (L. 1909, c. 12).

<sup>4</sup> *Matter of Seach*, 170 A. D. 686, 156 N. Y. Supp. 579; *aff'd* 219 N. Y. 634, 114 N. E. 1083 (1915); Bus. Corp. L. § 8.

<sup>5</sup> *Matter of Seach*, 170 A. D. 686,

156 N. Y. Supp. 579; *aff'd* 219 N. Y. 634, 114 N. S. 1083 (1915); Bus. Corp. L. § 8.

<sup>6</sup> Bus. Corp. L. § 8 (L. 1909, c. 12).

<sup>7</sup> Bus. Corp. L. § 8 (L. 1909, c. 12).

**§ 505. Id.: Filing and Evidentiary Value of Consolidation Agreement and Proceedings.**—A sworn copy of the proceedings of the stockholders' meetings of several corporations which consolidate, made by their respective secretaries, and attached to the consolidation agreement, is presumptive evidence of the holding and action of such meetings.<sup>8</sup> The agreement and a verified copy of the proceedings of each meeting of the stockholders of the various consolidating companies must be made in duplicate, one of which must be filed in the office of the Secretary of State and the other in the office of the clerk of the county where the principal business office of the new corporation is to be situated in New York State.<sup>9</sup> Upon filing of the consolidation agreement and verified copy of proceedings of stockholders' meetings in the office both of the Secretary of State and county clerk the consolidating corporations are merged or consolidated into the new corporation specified in the agreement, to be known by the corporate name therein mentioned; and the provisions of such agreement must be carried into effect as therein provided.<sup>10</sup> The Secretary of State collects a fee of twenty-five dollars for filing an agreement for the consolidation of two or more corporations other than railroad corporations.<sup>11</sup> The Secretary of State collects a fee of twenty-five dollars for a certificate under subdivision three of section nine of the General Corporation Law, viz.: a certificate stating the name, etc., of corporations consolidating and merging into a new corporation.<sup>12</sup>

**§ 506. Id.: Effect of Consolidation.**—The new corporation enjoys, in addition to the general powers of corporations, the rights, franchises and privileges possessed by each of the corporations so consolidated, subject to the restrictions, liabilities, duties and provisions contained in the Business Corporations Law so far as they may be applicable to the purposes for which it has been organized and expressed in the agreement for consolidation; and may prosecute and carry on any kind of business which each of the consolidating corporations was authorized by law to conduct.<sup>13</sup> Upon the consummation of such act of consolidation all the rights, privileges, franchises and interests of each of the corporate

<sup>8</sup> Bus. Corp. L. § 8 (L. 1909, c. 12).

<sup>9</sup> Bus. Corp. L. § 8 (L. 1909, c. 12).

<sup>10</sup> Bus. Corp. L. § 8 (L. 1909, c. 12).

<sup>11</sup> Executive L. § 26 (L. 1917, c. 69).

<sup>12</sup> Executive L. § 26 (L. 1917, c. 69).

<sup>13</sup> Bus. Corp. L. § 9 (L. 1909, c. 12).

parties to it, and all the real, personal and mixed property, and all the debts due on whatever account to either or any of them, as well as all stock subscriptions and other things in action belonging to either or any of them, are taken and deemed to be transferred to and vested in such new corporation without further act or deed; and all claims, demands, property and every other interest is as effectually the property of the new corporation as they were of the former corporations which were parties to such agreement and act; and the title to all real estate, taken by deed or otherwise, under the laws of New York State, vested in either or any of the corporate parties to the consolidation agreement and act, is not deemed to revert or to be in any way impaired by reason of the law pertaining to corporate consolidation or any thing done by virtue thereof, but is vested in the new corporation by virtue of such act of consolidation.<sup>14</sup> The rights of creditors of any corporation which is consolidated into a new one are not in any manner impaired, nor is any liability or obligation for the payment of any money due or to become due to any person or persons, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof, released or impaired by any such consolidation; but such new corporation succeeds to and is held liable to pay and discharge all such debts and liabilities of each of the corporations consolidated in the same manner as if such new corporation had itself incurred the obligation or liability to pay such debt or damages; and the stockholders of the respective corporations consolidated continue subject to all the liabilities, claims and demands existing against them as such at or before the consolidation; and no action or proceeding then pending before any court or tribunal in which any corporation that is so consolidated is a party, or in which any such stockholder is a party, abates or is discontinued by reason of such consolidation, but it may be prosecuted to final judgment as though no consolidation had been entered into, or such new corporation may be substituted as a party in place of any corporation so consolidated, by order of the court in which such action or proceeding may be pending.<sup>15</sup> “In the consolidation of corporations, pursuant to the provisions

<sup>14</sup> Bus. Corp. L. § 10 (L. 1909, c. 12): “and all the rights, privileges, franchises and property of the corporations, parties to any consolidation heretofore made under this chapter, shall vest as fully in

the new corporation thereby created as they were vested in the corporations, parties to such consolidations.”

<sup>15</sup> Bus. Corp. L. § 11 (L. 1909, c. 12).

of the statute, the new corporation starts upon its existence freighted with the liabilities of the old companies and subject to the terms and conditions of the consolidation agreement, so far as they are not in conflict with the law. While it is not competent to do anything which would impair the rights of outside creditors, there is no reason why the parties to the consolidation agreement may not bind themselves to something deemed for the benefit of the new corporation, and that is what seems to have been done in the present case. The manifest intention of the stockholders of the old companies, who united in making and signing the consolidation agreement, seems to have been to represent that their corporate properties and franchises vested in the new company freed from any burden of indebtedness. As to creditors not assenting to any such arrangement, this was quite unavailing; but as to themselves, it should, and would, operate to bar their claims, while the other creditors were seeking payment from the assets of the corporation since become insolvent."<sup>16</sup>

" . . . statutes for the consolidation of domestic corporations are to be treated as acts of incorporation, and . . . on consolidation being effected under their provisions, the constituent companies, unless such an intention is excluded by the language of the statute, are deemed to be dissolved, and their powers and faculties to the extent authorized become vested in the consolidated company as a new corporation created by the act of consolidation."<sup>17</sup> A statute authorizing the consolidation of corporations which provides that all liabilities incurred by either corporation, except mortgages, shall attach to the new corporation does not relieve the new company from the obligation of one of the old companies on bonds secured by mortgages on its property.<sup>18</sup> While a new corporation formed by consolidation of old corporations is not, in the absence of fraud, liable upon the contracts of the old corporation, yet it is liable, if it is organized out of the officers, directors and stockholders of the old and appropriates all of the assets of the latter in consideration solely of the issue of its stock to the holders of stock in the old corporation, for any debt owing by the old companies at the time of the consolidation, as there is no consideration moving to the old companies as legal entities from which its creditors may

<sup>16</sup> Matter of Utica Nat. Brewing Co., 154 N. Y. 268, 48 N. E. 521 (1897); L. 1892, c. 691, § 8 *et seq.*

<sup>17</sup> People v. New York, Chicago & St. Louis R. R. Co., 129 N. Y. 474

<sup>18</sup> L. R. A. 82, 29 N. E. 970

<sup>18</sup> Polhemus v. Fitchburg R. R. Co., 123 N. Y. 502, 26 N. E. 31 (1890); L. 1869, c. 917, § 5.

be satisfied.<sup>19</sup> A person who has subscribed for corporate stock and has thus become bound to receive it in many respects sustains the relation of stockholder both to the corporation and its creditors; but the fact that he subscribed to shares of a corporation later consolidated with another does not, six years after his subscription, even when accompanied by proof that he paid ten per cent of his subscription, entitle him to the issue of full-paid certificates of stock of the consolidating company.<sup>20</sup> An action against a corporation consolidated prior to the commencement of the action must be against the consolidated company.<sup>1</sup> On consolidation into one corporation of several, one of which is liable to holders of its preferred stock for dividends passed, the consolidated company alone may be prosecuted on such liability.<sup>2</sup> On consolidation of a defendant corporation pending suit against it the method provided by law for prosecuting or defending the action should be followed.<sup>3</sup>

**§ 507. Id.: Reorganization, In General.**—The subject of reorganization of corporations has already been considered in the chapter dealing with corporate bonds and mortgages, upon foreclosure of which reorganization may by statute be accomplished by the formation at the purchaser's instigation of a new corporation.<sup>4</sup> A corporation formed by about the same persons to whom certain property was transferred, and which takes such property, is charged with any conditions agreed to concerning it.<sup>5</sup> An action for breach of a syndicate

<sup>19</sup> *Wilson v. Aeolian Co.*, 64 A. D. 337, 73 N. Y. Supp. 150 (1901); *aff'd* 170 N. Y. 618, 63 N. E. 1123.

<sup>20</sup> *Babcock v. Schuylkill & Lehigh Valley R. R. Co.*, 133 N. Y. 420, 31 N. E. 30 (1892).

<sup>1</sup> *Copp v. Colorado Coal & Iron Co.*, 29 Misc. 109, 60 N. Y. Supp. 293 (1899).

<sup>2</sup> *Boardman v. Lake Shore & Michigan Southern Ry. Co.*, 84 N. Y. 157 (1881).

<sup>3</sup> *Klein v. East River Electric Light Co.*, 37 Misc. 490, 75 N. Y. Supp. 1000 (1902); *old Bus. Corp. L. § 12*.

The effect of consolidation, merger or absorption of corporation, on its unsecured liabilities, in absence of statutory or contract, provisions thereto, is discussed in notes 11

*L.R.A.(N.S.) 1119; 32 L.R.A.(N.S.) 616; 47 L.R.A.(N.S.) 1058.*

<sup>4</sup> See § 262, *supra*.

<sup>5</sup> *Thorn v. Volunteer St. Gregory Hospital*, 59 Misc. 442, 110 N. Y. Supp. 931 (1908). *Cary v. Schoharie Valley Machine Co.*, 2 Hun, 110 (1874). There is no opinion, but only this head-note: "A corporation was organized under the laws of the State (chap. 40, of 1848, and amendments) and its corporate business was conducted for two years, when the company voluntarily ceased to do business, and a new one was organized with larger capital and additional members but for the same purpose and under the same name. The first company turned over its property to the new organization. *Held*, that a stockholder in the first

agreement between individuals contemplating the formation of a new corporation to take over the business of an old one in which they were interested and for the surrender and return of certain securities alleged to have been illegally issued to some of such individuals must be brought by the complaining individual as such and not as a stockholder.<sup>6</sup> In a stockholder's action against members of a corporate reorganization committee a demurrer by a corporate defendant that no cause of action is alleged against it will be held bad if it appears that it is the depository of and received securities under the agreement of reorganization, though superseded later, and delivered all securities to its successor, if it be alleged on information and belief that it assisted individual members of the reorganization committee in misappropriating and wasting the corporate property.<sup>7</sup>

**§ 507-a. Id.: Under Business Corporations Law.**—Any stock corporation (excepting a moneyed, transportation, banking or insurance corporation) may reincorporate under the Business Corporations Law in the following manner: (1) The directors must call a meeting of stockholders by (a) publishing a notice stating the time, place and object of the meeting, signed by at least a majority of them, in a newspaper of the county in which the corporation's principal business office is situated, once a week for at least three weeks, and by (b) serving upon each stockholder, at least three weeks before the meeting, a copy of such notice, either personally, or by depositing it in the post-office, postage prepaid, addressed to him at his last known post-office address; (2) the stockholders must (a) meet at the time and place specified in the notice and (b) organize by choosing one of the directors chairman and a suitable secretary, and (c) take a vote of those present in person or by proxy upon the proposition to reincorporate under the Business Corporations Law, and, if votes representing a majority of all the stock of the corporation are cast in favor of the proposition, (3) the officers of the meeting must (a) execute and (b) acknowledge a certificate of the proceedings, containing also the statements required by statute in a

corporation could maintain an action against it on an indebtedness due from the company to him; that the corporate business was not terminated by its ceasing to do business. The fact that the plaintiff was a stockholder did not deprive him of the right to bring an action, the

case differing from a simple partnership."

<sup>6</sup> *Flanagan v. Lyon*, 54 Misc. 372, 105 N. Y. Supp. 1049 (1907).

<sup>7</sup> *Mawhimmer v. Bliss*, 124 A. D. 609, 109 N. Y. Supp. 332 (1908); *aff'd* 194 N. Y. 590, 88 N. E. 1125.

certificate of incorporation, and (4) this certificate must be filed in the offices where certificates of incorporation under the Business Corporations Law are required to be filed; and from the time of such filing such corporation is deemed to be a corporation organized under the Business Corporations Law, and, if originally organized or incorporated under a general law of New York State, it has and exercises all such rights and franchises as it had and exercised under the laws pursuant to which it was originally incorporated, and such reorganization does not in any way affect, change or diminish the existing liabilities of the corporation.<sup>7a</sup>

**§ 507-b. Id.: To Provide for Stock Without Nominal or Par Value.**—Any stock corporation other than a moneyed corporation or a corporation under the jurisdiction of any public service commission may be reorganized so that it, as well as its officers, directors and stockholders, may acquire and enjoy all the rights, privileges, powers and exemptions, and become subject to all of the liabilities and obligations imposed on corporations organized with shares of capital stock without par value, by filing and recording a certificate in form prescribed by statute, and by obtaining the approval of the State Comptroller if the amount of capital named in such certificate is less than the par value of its previously outstanding stock; but no corporation so reorganized can incur any debts subsequent to the filing of such certificate until it has assets of an actual value at least equal to the amount of the capital stated in such certificate as that with which it will carry on business, and the liability of the corporation, as well as its officers, directors and stockholders, for corporate debts contracted or obligations incurred prior to the filing of such certificate is unaffected by such filing, and for the purpose of enforcing and recovering upon such claims creditors have the same right of recourse against the corporation, or its officers, directors and stockholders individually, that they would have had if the corporation had not been reorganized, and all of the rights and benefits conferred by the statutes imposing liability upon stockholders to corporate creditors for the amount unpaid on their stockholdings, to corporate laborers, servants or employees other than contractors for services performed by them for the corporation, subject, however to the conditions, limitations and restrictions imposed by such statutes, such as relate to persons holding stock as collateral or as trustee, or to the necessity of the creditor obtaining a judgment against

<sup>7a</sup> Bus. Corp. L. § 4 (L. 1909, c. 12).

the corporation before seeking to hold the stockholders.<sup>7b</sup> This matter has already been treated and reference is made to such treatment.<sup>7c</sup>

**§ 508. Id.: Reorganization Agreement, Construction Of.—**

A reorganization agreement prepared by a committee and wholly in its language, in the preparation of which bondholders of the corporation, to be affected by it, had no part, though compelled to accept it as it stood or not at all, should be construed most favorably to the bondholders.<sup>8</sup> The fact that a reorganization agreement provides that the reorganization committee has the right to construe it and that its construction is final does not empower it to make a new contract or subvert the agreement by construing a vital provision into or out of it: "no one can be made, by contract, the final judge of his own acts, for the law writes 'good faith' into such agreements. . . . the power to construe and the engagement that the construction shall be final mean that it shall be final if the members of the committee act in good faith, but not otherwise."<sup>9</sup> When persons have the option to present their stock in an old company for exchange for bonds of a new corporation, and no limitation is put by the agreement of time for the exercise of the option, it must be acted upon or abandoned within a reasonable time.<sup>10</sup>

**§ 509. Id.: Modification or Rescission of.—**

In order to create an effective rescission of a corporate reorganization agreement there must be a lawful right to rescind, due notice of an intention to rescind and the restoration of benefits received by the party attempting to rescind, so that the other party may be placed in *statu quo*; even if the most complete right of rescission exists it cannot be exercised without a return or offer to return such benefits.<sup>11</sup> No ratification of a modification of a corporate reorganization agreement can be found when "there was no consideration, intent, misleading conduct, change of position or mutual understanding from which a waiver or estoppel could properly be inferred."<sup>12</sup> A corporation cannot escape its liability to an attorney to deliver him

<sup>7b</sup> St. Corp. L. §§ 24, 24-a, 24-b 24-c (L. 1917, c. 484).

<sup>7c</sup> See § 96-a, *supra*.

<sup>8</sup> Industrial & General Trust, Ltd. v. Tod, 180 N. Y. 215, 73 N. E. 7 (1904).

<sup>9</sup> Industrial & General Trust, Ltd. v. Tod, 180 N. Y. 215, 73 N. E. 7 (1904).

<sup>10</sup> Catlin v. Green, 120 N. Y. 441, 4 N. E. 941 (1890). Stock held nine years till worthless and company insolvent and its property in receiver's hands.

<sup>11</sup> Cox v. Stokes, 156 N. Y. 491, 51 N. E. 316 (1898).

<sup>12</sup> Cox v. Stokes, 156 N. Y. 491, 51 N. E. 316 (1898).

certain securities on its complete reorganization in consideration of his services upon the ground that the reorganization was not attained according to the precise scheme marked out originally if the reorganization was in fact effected and the attorney performed his part of the agreement.<sup>13</sup>

**§ 510. Id.: Rights, Powers and Liabilities of Parties: of Bondholders.**—When the relations between a bondholder and a reorganization committee of a corporation rest in contract and are defined by the reorganization agreement, his action against it for failure to proceed properly lies in contract and not in tort.<sup>14</sup> Although a reorganization agreement of a corporation contains no express provision for the preparation and adoption of a plan for reorganization at any particular time, nor for the performance of the duties imposed upon the reorganization committee in any categorical order, yet if the very purpose of the agreement and the sequence of its arrangement compel the implication that there was to be no binding agreement until the depositing bondholders had been given the opportunity to decide whether they would abide by the plan adopted by the members of the committee and others or withdraw therefrom, and this decision could not be made until the plan had been prepared, adopted and promulgated, the agreement will be held not binding until such plan has been made, adopted and notice of it given, unless waived.<sup>15</sup> Although there be no express provision in an agreement for the reorganization of a corporation that the reorganization committee prepare a plan and submit it to the bondholders before the corporate property is sold under foreclosure, yet if the construction of the agreement be such that the bondholders cannot withdraw their bonds from participation in the reorganization until after a plan of reorganization had been prepared and notice of it given or breach of duty by the committee, an implied covenant exists that such a plan be submitted before the corporate property was sold.<sup>16</sup> When the plan sent bondholders of a corporation by a reorganization committee provides that, prior to the conveyance of any of the corporation's property purchased by the committee

<sup>13</sup> *Babbitt v. Gibbs*, 150 N. Y. 281, 44 N. E. 952 (1896).

<sup>14</sup> *Industrial & General Trust v. Tod*, 170 N. Y. 233, 63 N. E. 285 (1902). The action was for conversion in the use of the corporation's bonds to buy in on foreclosure pursuant to the reorganization agreement.

<sup>15</sup> *Industrial & General Trust v. Tod*, 170 N. Y. 233, 63 N. E. 285 (1902).

<sup>16</sup> *Industrial & General Trust, Ltd. v. Tod*, 180 N. Y. 215, 73 N. E. 7 (1904).

to a new, contemplated company, the committee should submit to those it represented, *i. e.*, the bondholders, "a detailed plan of reorganization," to be binding on all bondholders unless a majority dissent within a stated time, the word "detail" means minor particulars necessary to complete a reorganization, but consistent with the original plan, and lawful and honest, so that nothing in matters of substance may be done under the detailed plan that could not have been done under the original agreement; and the provision binding all bondholders unless dissent were registered by a majority does not embrace anything except details of the plan included in the original agreement.<sup>17</sup>

**§ 511. Id.: Of Reorganization Committee.**—As to matters specifically provided for in a corporate reorganization agreement the reorganization committee are bound to compliance and cannot change without the consent of those for whom they act.<sup>18</sup> A provision in a corporate reorganization agreement that the members of the reorganization committee shall not be liable for anything except their own willful misconduct does not shield them if they fail in the performance of a condition precedent upon which the vesting of their powers was dependent.<sup>19</sup> No general powers are to be implied in behalf of members of a committee to reorganize a corporation, and express powers are not to be extended by construction.<sup>20</sup> An agreement between a committee undertaking to reorganize a corporation and those it represents should be strictly construed as against the committee and in favor of the *cestuis que trust*; and "such a construction necessarily denies to the committee the power, under guise of a detail of the original agreement, to incorporate into it a provision authorizing the committee to permit other parties than the holders of bonds to share in the property which had been brought in for the benefit of the bondholders alone."<sup>1</sup> A letter signed in the name of an individual, with the sole word "chairman" added, to another, agreeing to give the latter certain securities

<sup>17</sup> *United Water Works Co. v. Omaha Water Co.*, 164 N. Y. 41, 58 N. E. 58 (1900).

<sup>18</sup> *Cox v. Stokes*, 156 N. Y. 491, 51 N. E. 316 (1898). The agreement specified that the new mortgages should cover all property, including certain stocks and securities, and the committee modified the agreement by increasing the first mortgage bonds going to the man advancing the money for the reorganization and

providing that such stocks and securities should be left out of the new mortgages.

<sup>19</sup> *Industrial & General Trust v. Tod*, 170 N. Y. 233, 63 N. E. 285 (1905).

<sup>20</sup> *Industrial & General Trust v. Tod*, 170 N. Y. 233, 63 N. E. 285 (1902).

<sup>1</sup> *United Water Works Co. v. Omaha Water Co.*, 164 N. Y. 41, 58 N. E. 58.

in full payment for withdrawing specified suits and for help rendered or to be rendered in reorganizing a corporation, subject to ratification of the reorganization committee, is the personal agreement of the signer.<sup>2</sup> A creditor of a corporation may properly secure an accounting in equity from persons who acted as a creditors' committee to reorganize the corporation and transfer its business and assets to a new company, of amounts paid by him to such persons at their request for the purpose of the reorganization; and it is proper for the complaint to make them the sole defendants — though both individually and as a committee — without joining either of the corporations.<sup>3</sup> It seems that allegations of fraud and mismanagement on the part of a corporate reorganization committee, with averments of possession by it of the property of the corporation as a reorganization committee for over a year, warrant the committee's being called to account.<sup>4</sup> In the absence of fraud, acts of a reorganization committee performed under an agreement which bondholders have approved will not be nullified at the instance of a minority of them because the plan followed was unwise and of poor business judgment.<sup>5</sup> A fiduciary relation exists between depositors of claims of various kinds against a corporation and members of a committee vested with its control for purposes of reorganization with which such claims are deposited, and the members of the committee must act in the utmost good faith.<sup>6</sup> Members of a reorganization committee cannot be compelled to distribute stock they hold as such, before the expiration of the time set in the reorganization agreement during which they may hold it in their discretion, unless an abuse of such discretion is shown.<sup>7</sup> In order to avoid a contract by a committee, made pursuant to a corporate reorganization agreement and within the scope of such agreement, on the ground of fraud, the contractors seeking to avoid must show a fraud on the part of the committee or the contractors as distinguished from conduct by the committee which might amount as between

<sup>2</sup> Gerding v. Funk, 48 A. D. 603, 64 N. Y. Supp. 423 (1900); *aff'd* 169 N. Y. 572, 61 N. E. 1129.

<sup>3</sup> Biddle Purchasing Co. v. Snyder, 109 A. D. 679, 96 N. Y. Supp. 356 (1905).

<sup>4</sup> Mawhinney v. Bliss, 117 A. D. 255, 102 N. Y. Supp. 279 (1907); *aff'd* 189 N. Y. 501, 81 N. E. 1169.

<sup>5</sup> United Water Works Co. v.

Omaha Water Co., 21 Misc. 594, 48 N. Y. Supp. 817 (1897); *aff'd* 29 A. D. 630, 52 N. Y. Supp. 1151.

<sup>6</sup> Mawhinney v. Bliss, 117 A. D. 255, 102 N. Y. Supp. 279 (1907); *aff'd* 189 N. Y. 501, 81 N. E. 1169.

<sup>7</sup> Haines v. Kinderhook & Hudson Ry., 33 A. D. 154, 53 N. Y. Supp. 368 (1898).

them and the bondholders to a violation of their trust duties.<sup>8</sup> When under a railroad reorganization agreement on foreclosure the committee is to issue to the bondholders the stock of a new company formed to operate the road what is meant is the old road or the property bought on foreclosure by the committee, and whether the new road is capitalized at a large or small amount is immaterial so long as each bondholder receives his *pro rata* share of its stock; so that if the amount of stock provided by the charter of new road to be issued to bondholders of the old was the result of an honest construction by the committee of its powers under the reorganization agreement and under the laws of the state where the corporation was to be created, it would be unjust to hold the committee liable upon some narrow or technical construction of the agreement or the meaning of the law that it was obliged to act under.<sup>9</sup>

**§ 512. Id.: Of Old and New Corporation.**—The fact that any relief which the courts may grant to remedy a wrong springing from violation of a corporate reorganization agreement will prove of slight value is no reason for not doing what can be done.<sup>10</sup> A corporation issuing bonds, under the terms of a reorganization agreement, to be delivered to creditors to the amount of their claims, has such an interest in an action by a creditor against the reorganization committee to compel delivery of such bonds as to be entitled to be made a party in order to contest the validity of the full amount of the creditor's claim.<sup>11</sup> When a new company is formed to effect the reorganization of an insolvent old one and agrees to assume all the debts, obligations and liabilities of the latter in addition to its bonds, it will be held, in view of the evident object of the reorganization, that the new company assumes the old company's bond as stated in the reorganization agreement, *i. e.* by issuing new bonds and stock in their place; and not that it agrees to pay off the bondholders of the old company.<sup>12</sup> Proof that the stockholders of an old corporation organized another corporation in another state, turned over the assets of the old company to the new one, managed the new one in

<sup>8</sup> Brooks v. Dick, 135 N. Y. 652, 32 N. E. 230 (1892).

<sup>9</sup> White v. Wood, 129 N. Y. 527, 29 N. E. 835 (1892).

<sup>10</sup> Cox v. Stokes, 156 N. Y. 491, 51 N. E. 316 (1898). Specific performance of the rights of bondholders being impossible, an account-

ing by the prime reorganizer was ordered.

<sup>11</sup> Washington Savings Bank v. Fletcher, 55 A. D. 580, 67 N. Y. Supp. 365 (1900).

<sup>12</sup> Fernschild v. Yuengling Brewing Co., 154 N. Y. 667, 49 N. E. 151 (1898).

the name of and by the same persons who managed the old, carried on the same business in the same place, without any intent to hinder, delay or defraud the creditors of the old company, will not warrant an inference that the new company adopted a contract with the old company which did not call for the rendition of any services for the old company and by virtue of which no services were performed for the new company and no benefits received by it.<sup>13</sup> A corporation formed to succeed another which has been dissolved for the purpose is liable for an indebtedness of the old assumed for it by its president though the assumption was *ultra vires*, if it has received and retained the benefits of the contract of which such assumption was a part.<sup>14</sup> In seeking to hold a new corporation for a judgment debt against an old, it must be alleged that the new knew of the claim, that there was fraud in the joint reorganization of the new and the dissolution of the old, and that there are facts (which must be given) making the new responsible for the claim against the old; it is not sufficient simply to allege a transfer of all assets of the old to the new corporation after the cause of action on the claim accrued, a sufficiency of assets of the old to pay the claim, the dissolution of the old, the incorporation of the new and issue of its stock to holders of stock in the old, and knowledge by the old's officers of the claim.<sup>15</sup> A new corporation taking over property once held by a receiver of another corporation under a covenant to assume all liabilities incurred by the receiver and to take care of all sums which the receiver ought to pay, is liable for a judgment against such receiver for damages arising from his corporation's negligence recovered while he acted as receiver but finally affirmed on appeal after the transfer of all the original corporation's property to the new corporation.<sup>16</sup> It seems that the general rule is that the liability of a new corporation for the debts of an old one does not result from operation of law, but must follow from the contract relationship based upon the assumption of the debts of the old corporation by the new.<sup>17</sup>

<sup>13</sup> *Goldmark v. Magnolia Metal Co.*, 44 A. D. 35, 60 N. Y. Supp. 425 (1899); *aff'd* 170 N. Y. 579, 63 N. E. 1117.

<sup>14</sup> *Curtis v. Natalie Anthracite Coal Co.*, 89 A. D. 61, 85 N. Y. Supp. 413 (1903); *aff'd* 181 N. Y. 543, 73 N. E. 1126.

<sup>15</sup> *City of New York v. Eppinger*

& Russell Co., 170 A. D. 747, 156 N. Y. Supp. 662 (1915).

<sup>16</sup> *Schmid v. New York, Lake Erie & Western R. R. Co.*, 32 Hun, 335 (1884); *aff'd* 98 N. Y. 634.

<sup>17</sup> *Goldmark v. Magnolia Metal Co.*, 28 A. D. 264, 51 N. Y. Supp. 68 (1898).

## CHAPTER X.

### RECEIVERS.

#### XV. *Receivers.*

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**§ 513. Receivers: Definitions and Kinds.**—A receiver appointed before final judgment by the court in an action to dissolve or sequester the property of a corporation is a temporary receiver until final judgment is entered.<sup>1</sup> A permanent receiver in an action to dissolve a corporation or to sequester its property is one appointed by or pursuant to a final judgment in the action, or a temporary receiver who is continued by the final judgment.<sup>2</sup>

**§ 514. Id.: Appointment, in General.**—A reference cannot be made of course upon the consent of the parties in an action against a corporation to obtain the appointment of a receiver of its property, unless it is brought of the Attorney-General; and if the parties consent to a reference the court may in its discretion grant or refuse a reference, and if a reference is granted the court must designate the referee and if the referee refuses to serve or a new trial of the action is granted the court must upon the application of either party appoint another referee.<sup>3</sup> A receiver of a corporation can be appointed only as an incident to some other relief sought and not when such appointment is the whole purpose of the suit.<sup>4</sup> “The theory of the law providing for a temporary receiver is, that until the final judgment is entered in the action declaring the corporation to be insolvent and that its affairs are to

<sup>1</sup> Gen. Corp. L. § 104 (L. 1909, c. 28).

<sup>3</sup> C. C. P. § 1012.

<sup>2</sup> Gen. Corp. L. § 106 (L. 1909, c. 240).

<sup>4</sup> *People v. Hasbrouck*, 57 Misc. 130, 107 N. Y. Supp. 257 (1907).

be wound up and its assets distributed, the temporary receiver may have to be discharged, and that he should only interfere with the assets pending the litigation just so far as is necessary to preserve them, and that he should not be allowed to sell or dispose of them except from necessity, and then upon application to the court.”<sup>5</sup> An order appointing a temporary receiver of an insolvent corporation may be made before an order to show cause in proceedings for its voluntary dissolution why it should not be dissolved; and the receiver may likewise be authorized to issue temporary certificates.<sup>6</sup> No receiver may be appointed pending and as a proceeding in an action save “on the application of a party who establishes an apparent right to or interest in the property where it is in the possession of an adverse party and there is danger that it will be removed beyond the jurisdiction of the court, or lost, materially injured, or destroyed.”<sup>7</sup> It seems that the Supreme Court has no jurisdiction to appoint a receiver of a corporation simply upon a bill filed by a creditor-at-large.<sup>8</sup> “The court has no power to appoint a receiver of a corporation upon the filing of a bill by a creditor-at-large, nor until he has a judgment and an execution returned unsatisfied;” but the corporation may waive the fact that the plaintiff has not exhausted his remedy at law.<sup>9</sup> An order entered on a petition for voluntary dissolution of a corporation is not a nullity because in some respects irregular, imperfect and informal; but is effectual to appoint the receiver and may be perfected *nunc pro tunc*.<sup>10</sup> An order appointing a receiver of a corporation’s assets in proceedings for its voluntary dissolution which in its title shows the character of the proceeding and requires cause to be shown why the prayer of the petition should not be granted complies with the statute that such an order shall require all persons interested to show cause “why the corporation should not be dissolved.”<sup>11</sup> To

<sup>5</sup> *People v. Saint Nicholas Bank*, 76 Hun, 522, 28 N. Y. Supp. 114 (1894); C. C. P. §§ 1785–1789; now Gen. Corp. L. § 101 *et seq.*

<sup>6</sup> *Knickerbocker Trust Co. v. Tarrytown, White Plains & Mamaroneck Ry. Co.*, 133 A. D. 285, 117 N. Y. Supp. 871 (1909).

<sup>7</sup> *Hastings v. Tousey*, 121 A. D. 815, 106 N. Y. Supp. 639 (1907); quotation from C. C. P. § 713.

<sup>8</sup> *Lehigh Coal & Navigation Co. v. Central R. R. of N. J.*, 43 Hun, 546 (1887).

<sup>9</sup> *Moe v. McNally Co.*, 138 A. D. 480, 123 N. Y. Supp. 71 (1910).

<sup>10</sup> *Matter of Christian Jensen Co.*, 128 N. Y. 550, 28 N. E. 665 (1891). The defect claimed was that the order appointing the receiver did not require its publication and specify the newspapers, under C. C. P. § 2424.

<sup>11</sup> *Matter of Christian Jensen Co.*, 128 N. Y. 550, 28 N. E. 665 (1891); C. C. P. § 2423; now Gen. Corp. L. § 176 *et seq.*

sustain a denied allegation that one was duly appointed receiver of a corporation it is necessary to prove the commencement of an action and that the court obtained jurisdiction over the corporation as provided by statute.<sup>12</sup>

**§ 515. Id.: When Appointed, in General; and on Supp. Pro.**  
—A receiver of the property of a corporation can be appointed only by the court, and only (1) in an action brought against one or more trustees, directors, managers or other officers of a corporation to procure a judgment compelling them to account for their official conduct; or to pay over what they have acquired to themselves or transferred to others or lost or wasted through neglect of their duties; or to suspend from office for abuse of trust; or to remove from office and direct a new election; or to set aside or restrain an alienation of property by them; (2) in an action to procure a judgment sequestering the corporate property and distributing it; (3) in an action to procure a judgment dissolving a corporation and forfeiting its franchises for a year-long period in which it has been insolvent, or in which it has neglected to discharge its evidences of debt, or in which it has suspended its business; or (4) in an action by the Attorney-General to procure a judgment vacating or annulling the act of incorporation or the act renewing or continuing its existence for fraudulent concealment or suggestion of a material fact, or for offense against such an act, or for violation of a law, whereby it has forfeited its charter or become liable to dissolution by abuse of its powers, or has forfeited its franchises by failure to exercise its powers, or has done or omitted any act amounting to a surrender of its franchises, or has exercised a franchise not conferred upon it by law; (5) in an action brought for the foreclosure of a mortgage upon the property, of which the receiver is appointed, when the mortgage debt or the interest upon it has remained unpaid at least thirty days after it was payable and after payment thereof was duly demanded of the proper officer of the corporation, and when either the income of the property is specially mortgaged or the property itself is probably insufficient to pay the mortgaged debt; (6) in an action brought by the Attorney-General or by a stockholder to preserve the assets of a corporation

<sup>12</sup> *Spring v. The Bowery National Bank*, 63 Hun, 505, 18 N. Y. Supp. 574 (1892); L. 1883, c. 378, § 1, provided that the Supreme Court could appoint receivers of domestic corporations and that “any order

appointing a receiver, otherwise made, shall be void.”

As to the power to appoint receivers of corporations where there is no other relief asked, see note in 20 L.R.A. 210.

having no officer empowered to hold them, or (7) in a special proceeding for the voluntary dissolution of a corporation.<sup>13</sup> A stockholder cannot have a receiver appointed of all his corporation's property, paper and rights of action.<sup>14</sup> A receiver of the assets of a corporation will be appointed to preserve them at the instance of a stockholder if it is wholly insolvent, it has defaulted in one and will shortly in another lawsuit, its directors refuse to bring such proceedings that the rights of creditors and stockholders may be equally protected, there is danger that executions will wipe out all its assets, and there is no judgment creditor to make application for the preservation of the assets until they can be distributed.<sup>15</sup> In a representative action by a stockholder to compel the officers of the corporation to make restitution to it, a receiver *pendente lite* of all its property in the State with wide statutory powers will not be appointed because of mere misconduct by the officers and directors unless necessary to preserve the property or rights of creditors or stockholders, or if the allegations are loose and general of fraud and maladministration, made on information and belief and unsupported by anything that can reasonably be called legal proof, especially when the answering affidavits deny the allegations of the moving papers.<sup>16</sup> A receiver will not be appointed in an action by a stockholder as such to run his corporation solely on allegations that its secretary and treasurer has taken and hidden its books and papers and is notifying employees their services are no longer needed, etc.<sup>17</sup> A receiver will not be appointed to run the business of a corporation in lieu of its president owning half its stock, when it is not shown to be insolvent, no rights of creditors are involved and there is no suggestion that the individual directors and officers charged with misfeasance are not solvent.<sup>18</sup> "Something beyond the mere unsupported statements of the plaintiff

<sup>13</sup> Gen. Corp. L. § 306 (L. 1909, c. 28). This statute applies not only to a domestic corporation but to a foreign corporation which does business in New York or has within New York an agency, business, fiscal or for the transfer of its stock; see Gen. Corp. L. § 308.

<sup>14</sup> *Belmont v. Erie Ry. Co.*, 52 Barb. 637 (1869).

<sup>15</sup> *Porter v. Industrial Information Co.*, 5 Misc. 262, 25 N. Y. Supp. 328 (1893); C. C. P. § 1810; now B. C. N. Y.—40

Gen. Corp. L. § 306; subd. 3; §§ 1785, 1786; now Gen. Corp. L. § 101 *et seq.*

<sup>16</sup> *Fenn v. Ostrander, Incorporated*, 132 A. D. 311, 116 N. Y. Supp. 1083 (1909).

<sup>17</sup> *Fallon v. United States Directory Co.*, 86 A. D. 29, 83 N. Y. Supp. 359 (1903).

<sup>18</sup> *Hastings v. Tousey*, 121 A. D. 815, 106 N. Y. Supp. 639 (1907); C. C. P. § 713.

[stockholder, that corporate assets have been fraudulently diverted and should be restored to the corporation,] made on information and belief in the general allegations of a complaint should appear to warrant the appointment [of a receiver] where the allegations are explicitly denied.”<sup>19</sup> It is no reason for appointing a new receiver of one corporation for which a receiver already exists that it was organized simply to have transferred to it the property of a second corporation, against which an individual applying for the new receiver has a judgment, so as to prevent such property of the second corporation from being subject to seizure to pay its debts; until it has been proven that property of the second corporation applicable to the debt came into the hands of the receiver of the first and that if it has, it is impossible to separate it from other property.<sup>20</sup> A temporary receiver of a corporation will be appointed only in a clear case of necessity therefor to protect the interests of the applicant from imminent and serious injury.<sup>1</sup>

A receiver of the property of a domestic corporation cannot be appointed in proceedings supplementary to execution, because the policy of this State favors a *pro rata* distribution of the assets of an insolvent domestic corporation and not a receivership for the benefit of a specific creditor.<sup>2</sup>

If the charter of a domestic corporation is forfeited on proceedings taken by the State Commissioner of Health, on the ground that it conducts its business without New York State so as to make it a nuisance to a considerable number of people within New York State, the Attorney-General must forthwith apply to the Supreme Court for the appointment of a receiver of its property, who has all the powers and duties, so far as practicable, prescribed by articles ten-a and eleven of the General Corporation Law.<sup>3</sup>

**§ 516. Id.: On Vacation or Annulment.**—A final judgment in an action by the Attorney-General against a corporation brought under the statute to vacate or annul its act of incorporation or any act renewing the corporation or continuing its corporate existence must provide for the appointment of a receiver.<sup>4</sup>

<sup>19</sup> *Weber v. Wallerstein*, No. 2, 111 A. D. 700, 97 N. Y. Supp. 852 (1906).

<sup>20</sup> *Schulze v. Sizer*, 14 A. D. 274, 43 N. Y. Supp. 463 (1897).

<sup>1</sup> *Thalmann v. Hoffman House*, 27 Misc. 140, 58 N. Y. Supp. 227 (1899).

<sup>2</sup> *Matter of Boucker Co. v. Callahan Co.*, 218 N. Y. 321, 113 N. E. 257 (1916); C. C. P. §§ 2463, as amended L. 1908, c. 278.

<sup>3</sup> Gen. Corp. L. § 200 (L. 1917, c. 292).

<sup>4</sup> Gen. Corp. L. § 134 (L. 1909, c. 28).

**§ 517. Id.: On Sequestration and Dissolution.**—In an action for sequestration of a corporation's property or for its dissolution the court may at any stage appoint one or more receivers of its property.<sup>5</sup> "It has long been the settled law of this state that the jurisdiction of Chancery does not extend to the sequestration of the property of a corporation by means of a receiver (*citations*). It follows that the authority of the court in this proceeding must be found in the statute and not in its general equitable powers."<sup>6</sup> When a judgment creditor's execution against a corporation has been returned unsatisfied and he then, by later action for sequestration of its property has receivers appointed, if the court opens up the original judgment and allows the defendant to appear and serve an answer, it must also at its request, vacate the appointment of the temporary receivers, because sequestration can only be had on final judgment, and such no longer existed after the court allowed the defendant to appear and answer.<sup>7</sup> In an action for sequestration of a corporation's property and appointment of a receiver the corporation will not be permitted to delay matters by interposing an answer alleging it has no knowledge or information sufficient to form a belief as to the entry of a judgment and the issue thereon of execution returned unsatisfied alleged in the complaint or alleging the commencement of dissolution proceedings not concluded; as such an answer will be stricken out on motion as frivolous.<sup>8</sup> In an action for sequestration and distribution of the property of a domestic corporation and the appointment of a receiver, not brought by the Attorney-General, an order of reference and the report of the referee must be set aside on motion of the corporation's attorney, even though not made till after notice of motion for judgment on the report has been served.<sup>9</sup> An order appointing a temporary receiver in an action for sequestration of the property of a domestic corporation should not be made on a complaint alone, unsupported by any affidavit or other evidence.<sup>10</sup> A receiver of a domestic corporation will not be appointed in an action to sequester its

<sup>5</sup> Gen. Corp. L. § 104 (L. 1909, c. 28). "A receiver, so appointed, before final judgment is a temporary receiver, until final judgment is entered."

<sup>6</sup> Matter of Binghampton Electric Co., 143 N. Y. 261, 38 N. E. 297 (1894).

<sup>7</sup> Rodbourn v. Utica, Ithaca & Elmira Ry. Co., 28 Hun, 369 (1882);

C. C. P. § 1784; now Gen. Corp. L. § 100.

<sup>8</sup> Morgan & Co. v. Quo Vadis Amusement Co., 45 Misc. 130, 91 N. Y. Supp. 882 (1904).

<sup>9</sup> Fallon v. Egberts Woolen Mill Co., 24 Misc. 304, 53 N. Y. Supp. 672 (1898); aff'd 46 A. D. 630, 61 N. Y. Supp. 1136; C. C. P. § 1012.

<sup>10</sup> Federman v. Standard Churn

property solely on a complaint verified unqualifiedly that execution on a money judgment against it has been returned unsatisfied and on a motion made before the time to answer has expired; the facts necessitating a receiver to effectuate the judgment must be shown.<sup>11</sup> No warrant exists for appointing a temporary receiver of a corporation and enjoining its creditors from suing, upon a proceeding by its directors for its voluntary dissolution, if the schedule of its assets and liabilities annexed to the petition shows a surplus of the former over the latter; and affidavits of its assets and liabilities made over four months after the receiver's appointment cannot be received to support such appointment and injunction.<sup>12</sup> A temporary receiver of a corporation cannot be appointed in proceedings for its voluntary dissolution, as a receiver can, under the statute, only be appointed upon granting the final order dissolving the corporation.<sup>13</sup> An appointment of a receiver in proceedings for voluntary dissolution of a corporation must be made at the very time provided by the statute, viz., on the coming in of the report of the referee appointed to hear any cause why the dissolution should not take place; and until due appointment at such time the corporate creditors may pursue their legal remedies, *e. g.*, by attachment, against the corporation.<sup>14</sup>

**§ 518. Id.: On Foreclosure.**—A receiver of mortgaged property of a corporation may be appointed on sufficient facts alleged in a verified complaint, even on information and belief as to some of its averments particularly in defendant's knowledge, when not denied by answer or affidavit.<sup>15</sup>

**§ 519 Id.: Where and by What Court Appointed and Controlled.**—An action or proceeding brought by the Attorney-General on behalf of the People of the State against any corporation for the purpose of procuring the appointment

Mfg. Co., 128 A. D. 493, 112 N. Y. Supp. 834 (1908).

<sup>11</sup> Kieley v. Barron & Cooke H. & P. Co., 87 A. D. 317, 84 N. Y. Supp. 306 (1903); C. C. P. § 1784; now Gen. Corp. L. § 100.

<sup>12</sup> Matter of Hitchcock Mfg. Co., 1 A. D. 164, 37 N. Y. Supp. 834 (1896); C. C. P. §§ 2421, 2427; now Gen. Corp. L. §§ 174, 188.

<sup>13</sup> Matter of E. M. Boynton Saw & File Co., 34 Hun, 369 (1884); C. C. P. § 2429; now Gen. Corp. L. §§ 191, 192, 194.

<sup>14</sup> Chamberlaine v. Rochester

Seamless Paper Vessel Co., 7 Hun, 557 (1876), c. 8, part 3, — R. S. —. The title of the receiver to the corporate property does not attach from the date of the order directing the appointment of a receiver, and a creditor's attachment after that order but before an order appointing a receiver is therefore good.

<sup>15</sup> Holland Co. v. Consolidated Gas & Electric Co., 85 Hun, 454, 32 N. Y. Supp. 830 (1895); C. C. P. § 713.

of a receiver may be brought in any county of the State to be designated by the Attorney-General.<sup>16</sup> Applications made by the Attorney-General for the appointment of a receiver of a corporation must be made in the judicial district in which the action in which the appointment is sought is triable.<sup>17</sup> A receiver appointed of a corporation in an action to foreclose a mortgage need not be appointed in the judicial district in which its principal business office is located, as would be necessary were the receiver one to wind up the corporation and distribute its assets.<sup>18</sup> A State court has power to appoint receivers of a corporation in an action by the Attorney-General for its dissolution although the Federal court has already appointed receivers of all the property and franchises of the same corporation in a bill filed by general creditors.<sup>19</sup> The State courts of New York will not appoint a receiver of the property of a corporation for which a receiver has already been appointed by the Federal courts, at the instance of holders of certificates of the Federal receiver issued by order of the Federal courts; but will leave the certificate holders to be cared for on the accounting in the Federal courts by the receiver appointed therein.<sup>20</sup> A court which has appointed a receiver of the property of an insolvent corporation "may, in aid of that appointment, forbid any after interference by way of levy or seizure with the property in his possession," *e. g.*, by one who was an attachment creditor before the appointment of the receiver; and such an order by the court is not an injunction in the sense that the statutory rules governing the grant of injunctions are applicable to it.<sup>1</sup> The Supreme Court will entertain an equitable suit to vacate an order of a court obtained by a corporate receiver for a fraudulent purpose, *e. g.* a sale of a judgment, and the sale made pursuant thereto, even though a motion could have been made for the same purpose before the court in the action in which the receiver was appointed.<sup>2</sup> The Supreme Court of this State having jurisdiction *in personam* over a receiver

<sup>16</sup> Gen. Corp. L. § 315 (L. 1909, c. 28).

<sup>17</sup> Gen. Corp. L. § 108 (L. 1909, c. 28).

<sup>18</sup> United States Trust Co. v. New York, West Shore & Buffalo Ry. Co., 35 Hun, 341 (1885); L. 1883, c. 378.

<sup>19</sup> People v. New York City Railway Co., 57 Misc. 114, 107 N. Y. Supp. 247 (1907).

<sup>20</sup> Passage v. Dansville & Mt. Morris R. R. Co., 41 A. D. 182, 58 N. Y. Supp. 770 (1899).

<sup>1</sup> Woerishoffer v. North River Construction Co., 99 N. Y. 398, 2 N. E. 47 (1885); C. C. P. § 603 *et seq.*

<sup>2</sup> Hackley v. Draper, 60 N. Y. 88 (1875).

appointed in an action to dissolve a corporation may enjoin him from further prosecuting an action he has begun in another state over matters which can be as well disposed of in an action pending before it as in the action in the foreign state.<sup>3</sup> By the proper presentation of a petition to a state court praying for the dissolution of a corporation and the appointment of a receiver upon due notice of the application to the Attorney-General, the court acquired jurisdiction of the subject-matter of the proceeding and took the property of the corporation into the custody of the law, although the receiver had not actually and physically seized and taken it into his manual possession: the state court acquires the exclusive jurisdiction and right to take such possession and make a final decree.<sup>4</sup>

**§ 520. Id.: Notice of Application and Appointment.**—When a receiver of the property of a corporation is appointed in an action otherwise than by or pursuant to a final judgment notice of the application for his appointment must be given to the proper officer of the corporation.<sup>5</sup> Permanent receivers appointed by or pursuant to a final judgment in an action or by or pursuant to a final order in a case in which the corporation is insolvent or in which a dissolution of the corporation will be beneficial to the interests of the stockholders and not injurious to the public interests must immediately upon their appointment give notice thereof, which must be published for three weeks in a newspaper printed in the county in which the principal place of conducting the business of such corporation was situated.<sup>6</sup> In such notice of their appointment the receivers must require: (1) All persons indebted to the corporation to render an account of and to pay to such receivers, by a day and at a place specified in the notice, all debts and

<sup>3</sup> *Guaranty Trust Co. v. Edison United Phonograph Co.*, 128 A. D. 591, 112 N. Y. Supp. 929 (1908).

<sup>4</sup> *Matter of Schuyler's Steam Tow Boat Co.*, 136 N. Y. 169, 20 L.R.A. 391, 32 N. E. 623 (1892). A creditor had libelled the corporation's boats in the U. S. court after he knew a receiver had been applied for in the State court but before the appointment had been made. His remedy was held to be against the receiver solely.

On inherent jurisdiction in equity, independently of statute at the in-

stance of stockholders, to appoint a receiver because of mismanagement or fraud of its officers, see note in 39 L.R.A.(N.S.) 1032, L.R.A.1915A 606.

<sup>5</sup> Gen. Corp. L. § 306 (L. 1909, c. 28). This statute applies not only to a domestic corporation but to a foreign corporation which does business within New York or has within New York an agency, business, fiscal or for the transfer of its stock.

<sup>6</sup> Gen. Corp. L. § 250 (L. 1909, c. 28).

sums of money owing by them respectively; (2) all persons having in their possession any property or effects of the corporation to deliver the same to such receivers by the day so appointed; (3) all the creditors of the corporation to deliver their respective accounts and demands to the receivers or one of them by a day to be specified in the notice which must be not less than forty days from the publication of such notice; and (4) all persons holding any open or subsisting contract of the corporation to present the same in writing and in detail to such receivers at the time and place specified in such notice.<sup>7</sup> Notice must be given the Attorney-General of an application for the appointment of a receiver of a corporation in a judgment creditor's proceeding to sequester its property but not in a proceeding for the appointment of a receiver on foreclosure of a mortgage given by the corporation.<sup>8</sup> An application by a judgment creditor of a corporation having no lien on its property to vacate the appointment of a receiver of such property on the ground that no notice of the application for the receiver's appointment was given him, his attorney or the Attorney-General will be denied if such notice and a copy of the judgment were subsequent to the appointment served on the Attorney-General and an order was thereupon made by the court providing *nunc pro tunc* for his appointment on the notice so served.<sup>9</sup> The receivers must, immediately upon their appointment, give notice thereof which must be published for three weeks in a newspaper printed in the county where the principal place of conducting the business of such corporation has been situated; and therein must require: (1) All persons indebted to such corporation (a) to render an account of all debts and sums owing by them respectively to such receivers, (b) to do this by a day and at a place specified in the notice, and (c) to pay the same; (2) all persons having in their possession any property or effects of such corporation to deliver the same to the receivers by the day so appointed; (3) all creditors of such corporation to deliver their respective accounts and demands to the receivers or one of them by a day to be specified in such notice which must not be less than forty days from its first publication; (4) all persons holding any open or subsisting contract of such corporation to present the same in

<sup>7</sup> Gen. Corp. L. § 250 (L. 1909, c. 28).

<sup>8</sup> *Whitney v. New York & Atlantic R. R. Co.*, 32 Hun, 164 (1884); L. 1883, c. 378, § 8.

<sup>9</sup> *Morrison v. Menhaden Co.*, 37 Hun, 522 (1885); L. 1883, c. 378.

writing and in detail to such receivers at the time and place in such notice specified.<sup>10</sup>

§ 521. **Id.: Effect of Appointment.**—The appointment of a common-law receiver, not of a corporation but of its property, does not take title to the property from the corporation or the right to recover any indebtedness due it; so that the right to maintain proceedings supplementary to execution and to examine a third party still remains in the judgment creditor of the corporation.<sup>11</sup> “It is obvious that every lien upon the property of a corporation resting upon valid agreement or process before the appointment of a receiver, the lienor being lawfully in possession, must be preserved with the right of enforcement, unless courts and legislatures are to override the vested rights of creditors.”<sup>12</sup> An agreement under which one owning the majority stock in a corporation sold so much thereof to the minority stockholders as to make them majority stockholders, upon condition that he be paid a stated salary for a certain number of years, as vice-president or consulting engineer of the corporation, binds the individuals signing it to an employment of such one for the stated time and salary, and is not terminated on the appointment of a receiver for the corporation in an action by them against it alleging its insolvency.<sup>13</sup> The appointment of a receiver for a corporation and an injunction against it from exercising its franchises do not relieve its stockholders from their liability to suit for its judgment debts on which execution has been returned unsatisfied.<sup>14</sup> A Federal Court which has appointed receivers of the property of a State corporation on motion of a general creditor should direct them to turn over such property to the receivers of the same corporation later appointed by the State Court in dissolution proceedings instigated by the Attorney-General.<sup>15</sup> One injured through alleged fraudulent diversion of assets of a corporation by others while acting as its officers is not precluded from himself suing them by the appointment of a receiver, unless he be a permanent receiver.<sup>16</sup> A judgment creditor of a corporation

<sup>10</sup> Gen. Corp. L. § 250 (L. 1909, c. 28).

<sup>11</sup> *Matter of Howell v. German Theatre*, 64 Misc. 110, 117 N. Y. Supp. 1124 (1909); C. C. P. § 2441.

<sup>12</sup> *Matter of Binghamton Electric Co.*, 143 N. Y. 261, 38 N. E. 297 (1894).

<sup>13</sup> *Kinsman v. Fisk*, 37 A. D. 443, 56 N. Y. Supp. 33 (1899).

<sup>14</sup> *Kincaid v. Dwinelle*, 59 N. Y. 548 (1875); Gen. Mfg. Act, L. 1848, c. 40, §§ 18, 24.

<sup>15</sup> *People v. New York City Railway Co.*, 57 Misc. 114, 107 N. Y. Supp. 247 (1907).

<sup>16</sup> *Dibblee v. Metcalf*, 13 Misc. 136, 34 N. Y. Supp. 122 (1895).

upon whose judgment the sheriff has levied under execution and taken the corporation's property into his possession is entitled to have his lien on such property satisfied though a receiver for the corporation in proceedings for its voluntary dissolution was appointed thereafter; but in order to protect other creditors the receiver instead of the sheriff may be directed to sell the corporate property in the latter's hands as well as its other property, with a proviso that the receiver apply the proceeds upon the executions in order of priority.<sup>17</sup> An agreement by a corporation to pay rent for the full term of a lease of premises occupied by it does not cease to be a subsisting obligation by reason of its insolvency and the appointment of a receiver for it, and the lessor may either not re-enter and allow the premises to remain vacant and recover all the rent for the unexpired term as it accrues, or avail himself of the right given him under the lease to rent the premises to someone else and hold the receiver for the difference between the rentals.<sup>18</sup> A proceeding for the appointment of a receiver of a corporation under a statute permitting such appointment on the petition of one who has obtained a judgment against it on which an execution has not been satisfied "is a proceeding against the corporation, and if the appointment of a receiver under it is binding upon the corporation, no one else can question it;" *e. g.*, because of a misnomer of the corporation.<sup>19</sup> A corporation is not divested of title to its property by the appointment of a temporary receiver *pendente lite*.<sup>20</sup> "The appointment of a temporary receiver *pendente lite* does not dissolve a corporation, nor restrain the exercise of its corporate powers . . . his powers were limited to the [federal] district in which the decree was made, unless some additional power was subsequently conferred. The corporation still had the right to exercise its corporate powers, except as to the matters and claims specially confided to the receiver by that court. The title to the property was not changed by his appointment. The receiver acquired no title, but only the right of possession as the officer of the court. The title remained in the corporation in which it was vested when the appointment was

<sup>17</sup> Matter of Muehlfeld & Haynes Piano Co., 12 A. D. 492, 42 N. Y. Supp. 802 (1896); C. C. P. § 1405.

<sup>18</sup> People v. St. Nicholas Bank, 3 A. D. 544, 38 N. Y. Supp. 379 (1896); *aff'd* 151 N. Y. 592, 45 N. E. 1129.

<sup>19</sup> Whittlesey v. Frantz, 74 N. Y. 456 (1878); 2 R. S. 463, § 36.

<sup>20</sup> Mutual Brewing Co. v. New York & College Point Ferry Co., 16 A. D. 149, 45 N. Y. Supp. 101 (1897).

made.”<sup>1</sup> A corporation is not disabled from moving to vacate an attachment against it because of the appointment by court order of a temporary receiver of its property in proceedings for its voluntary dissolution.<sup>2</sup> The pendency of an action by the People to dissolve a corporation, in which a temporary receiver has been appointed, does not prohibit the commencement of an action to foreclose a mortgage given by the corporation.<sup>3</sup>

A receiver appointed in a proceeding for the voluntary dissolution of a corporation takes title to its property on the mere making of the order appointing him, even though he does not take possession; so that an attachment thereof by creditors cannot be made against such property after such order without leave of court in spite of the fact that the dissolving company had no true title thereto as against such creditors.<sup>4</sup> A final judgment dissolving a corporation at the instance of the Attorney-General, adjudging it insolvent and its capital stock impaired, relates back to the date when the temporary receiver was appointed and took possession of its assets.<sup>5</sup> The title of receivers of a corporation does not relate back to the time at which the order appointing them was signed by a judge as a court order, as distinguished from the time it was entered, so as to defeat intervening rights of a creditor of the corporation actually acquired before the perfection of the order by entry.<sup>6</sup>

<sup>1</sup> *Sigua Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194 (1902). The right to recover calls unpaid on stock was held to remain in the corporation.

<sup>2</sup> *Waverly Co. v. Worthington Co.*, 41 Misc. 447, 24 N. Y. Supp. 331 (1893).

<sup>3</sup> *Herring v. N. Y. Lake Erie & Western R. R. Co.*, 105 N. Y. 340, 12 N. E. 763 (1887).

<sup>4</sup> *Dickey v. Bates*, 13 Misc. 489, 35 N. Y. Supp. 525 (1895).

<sup>5</sup> *People v. Merchants' Trust Co.*, 187 N. Y. 293, 79 N. E. 1004 (1907).

<sup>6</sup> *Wileox v. National Shoe & Leather Bank*, 67 A. D. 466, 73 N. Y. Supp. 900 (1902). One night the order was signed by a judge at his home, “Enter, Wm. N. Cohen, J. S. C.” At ten the next morning the defendant bank applied a balance on deposit with it to the corporation’s credit to the latter’s

note coming due to the bank that day. At twenty-five minutes past ten the order was filed with the clerk of the court. The order, being a court order, was held not effective to prevent such application by the bank of the balance to the note until entered, which occurred only when filed.

On effect of appointment of receiver for corporation on right to deal with corporation directly, see note in 34 L.R.A.(N.S.) 1200.

Effect of appointment of receiver for insured on fire insurance, is discussed in a note in 19 L.R.A.(N.S.) 643.

Effect of appointment of receiver on right of set-off, see note in 17 L.R.A. 458.

Effect of appointment of receiver for corporation as affecting its right to sue, see note in 50 L.R.A.(N.S.) 384.

**§ 522. Id.: Qualification.**—All receivers appointed in sequestration or dissolution proceedings must take and subscribe an oath before proceeding to the discharge of any of their duties, which must be that they will well and truly execute the trust by their appointment reposed in them, according to the best of their skill and understanding, and which must be filed with the officer or court that appointed them.<sup>7</sup> Before entering upon the duties of their appointment such receivers must give such security to the People of the State, and in such penalty, as the court directs, conditioned for the faithful discharge of the duties of their appointment and for the due accounting for all moneys received by them.<sup>8</sup> A receiver appointed in an action or special proceeding must before entering upon his duties execute and file with the proper clerk a bond to the People with at least two sufficient sureties in a penalty fixed by the court, judge or referee making the appointment, conditioned for the faithful discharge of his duties as receiver; and the execution of any such bond by any fidelity or surety company authorized by the laws of New York State to transact business is equivalent to the execution of such bond by two sureties; but if special provision is made by law for the security to be given by a receiver in any particular case or for increasing such security, such special provision prevails over the general requirement just stated.<sup>9</sup> The court, or the judge making the order if it was made out of court, by or pursuant to which the receiver was appointed, or his successor in office, may at any time remove the receiver or direct him to give a new bond with new sureties with the condition that he will faithfully discharge his duties as receiver; but if special provision is made by law for the security to be given by a receiver or for increasing it or for removing him, in any particular case, such special provision prevails over the general rule just stated.<sup>10</sup> A temporary receiver appointed of the property of a corporation on dissolution or on sequestration of its property must qualify as prescribed by law for the qualification of a permanent receiver.<sup>11</sup> A permanent receiver appointed by or pursuant

On effect of appointment of receiver or assignee for creditors of a corporation on compensation of officers, agents, or employees for unexpired term of employment, see note in 51 L.R.A. 146.

<sup>7</sup> Gen. Corp. L. § 238 (L. 1909, c. 28).

<sup>8</sup> Gen. Corp. L. § 234 (L. 1909, c. 28).

<sup>9</sup> Gen. Corp. L. § 235 (L. 1909, c. 240).

<sup>10</sup> Gen. Corp. L. § 236 (L. 1909, c. 240).

<sup>11</sup> Gen. Corp. L. § 104 (L. 1909, c. 28).

to a final judgment in an action or by or pursuant to a final order in a case in which the corporation is insolvent or in which a dissolution of the corporation will be beneficial to the interests of the stockholders and not injurious to the public interests is vested with all the property, real or personal, vested or contingent, of the corporation, from the time of having filed the security required by law.<sup>12</sup> While a receiver appointed of a corporation's property in proceedings for its voluntary dissolution cannot interfere with such property until he files his bond, yet after he files his bond his title relates back to the date of his appointment.<sup>13</sup> "When a receiver has duly qualified his appointment takes effect to relate back to the date at which the appointment was made, and not to the date at which the petition was filed."<sup>14</sup> The general rule, that, unless the court or a party in interest having power waives the bond required of a receiver, by court order, before he intermeddles with the property, the receiver must give security before he undertakes to execute the trust is avoided by evidence justifying an inference that the bond had been given; such evidence, for instance, as that a State court permitted a receiver required by the appointing, Federal Court to give bond, to sue, and that the receiver resigned after some time had lapsed since his appointment.<sup>15</sup> One appointed temporary receiver of a corporation who as such has duly executed his bond may sue to recover the assets of the corporation even though he fails when by judgment of the court he is continued as permanent receiver to give a new bond.<sup>16</sup> An action cannot be brought legally on the bond of a receiver, against his surety, if no notice was given the latter of the settlement of the former's accounts: certainly if no showing is made of conversion by the receiver to his own use of any part of the estate.<sup>17</sup> The sureties on the bond of a receiver appointed for a corporation in proceedings for its voluntary dissolution by a court which would have had power to appoint him but which exercised its right at a time not sanctioned by law cannot absolve themselves from their

<sup>12</sup> Gen. Corp. L. § 232 (L. 1909, c. 28).

<sup>13</sup> *Matter of Christian Jensen Co.*, 128 N. Y. 550, 28 N. E. 665 (1891).

<sup>14</sup> *Matter of Muehlfeld & Haynes Piano Co.*, 12 A. D. 492, 42 N. Y. Supp. 802 (1896).

<sup>15</sup> *Hegewisch v. Silver*, 140 N. Y. 414, 35 N. E. 658 (1893).

<sup>16</sup> *Jones v. Blun*, 145 N. Y. 333, 39 N. E. 954 (1895); C. C. P. §§ 1788, 2429; 2 R. S. 468, § 66.

<sup>17</sup> *Stratton v. City Trust, Safe Deposit & Surety Co.*, 86 A. D. 551, 83 N. Y. Supp. 780 (1903); C. C. P. § 715.

liability by insisting that he was not receiver if he acted as such, though the proceedings for the corporation's voluntary dissolution were later quashed.<sup>18</sup> A receiver of a corporation appointed on the application of the Attorney-General in proceedings to dissolve it should not be ordered to file security for costs in an action brought by the corporation before his appointment which he continues, in the absence of proof not only that it was insolvent when it began the action but that it was brought *mala fide*.<sup>19</sup>

**§ 523. Id.: Powers, Duties and Liabilities; Under Statute, In General.**—The powers of receivers must be sought in the statutes, and will be found in the following sections.

**§ 524. Id.: When Appointed on Application of Attorney-General.**—In all cases in which receivers are appointed for any domestic corporation on application by the Attorney-General, all property, real and personal, and all securities of any kind and nature belonging to such corporation, no matter where located or by whom held, must be transferred to, vested in and held by such receivers, if and when directed by order of the Supreme Court on due notice of application for the order given to the Attorney-General and the custodian of the funds, securities or property.<sup>20</sup>

**§ 525. Id.: On Sequestration and Dissolution.**—Permanent receivers appointed in actions to sequester the property of a corporation and distribute its property among creditors or in proceedings to dissolve it are trustees of the property for the benefit of the creditors and stockholders of the corporation.<sup>1</sup> A permanent receiver appointed in an action to dissolve a corporation or to sequester its property has all the powers and authority conferred, and is subject to all the duties and liabilities imposed, upon a receiver by the statute prescribing the duties, powers and liabilities of receivers of corporations.<sup>2</sup> Such receivers are vested with all the property, real or personal, vested or contingent, of the corporation from the time of their having filed the security required

<sup>18</sup> Thompson v. Denner, 16 A. D. 160, 44 N. Y. Supp. 723 (1897).

<sup>19</sup> Hale v. Mason, 86 Hun, 499, 33 N. Y. Supp. 789 (1895). A delay of 16 months after the receiver's appointment in the making of a motion to require him to give security is also ground for its denial.

On right of receiver to question

validity of attachment see note in 35 L.R.A. 765.

<sup>20</sup> Gen. Corp. L. § 233 (L. 1909, c. 28).

<sup>1</sup> Gen. Corp. L. § 230 (L. 1909, c. 28).

<sup>2</sup> Gen. Corp. L. § 106 (L. 1909, c. 240). The statute referred to is Gen. Corp. L. §§ 230-278.

by law.<sup>3</sup> A permanent receiver appointed for an electric lighting company in an action for sequestration of its property is liable for a claim by one personally injured in his employ as receiver and must pay it as in the same class as operating expenses before mortgage debts or other debts existing when the action in which he was appointed was brought.<sup>4</sup> A receiver appointed in proceedings for the dissolution of an insolvent corporation and the distribution of its assets among its creditors "although he may be appointed in a suit brought by a single creditor or stockholder, takes the whole estate of the insolvent corporation for the benefit of all its creditors, and, before distribution is made, opportunity is to be given to creditors, not parties to the action in the first instance, to come in and make themselves parties to it, by the exhibition of their claims, and it is only when they make themselves parties that they can have the benefit of the decree. . . . It is essential to the complete and proper administration of the system established by the statute, that all questions respecting the claims of creditors upon the fund in the hands of the receiver; and its distribution, and the accounting by the receiver should be determined upon an application to the court in the action in which the receiver is appointed. Each creditor has the right to be heard in respect to his own demand, and to contest the demands of others."<sup>5</sup> A receiver appointed of a corporation in proceedings to dissolve it is not required to pay a creditor the sum received by the corporation on disposing of goods delivered to it by such creditor under an agreement that it was to pay out of the proceeds of such goods but with the option to it to buy such goods itself, if it was liable under such agreement to pay for such goods whether it sold such goods or bought them itself and if it mixed the proceeds in with all its other moneys.<sup>6</sup> A receiver of a corporation appointed in proceedings for its dissolution may not enforce any action against its directors which is vested by law in its creditors or stockholders as such, but only a cause of action that had vested in the corporation.<sup>7</sup>

A temporary receiver of the property of a corporation appointed in an action to dissolve it or to sequester its

<sup>3</sup> Gen. Corp. L. § 232 (L. 1913, c. 766).

<sup>4</sup> Robinson v. New York & Staten Island Electric Co., 99 A. D. 509, 91 N. Y. Supp. 153 (1904).

<sup>5</sup> Rinn v. Astor Fire Ins. Co., 59 N. Y. 143 (1874); 2 R. S. 462 *et seq.*

<sup>6</sup> Baker v. Turner, 19 A. D. 223, 46 N. Y. Supp. 25 (1897).

<sup>7</sup> Higgins v. Tefft, 4 A. D. 62, 38 N. Y. Supp. 716 (1896).

property has power, without order of the court, (a) to collect and receive the debts, demands and other property of the corporation, (b) to preserve the property and the proceeds of the debts and demands collected, (c) to sell or otherwise dispose of the property as directed by the court, (d) to collect, receive and preserve the proceeds thereof, (e) to maintain any action or special proceeding for any of such purposes, and (f) such as is incidental to the exercise of the powers just enumerated; and, if granted by the order or interlocutory judgment appointing him or by an order subsequently made in the action, or by the final judgment, such powers, authority, duties and liabilities of a permanent receiver as the court thinks proper, except that he cannot make any distribution among the creditors or stockholders before final judgment unless he is specially directed so to do by the court.<sup>8</sup> "It is the evident policy of the statute to vest in the temporary receiver many of the important powers that are exercised by a permanent receiver, and this for the very obvious reason that before final judgment, in an action to procure the dissolution of a corporation, it is of vital importance that the title of the corporate property should be vested in an officer of the court who has full authority to reduce it to possession wherever found and to maintain any action or special proceeding necessary in the premises."<sup>9</sup>

§ 526. *Id.*: **In General.**—A permanent receiver appointed by or pursuant to a final judgment in an action or by or pursuant to a final order in a case in which the corporation is insolvent or in which a dissolution of the corporation will be beneficial to the interests of the stockholders and not injurious to the public interests is a trustee of the property for the benefit of the creditors of the corporation and of its stockholders.<sup>10</sup> A permanent receiver appointed by or pursuant to a final judgment in an action or by or pursuant to a final order in a case in which the corporation is insolvent or in which a dissolution of the corporation will be beneficial to the interests of the stockholders and not injurious to the public interests must as speedily as possible convert the property, real and personal, of the corporation, into money.<sup>11</sup> "What are the duties and powers of a receiver appointed in an equity action *pendente*

<sup>8</sup> Gen. Corp. L. §§ 104, 105 (L. 1909, c. 28).

<sup>9</sup> *Nealis v. American Tube & Iron Co.*, 150 N. Y. 42, 44 N. E. 944 (1896); C. C. P. § 1788, now Gen. Corp. L. § 104.

<sup>10</sup> Gen. Corp. L. § 231 (L. 1909, c. 28).

<sup>11</sup> Gen. Corp. L. § 245 (L. 1909, c. 28).

*lite*, are not defined by the statute or code, and are usually defined in the appointing order. As an officer of the court he is subject to its directions. Section 1788 of the Code of Civil Procedure [now section 104 of the General Corporation Law], defining the powers and duties of a temporary receiver appointed in a sequestration action does not necessarily apply to receivers appointed in other actions."<sup>12</sup> A receiver of a corporation cannot repudiate a legal transaction of the company.<sup>13</sup> ". . . a receiver is a trustee for the benefit of the creditors of the corporation as well as its stockholders, and . . . he is to redeem mortgages and pledges and satisfy any judgment which may be an incumbrance upon the property so sold by him, or to sell such property subject to mortgages, contracts, pledges or judgments."<sup>14</sup> "The general rule is well established that a receiver takes the title of the corporation or individual whose receiver he is, and that any defense which would have been good against the former, may be asserted against the latter. But there is a recognized exception, which permits a receiver of an insolvent individual or corporation, in the interest of creditors, to disaffirm dealings of the debtor in fraud of their rights."<sup>15</sup> ". . . the situation of a receiver of an insolvent corporation is quite different from that of an assignee for the benefit of creditors, limited in his authority and power by the terms of the deed of assignment. The receiver is subject to the direction of the court that appointed him and to the provisions of the statutes regulating the distribution of the assets of an insolvent corporation . . . greater latitude of judgment and action is contemplated by the provisions of the statutes on the part of a receiver and in the supervisory powers of the court."<sup>16</sup> A receiver appointed of a railroad corporation *pendente lite* may be held for the value of coal supplied him as such upon allegations in the complaint that he operated the road, bought the coal for that purpose, and the road could not be operated without such coal, without the necessity of an allegation that the court directed such operation, because his duty without

<sup>12</sup> Cobb v. Sweet, 46 A. D. 375, 61 N. Y. Supp. 545 (1899).

<sup>13</sup> Hyde v. Lynde, 4 N. Y. 387 (1850). "If the settlement, though a lawful act in itself, had been made for an illegal purpose . . . the persons defrauded would undoubtedly have a remedy."

<sup>14</sup> Matter of Coleman, 174 N. Y. 373, 66 N. E. 983 (1903).

<sup>15</sup> Pittsburg Carbon Co. v. McMillin, 119 N. Y. 46, 7 L.R.A. 46, 23 N. E. 530 (1890).

<sup>16</sup> People v. St. Nicholas Bank, 151 N. Y. 592, 45 N. E. 1129 (1897).

a court order would be to operate the road.<sup>17</sup> In order that one holding a prior judgment may secure the sale of property of the debtor held by the sheriff under a subsequent judgment by a corporate receiver, notice must be given the Attorney-General in the action in which the receiver was appointed and the petition must be made in the district in which the action is pending.<sup>18</sup>

A receiver of a corporation appointed on foreclosure of a mortgage of all its property has placed in his possession all the corporate property and is authorized to operate the business of the company, protect his title, defend all suits against the mortgager-corporation, etc.; but he does not represent the corporation or supersede it in the exercise of his powers otherwise, as the corporation still exists and acts for itself except as to the mortgaged property; so that the receiver is not a proper party to an action against the corporation to recover for a trespass committed by it before the receiver's appointment.<sup>19</sup> A court of equity has jurisdiction, when it has possession through its receiver in a foreclosure action of the property of a railroad company, to authorize the creation of debts for rolling stock and other purposes, if in its opinion it is necessary so to do to secure the continued and successful operation of the road; and to charge the debts so created as a first lien on the mortgaged property.<sup>20</sup>

**§ 527. Id.: Subject to Court Control.**—The receivers appointed in proceedings for sequestration, dissolution, annulment, foreclosure and preservation of assets are subject to the control of the court and may be compelled to account at any time.<sup>1</sup> A temporary receiver appointed in an action to dissolve a corporation or sequester its property is subject to the control of the court.<sup>2</sup> When an action to dissolve a corporation by the People and another action to foreclose a mortgage given by it are pending at the same time, the court may supersede the receiver in the first action and transfer his duties to the receiver in the second.<sup>3</sup>

<sup>17</sup> *Cobb v. Sweet*, 46 A. D. 375, 61 N. Y. Supp. 545 (1899).

<sup>18</sup> *Gillig v. Treadwell Company*, 151 N. Y. 552, 45 N. E. 1035 (1897); L. 1883, c. 378, § 8.

<sup>19</sup> *Decker v. Gardner*, 124 N. Y. 334, 11 L.R.A. 480, 26 N. E. 814 (1891).

<sup>20</sup> *Vilas v. Page*, 106 N. Y. 439, 13 N. E. 743 (1887).

<sup>1</sup> Gen. Corp. L. § 276 (L. 1909, c. 28).

<sup>2</sup> Gen. Corp. L. § 105 (L. 1909, c. 28).

<sup>3</sup> *Herring v. N. Y., Lake Erie & Western R. R. Co.*, 105 N. Y. 340, 12 N. E. 763 (1887).

**§ 528. Id.: When Only One and When More.**—When one receiver only is appointed in proceedings for sequestration or dissolution all provisions in reference to several receivers apply to him.<sup>4</sup> When there are more receivers than one appointed, the debts and property of the corporation may be collected and received by any one of them.<sup>5</sup> When there are more than two receivers appointed, every power and authority conferred on the receivers may be exercised by any two of them.<sup>6</sup>

**§ 529. Id.: As to Moneys, Drafts and Books.**—All orders appointing receivers of corporations must designate therein one or more places of deposit wherein all funds of the corporation not needed for immediate disbursement shall be deposited; and no deposits or investments of such trust funds must be made elsewhere except upon the order of the court upon due notice given to the Attorney-General.<sup>7</sup> A receiver of a corporation should keep funds in his hands as such separate from his individual moneys, whether banked or not; and if he does not, and the court can see any benefit to him personally by the commingling of the funds and moneys, he is chargeable with interest, either simple or compound, as the facts developed may require.<sup>8</sup> A stockholder of a corporation in a receiver's hands has the right to show from the receiver's books what amount of the corporate funds the latter has deposited to his private credit, and what amounts he has withdrawn therefrom for his individual use.<sup>9</sup> A receiver of a corporation buying goods for which the seller drew a draft upon him, addressed to him as receiver, and accepted in his name as receiver, is not personally liable thereon if the order appointing him authorized him to carry on the corporation's business so far as necessary to enable him to collect accounts due it and he purchased the goods in question pursuant to such authority to the seller's knowledge.<sup>10</sup> A receiver appointed for a corporation by an order directing delivery to him of its books cannot hold such corporation in contempt for not turning over such books if they are in the possession of a new corporation as transferee of a mortgagee of the old

<sup>4</sup> Gen. Corp. L. § 235 (L. 1909, c. 28).

<sup>5</sup> Gen. Corp. L. § 236 (L. 1909, c. 28).

<sup>6</sup> Gen. Corp. L. § 236 (L. 1909, c. 28).

<sup>7</sup> Gen. Corp. L. § 313 (L. 1909, c. 28).

<sup>8</sup> Matter of Commonwealth Fire Ins. Co., 32 Hun, 78 (1884).

<sup>9</sup> Matter of Commonwealth Fire Ins. Co., 32 Hun, 78 (1884).

<sup>10</sup> Olpherts v. Smith, 54 A. D. 514, 66 N. Y. Supp. 976 (1900); aff'd 173 N. Y. 593, 65 N. E. 1120.

corporation's property who had obtained them on foreclosure of the mortgage, even though the officers of the old and new companies are the same and it is claimed the new corporation is a sham.<sup>11</sup> A receiver appointed for a corporation in proceedings for its voluntary dissolution cannot, by order to show cause why a general assignee of the corporation who had obtained possession of all its property before the receiver's appointment should not deliver the corporate books to him, determine the right of property in the corporate books, especially if the assignee was not a party to the proceedings for the receiver's appointment.<sup>12</sup>

**§ 530. Id.: As to Contracts and Agreements.**—If there are any open and subsisting engagements or contracts of the corporation which are in the nature of insurances or contingent engagements of any kind, the receivers may with the consent of the party holding such engagement cancel and discharge the same by refunding to such party the premium or consideration paid thereon by the corporation or so much thereof as is in the same proportion to the time remaining of any risk assumed by such engagement as the whole premium bore to the whole term of such risk; and upon such amount being paid by such receivers to the person holding or being the legal owner of such engagement it is deemed canceled and discharged as against such receivers.<sup>13</sup> A corporation is not, as a matter of law, excused from performing its contracts by the appointment of receivers in proceedings for its voluntary dissolution, or relieved from liability of damages for the breach.<sup>14</sup> “It is the settled law in this State that a receiver who enters into a contract as such, by the direction or authority of a court having jurisdiction to confer such authority or make such direction, is not personally liable upon the contracts so entered into. . . . It is equally well settled that if a receiver, although authorized by the court to contract as such, assumes to contract in his individual capacity, although for the benefit of his trust, or if he assumes to contract as receiver without authority so to do, he will be held personally liable. . . . Such want of authority may arise because of the omission from the order or decree of the court of language suitable to confer the same, or because the

<sup>11</sup> *Olmsted v. Rochester & Pittsburgh R. R. Co.*, 46 Hun, 552 (1887).

<sup>12</sup> *Matter of Muehlfeld*, 16 A. D. 401, 45 N. Y. Supp. 16 (1897).

<sup>13</sup> Gen. Corp. L. § 256 (L. 1909, c. 28).

<sup>14</sup> *Stannard v. Reid & Co.*, 114 A. D. 135, 99 N. Y. Supp. 567 (1906).

court was without jurisdiction to confer such authority.”<sup>15</sup> It seems that corporate receivers who have repudiated a contract to which their corporation is a party cannot restrain other parties to it from enforcing a forfeiture clause therein against the insolvent corporation.<sup>16</sup> A temporary receiver not empowered by court order to continue the corporation’s business, dispose of its property or employ a truckman, cannot be held liable as receiver on an agreement to pay a weekly salary to an individual as a truckman.<sup>17</sup> One appointed temporary receiver of a corporation in proceedings for its voluntary dissolution under an order empowering him to complete its unperformed outstanding contracts is liable as receiver only, and not individually, to one supplying goods to him as receiver for completion of such a contract, as the statutory power of a temporary receiver to preserve “property” of the corporation, includes as “property” “contracts for work entered into by the corporation, in which moneys are invested for material and out of the performance of which reimbursement of those moneys is to be made, or out of which profits are to be derived.”<sup>18</sup>

§ 531. **Id.: As to Leases.**—A receiver of a lessee-corporation on its dissolution cannot be charged as assignee of the lease if he waives the term, but if the landlord does not choose to re-enter the estate may be liable for the rent.<sup>19</sup>

§ 532. **Id.: As to Counsel.**—If the receiver of a corporation for sequestration, dissolution, annulment, foreclosure or preservation of assets employs counsel the following rules apply: (1) He must within three months after he has qualified as receiver enter into a written contract fixing the compensation of such counsel at not exceeding a certain amount or a certain percentage of the sums received and disbursed by him; (2) such contract must be approved by the Supreme Court on at

<sup>15</sup> *Sager Manufacturing Co. v. Smith*, 45 A. D. 358, 60 N. Y. Supp. 849 (1899); *aff’d* 167 N. Y. 600, 60 N. E. 1120.

<sup>16</sup> *West v. Guaranty Trust Co.*, 162 A. D. 301, 147 N. Y. Supp. 421 (1914).

<sup>17</sup> *Merger v. Lexow*, 1 A. D. 116, 37 N. Y. Supp. 67 (1896). The truckman might hold the person appointed receiver individually liable.

<sup>18</sup> *Nason Manufacturing Co. v. Garden*, 52 A. D. 363, 65 N. Y. Supp. 147 (1900); C. C. P. §§ 2423

(now Gen. Corp. L. § 176 *et seq.*), 1788 (now Gen. Corp. L. § 104 *et seq.*).

On power of railway receiver to contract for transportation beyond on line 31 L.R.A.(N.S.) 33.

On right of receiver of insurance company to funds deposited with state official to secure performance of contract, see note in 46 L.R.A.(N.S.) 187.

<sup>19</sup> *People v. National Trust Co.*, 82 N. Y. 283 (1880).

least eight days' notice to the Attorney-General; (3) a payment by such receiver to his counsel on account of services can only be made pursuant to an order of the court on notice to the Attorney-General and subject to review on the final accounting; (4) a contract with counsel cannot be made for a longer period than eighteen months, but may be renewed from time to time for periods of not more than one year if approved by the Supreme Court on at least eight days' notice to the Attorney-General.<sup>20</sup> If receivers cannot agree on counsel the court will remove them and appoint others who can.<sup>1</sup> The employment by a receiver of an insolvent bank appointed on the application of the Attorney-General of one who resigned as deputy in the latter's office to accept the retainer will not be countenanced by the court.<sup>2</sup> The court has the right to examine into the reasons of a contemplated change of attorneys by a receiver of an insolvent corporation, to see how the change will effect the interests of creditors; but unless the court is satisfied the interests of the trust would be prejudiced by the change, it should grant the receiver's motion for substitution.<sup>3</sup> ". . . a court of primary jurisdiction in the exercise of its discretion may authorize the receiver of an insolvent corporation, appointed in an action brought for its dissolution, which was defended in good faith by the corporation, though unsuccessfully, to pay as a preferred claim out of the funds in his hands, a reasonable sum for the compensation of counsel employed by the corporation in defending the action;" but if the corporation acted fraudulently in asking the counsel to defend the action because it knew of the insolvency, though he did not, the claim

<sup>20</sup> Gen. Corp. L. § 242 (L. 1909, c. 28): "In case of the intervention of any policyholder or depositor, by permission of the court, such policyholder or depositor shall defray the legal expenses thereof, and no allowance shall be made for costs or fees to any attorney of such policyholder or depositor. It shall be unlawful for receivers of an insurance, banking or railroad corporation, or trust company, to pay to any attorney or counsel any costs, fees or allowances until the amount thereof shall have been stated to the special term as provided in section two hundred and forty-nine of this chapter, as

expenses incurred, and shall have been approved by that court, by an order of the court duly entered, and any such order shall be the subject of review by the Appellate Division and the Court of Appeals on an appeal taken therefrom by any party aggrieved thereby."

<sup>1</sup> *People v. Brooklyn Bank*, 125 A. D. 354, 109 N. Y. Supp. 534 (1908); L. 1906, c. 349, § 2a.

<sup>2</sup> *People v. Brooklyn Bank*, 125 A. D. 354, 109 N. Y. Supp. 534 (1908); L. 1906, c. 349, § 2a.

<sup>3</sup> *People v. Bank of Staten Island*, 112 A. D. 791, 99 N. Y. Supp. 486 (1906).

of counsel is infected with the fraud of the corporation, from which the compensation is due, and payment thereof from the receiver's fund will be refused.<sup>4</sup> The court will not approve now as of a date three and one-half years back a contract between receivers of a corporation and their counsel.<sup>5</sup>

**§ 533. Id.: Recovery of Stock Subscriptions.**—The receiver appointed for sequestration, dissolution, annulment, foreclosure or preservation of assets must immediately proceed to recover any sum remaining due upon any share of stock subscribed in such corporation unless the person so indebted is wholly insolvent, and for that purpose may commence and prosecute any action or proceeding for the recovery of such sum without the consent of any creditors of such corporation.<sup>6</sup>

**§ 534. Id.: Recovery of Assets and Penalties.**—Actions by and against receivers are treated generally in the five hundred and sixtieth, sixty-first and sixty-second sections of this book. In all cases in which receivers are appointed for any domestic corporation on application of the Attorney-General, all property, real and personal, and all securities of any kind and nature belonging to such corporation, no matter where located or by whom held, must be transferred to, vested in and held by such receivers, if and when directed by order of the Supreme Court on due notice of application for the order given to the Attorney-General and the custodian of the funds, securities or property.<sup>7</sup>

Receivers for sequestration and dissolution have power: (1) to sue in their own names or otherwise and recover all the property, debts and things in action belonging or due or to become due to such corporation, whether accruing or maturing before or after the dissolution thereof, and whether vested or contingent at the time of such dissolution, in the same manner and with the like effect as such corporation might or

<sup>4</sup> *People v. Commercial Alliance Life Insurance Co.*, 148 N. Y. 563, 43 N. E. 988 (1896).

<sup>5</sup> *In re People's Trust Co. of N. Y.*, — Misc. — (1918); N. Y. L. J. Feb. 15, Sp. T. Kings Co.; Gen. Corp. L. § 242.

<sup>6</sup> Gen. Corp. L. § 244 (L. 1909, c. 28).

For a discussion of the question of right, in action by corporate receiver to recover unpaid balance of stock subscriptions, to interpose a defense that would have been avail-

able against the corporation, see note in 18 L.R.A.(N.S.) 347.

On right of receiver of corporation, to recover statutory added liability of corporate shareholder, see note in 31 L.R.A.(N.S.) 365.

Suit in equity by receiver, assignee, or trustee to enforce liability on unpaid subscriptions to stock, see note in 46 L.R.A.(N.S.) 452.

<sup>7</sup> Gen. Corp. L. § 233 (L. 1909, c. 28).

could have done if no receivers had been appointed.<sup>8</sup> In such an action by such receivers no set-off can be allowed for any debt unless it was owing to such creditor by such corporation before the appointment of the receiver of such corporation or unless it had been duly contracted by such receiver subsequent to his appointment; notwithstanding the notice to creditors the receivers may sue for and recover any property or effects of the corporation and any debts due to it, at any time, before the day appointed for the delivery or payment thereof.<sup>9</sup> Such receivers have power (2) to take into their hands all the property of such corporation, whether attached, or delivered to them, or afterwards discovered; and all books, vouchers and securities relating to the same.<sup>10</sup> Such receivers have power (3) in the case of a non-resident, absconding or concealed debtor, to demand and receive of every sheriff who has attached any of the property of such debtor, or who has in his hands any moneys arising from the sale of such property, all such property and moneys, on paying him his reasonable costs and charges for attaching and keeping the same, to be allowed by the court having jurisdiction.<sup>11</sup>

A receiver in an action to sequester and distribute the property of a judgment-debtor corporation, or to dissolve it and forfeit its corporate rights, privileges and franchises, or in a proceeding to dissolve it, or in an action by the Attorney-General to vacate or annul the corporation or its charter or any act renewing the corporation or continuing its corporate existence, or in an action to preserve the corporation's assets, appointed and qualified either before, upon, or after final judgment in the action or special proceeding in which such appointment was made, is entitled to a court order to help him to recover assets of the corporation.<sup>12</sup> The receiver must show (1) by his own verified petition, affidavit or other competent proof (2) to the Supreme Court at a special term thereof held within the judicial district wherein such appointment was made that he has good reason to believe (a) that any officer, stockholder, agent or employee of such corporation, or any other person whomsoever, has embezzled or concealed or withholds or has in his possession or under his control, or has wrongfully disposed of any property of such corporation

<sup>8</sup> Gen. Corp. L. § 239, subd. 1 (L. 1913, c. 766).

<sup>9</sup> Gen. Corp. L. § 239, subd. 1 (L. 1913, c. 766).

<sup>10</sup> Gen. Corp. L. § 239, subd. 2 (L. 1913, c. 766).

<sup>11</sup> Gen. Corp. L. § 239 (L. 1913, c. 766).

<sup>12</sup> Gen. Corp. L. § 240 (L. 1909, c. 28).

which of right ought to be surrendered to the receiver thereof; or (b) that any person can testify concerning the embezzlement, concealment, withholding, possession, control or wrongful disposition of any such property.<sup>13</sup> Whenever such a condition is shown the court must make an order, with or without notice, commanding such person or persons to appear at a time and place to be designated in the order, before the court or before a referee named by the court for that purpose, and to submit to an examination concerning such embezzlement, concealment, withholding, possession, control or wrongful disposition of such property.<sup>14</sup> At the time of making such order or at any time thereafter the court may in its discretion enjoin and restrain the person or persons so ordered to appear and be examined from in any manner disposing of any property of such corporation which may be in the possession or under the control of the person so ordered to be examined, until the further order of the court in relation thereto.<sup>15</sup> No person so ordered to appear and be examined can be excused from answering any question on the ground that his answer might tend to convict him of a criminal offense; but his testimony taken upon such examination cannot be used against him in any criminal action or proceeding.<sup>16</sup> Any person so ordered to appear and be examined shall (1) be entitled to the same fees and mileage (to be paid at the time of serving the order) as are allowed by law to witnesses subpoenaed to attend and testify in an action in the Supreme Court; (2) be subject to the same penalties upon failure to appear and testify in obedience to such an order as are provided by law in the case of witnesses who fail to obey a subpoena to appear and testify in an action; (3) be sworn by the court or referee to tell the truth; (4) be entitled to be represented on such examination by counsel; (5) be liable to cross-examination; and (6) be permitted to make any voluntary statement in his own behalf concerning the subject of his examination which may seem to him desirable or pertinent thereto.<sup>17</sup> The court before which such examination is taken, as well as the referee if one be appointed for that purpose, have power to adjourn such examination from time to time, and may rule upon any question or objection arising in the course of such examina-

<sup>13</sup> Gen. Corp. L. § 240 (L. 1909, c. 28).

<sup>14</sup> Gen. Corp. L. § 240 (L. 1909, c. 28).

<sup>15</sup> Gen. Corp. L. § 240 (L. 1909, c. 28).

<sup>16</sup> Gen. Corp. L. § 240 (L. 1909, c. 28).

<sup>17</sup> Gen. Corp. L. § 240 (L. 1909, c. 28).

tion to the same extent that might be done if the person so examined were testifying as a witness in the trial of an action.<sup>18</sup> When the examination of any person under such order is concluded, the testimony must be signed and sworn to by the person so examined, and be filed in the office of the clerk of the county where the action is pending, or was tried, in which the receiver was appointed.<sup>19</sup> If from such testimony it appear to the satisfaction of the court that any person so examined is wrongfully concealing or withholding, or has in his possession or under his control, any property which of right belongs to such receiver, the court may make an order commanding the person so examined forthwith to deliver the same to such receiver, who must hold the same subject to the further order of the court in relation thereto; and otherwise, the court may, at the conclusion of any such examination, make such final order in the premises as the interests of justice may require.<sup>20</sup>

All penalties which are recovered by any receivers pursuant to the eleventh article of the General Corporation Law are deemed part of the property of the corporation and must be distributed as such among its creditors.<sup>1</sup>

A receiver permanently appointed for a corporation after judgment for its dissolution is not entitled to property generally assigned by it to an assignee while insolvent, without preferences and before the receiver was appointed.<sup>2</sup>

§ 535. **Id.: Appraisal of Property.**—Whenever it becomes necessary by reason of the provisions of any law of New York State to appraise in whole or in part the property of any corporation in the hands of a receiver or otherwise, the persons whose duty it is to make such appraisal must value the real estate at its full and true value, taking into consideration actual sales of neighboring real estate similarly situated during the year immediately preceding the date of such appraisal, if any; and must value all such property, stocks, bonds or securities as are customarily bought or sold in the open markets in the City of New York or elsewhere for the day on which such appraisal or report may be required by ascertain-

<sup>18</sup> Gen. Corp. L. § 240 (L. 1909 c. 28).

<sup>19</sup> Gen. Corp. L. § 240 (L. 1909, c. 28).

<sup>20</sup> Gen. Corp. L. § 240 (L. 1909, c. 28).

<sup>1</sup> Gen. Corp. L. § 260 (L. 1909, c. 28).

<sup>2</sup> *People v. United States Law Blank & Stationery Co.*, 24 Misc. 535, 53 N. Y. Supp. 852 (1898); C. C. P. § 1788; R. S. part 3, c. 8, tit. 4, §§ 67, 68.

ing the range of the market and the average of prices as thus found, running through a reasonable period of time.<sup>3</sup>

**§ 536. Id.: Holding Real Property in Trust.**—A receiver appointed by or pursuant to an order or a judgment in an action in (a) the Supreme Court or (b) a County Court, or (c) in a special proceeding for the voluntary dissolution of a corporation may take and hold real property upon such trusts and for such purposes as the court directs, subject to the direction of the court from time to time respecting the disposition thereof.<sup>4</sup>

**§ 537. Id.: As to Selling and Converting Property.**—The receivers appointed for sequestration, dissolution, annulment, foreclosure or preservation of assets must convert the property of the corporation, real and personal, into money as speedily as possible.<sup>5</sup> Receivers on sequestration or dissolution have power to sell at public auction from time to time all the property, real and personal, vested in them which comes into their hands, after giving at least fourteen days' public notice of the time and place of sale, and after also publishing the same for two weeks in a newspaper, if any, printed in the county where the sale is to be made; and to allow such credit on the sale of real property by them as they deem reasonable for not more than three-fourths of the purchase money, which credit must be secured by a bond of the purchaser and a mortgage on the property sold; and on such sales to execute the necessary conveyances and bills of sale; and to redeem all mortgages and conditional contracts and all pledges of personal property, and to satisfy any judgments, which may be an incumbrance on any property so sold by them; or to sell such property subject to such mortgages, contracts, pledges or judgments.<sup>6</sup> A receiver duly appointed in New York State by and pursuant to (1) a judgment in an action or (2) an order in a special proceeding may be authorized by the court by which such judgment was rendered or order made to sell or convey the property, whether real or personal, of the corporation of which he is the receiver at private sale and upon such terms and conditions as the court may direct (a) upon application to such court and (b) upon notice to such parties as may be entitled to notice of applications made in such action or special proceeding.<sup>7</sup> An order allowing sale by a receiver to a corporation of assets for

<sup>3</sup> Gen. Corp. L. § 310 (L. 1909, c. 28).

<sup>4</sup> Gen. Corp. L. § 243 (L. 1909, c. 28).

<sup>5</sup> Gen. Corp. L. § 245 (L. 1909, c. 28).

<sup>6</sup> Gen. Corp. L. § 239, subds. 4, 5, 6 and 7 (L. 1913, c. 766).

<sup>7</sup> Gen. Corp. L. § 246 (L. 1909, c. 28).

various considerations, one of which was the release from personal liability of the individuals who formed and backed such corporation and became its directors so that it might make the purchase, will not be modified so as to prevent such release.<sup>8</sup> While a receiver who takes property belonging to a third person in the belief that it belongs to a trust is nevertheless liable for conversion, without permission from the court to sue him, yet, if upon his accounting as temporary receiver such third party makes himself a party and demands such property and the court orders such property to be retained by the permanent receiver, the latter is protected from attack without the court's permission.<sup>9</sup> The court will not, in a proceeding for voluntary dissolution of a corporation, give temporary receivers appointed by it leave to sell all the corporate property upon facts shown only in affidavits, but will wait till the hearing provided by statute has been had before the court or referee.<sup>10</sup> Receivers appointed of a corporation in proceedings for its voluntary dissolution may give good title to its property by sale under order of the court of which notice was given the creditors and stockholders but not the Attorney-General if the latter was notified on the confirmation of the sale and did not object, even though the creditors and stockholders received no notice of the confirmation.<sup>11</sup> Assuming that a trust of corporations would not be entitled to the proceeds of a contract by one of its constituents because the trust is illegal and void, yet the trust's receiver is entitled to such proceeds; because, whether the proceeds belong to the trust or the constituent, he "unites in himself the right of the trust combination, and also the right of creditors."<sup>12</sup>

**§ 538. Id.: As to Debts and Credits.**—Payment of claims of creditors of a corporation and distribution of its assets by receivers are considered in the five hundred and fiftieth section and following sections of this work. The notice which receivers are required by statute to publish of their appointment must require: (1) All persons indebted to the corporation, by a day and at a place specified in the notice, to render

<sup>8</sup> *Craig v. James*, 89 A. D. 541, 85 N. Y. Supp. 583 (1904); *aff'd* 181 N. Y. 538, 73 N. E. 1121.

<sup>9</sup> *Fallon v. Egberts Woolen Mills Co.*, 56 A. D. 585, 67 N. Y. Supp. 347 (1900).

<sup>10</sup> *Matter of Malcolm Brewing Co.*, 78 A. D. 592, 79 N. Y. Supp. 1057 (1903); C. C. P. § 2423, now see Gen. Corp. L. § 176 *et seq.*

<sup>11</sup> *Johnson v. Rayner*, 25 A. D. 598, 49 N. Y. Supp. 959 (1898); C. C. P. § 2429, see now Gen. Corp. L. § 191 *et seq.*

<sup>12</sup> *Pittsburg Carbon Co. v. McMillen*, 119 N. Y. 46, 7 L.R.A. 46, 23 N. E. 530 (1890).

an account of all debts and sums of money owing by them respectively, to such receivers, and to pay the same; (2) all persons having in their possession any property or effects of such corporation to deliver the same to such receivers by the day so appointed; (3) all the creditors of such corporation to deliver their respective accounts and demands to the receivers or one of them by a day specified in such notice which must be not less than forty days from the first publication of such notice; and (4) all persons holding any open or subsisting contract of the corporation to present the same in writing and in detail to such receivers at the time and place specified in such notice.<sup>13</sup> Every person having possession of any property belonging to a corporation as to which a receiver is had on sequestration, dissolution, annulment, foreclosure, or preservation of assets, and every person indebted to it must, after the first publication of the notice of the appointment of receivers, account and answer for the amount of such debt and for the value of such property to such receivers.<sup>14</sup> Every person indebted to the corporation or having the possession or custody of any property or thing in action belonging to it who conceals the same and does not deliver either a just and true account of such indebtedness or such property or thing in action to the receivers or one of them by the day for that purpose appointed in the notice of their appointment forfeits double the amount of such debt or double the value of such property so concealed — and such penalties may be recovered by the receivers.<sup>15</sup>

Receivers for sequestration or dissolution have power (5) to settle all matters and accounts between such corporation and its debtors or creditors, and to examine any person touching such matters and accounts on oath, to be administered by either of them.<sup>16</sup> Such receivers have power (6) to compound, under the order of the court appointing them, with any person indebted to such corporation, and thereupon to discharge all demands against such person.<sup>17</sup> Receivers for sequestration, dissolution, annulment, foreclosure or preservation of assets may settle controversies arising between them and any other person in regard to any demands against the corporation or debts due to it in two ways: (1) They may be referred

<sup>13</sup> Gen. Corp. L. § 250 (L. 1909, c. 28).

<sup>14</sup> Gen. Corp. L. § 251 (L. 1909, c. 28).

<sup>15</sup> Gen. Corp. L. § 252 (L. 1909, c. 28).

<sup>16</sup> Gen. Corp. L. § 239, subd. 8 (L. 1913, c. 766).

<sup>17</sup> Gen. Corp. L. § 239 (L. 1913, c. 766).

to one or more indifferent persons who may be agreed upon by the receivers and the party with whom such controversy may exist by a writing to that effect signed by them; or (2) the receivers or the other party, if such referee or referees be not selected by agreement and no action at law is pending arising out of such debts or demands, may (1) give a notice of their intention to apply to any judge of the Supreme Court at chambers (residing in the same district with such receivers) for the appointment of one or more referees, specifying (a) the time and (b) place when such application will be made; and (2) serve such notice at least ten days before the time so therein specified.<sup>18</sup> If referees are sought by appointment of court, the judge before whom the application is made (1) must on the day so specified receive due proof of the service of such notice and (2) may then in his discretion proceed to select one or more referees, the same in all respects as they are now selected according to the rules and practice of the Supreme Court.<sup>19</sup> Commission or commissions to take testimony may be issued by the referee or referees appointed to hear such controversy when any witness to it resides out of the county where such receivers resided at the time of their appointment, and in like manner as justices of the peace are now authorized to issue the same; and the testimony so taken must be returned to such referee or referees in the same manner and be read before them on a hearing in like manner as testimony taken on commission before justices of the peace.<sup>20</sup> The written agreement of the parties as to who shall be referee or referees must be filed by the receivers in the office of a clerk of the Supreme Court and an order must thereupon be entered by such clerk in vacation or in term appointing the persons so selected to determine the controversy.<sup>1</sup> The officer before whom the referees are selected must certify such selection in writing and such certificate must be filed by the receivers in the office of a clerk of the Supreme Court, who must then enter an order in vacation or in term appointing the persons so selected to determine the controversy.<sup>2</sup> Such referees have the same powers and are subject to the like duties and obligations as referees appointed by the Supreme Court in personal actions pending therein, and receive the

<sup>18</sup> Gen. Corp. L. § 241 (L. 1909, c. 28).

<sup>19</sup> Gen. Corp. L. § 241 (L. 1909, c. 28).

<sup>20</sup> Gen. Corp. L. § 241 (L. 1909, c. 28).

<sup>1</sup> Gen. Corp. L. § 241 (L. 1909, c. 28).

<sup>2</sup> Gen. Corp. L. § 241 (L. 1909, c. 28).

same compensation.<sup>3</sup> The report of the referees must be filed in the same office in which the order for their appointment was entered, and is conclusive on the rights of the parties if not set aside by the court.<sup>4</sup>

The receivers may cancel and discharge any open and subsisting engagements or contracts of such corporation which are in the nature of insurances or contingent engagements of any kind, with the consent of the party holding such engagement, by refunding to such party the premium or consideration paid thereon by such corporation or so much thereof as is in the same proportion to the time remaining of any risk assumed by such engagement as the whole premium bore to the whole term of such risk; and upon such amount being paid by such receivers to the person holding or being the legal owner of such engagement it must be deemed canceled and discharged as against such receivers.<sup>5</sup> The receivers must retain out of the moneys in their hands a sufficient amount to pay the sums which they are authorized to pay for the purpose of canceling and discharging any open or subsisting engagements.<sup>6</sup>

The receivers may retain from moneys in their hands the proportion which would belong to any demand, if established, on which any suit is pending against the corporation or themselves, together with the necessary costs and proceedings, to be applied according to the event of such suit, or to be distributed in a second or other dividend.<sup>7</sup> Every person to whom a corporation is indebted on a valuable consideration for any sum of money not due at the time of such distribution but payable afterwards must receive his proportion with other creditors after deducting a rebate of legal interest upon the sum distributed for the time unexpired of such credit.<sup>8</sup>

The receivers may set off credits or debts when mutual credit has been given by any corporation and any other person or mutual debts have subsisted between such corporation and any other person, and may pay the proportion or receive the balance due; but no set off can be allowed of any claim or debt which would not have been entitled to a dividend as provided by statute; and no set off must be allowed by such receivers of any claim or debt which has been purchased by or

<sup>3</sup> Gen. Corp. L. § 241 (L. 1909, c. 28).

<sup>4</sup> Gen. Corp. L. § 241 (L. 1909, c. 28).

<sup>5</sup> Gen. Corp. L. § 256 (L. 1909, c. 28).

<sup>6</sup> Gen. Corp. L. § 257 (L. 1909, c. 28).

<sup>7</sup> Gen. Corp. L. § 257 (L. 1909, c. 28).

<sup>8</sup> Gen. Corp. L. § 258 (L. 1909, c. 28).

transferred to the person claiming its allowance which could not have been set off by him in a suit brought by such receivers.<sup>9</sup>

The receivers must call a general meeting of the creditors of such corporation (1) within four months from the time of their appointment, (2) by a notice specifying (a) the place and (b) the time of such meeting (not more than three months nor less than two months after the first publication of such notice), (3) by publishing such notice at least once in each week for three weeks until the time of such meeting in a newspaper printed in the county where the principal place of conducting the business of such corporation has been situated.<sup>10</sup> At such creditors' meeting, or other adjourned meeting, thereafter, all accounts and demands for and against such corporation and all its open and subsisting contracts must be ascertained and adjusted as far as may be, and the amount of moneys in the hands of the receivers declared.<sup>11</sup>

"The statute authorizing proceedings for the voluntary dissolution of corporations prescribes a method for ascertaining the claims of creditors and for a reference in case claims are disputed. But this method is not . . . exclusive. The court may, nevertheless, when in its judgment it is proper so to do, authorize an action to be brought against the receiver who disputes the validity of a claim, so that the matter may be more deliberately examined and determined than in the summary method authorized by the statute. But whether the validity of a claim is ascertained by a summary reference or by action, the purpose of each proceeding is the same, to procure an adjudication for the guidance of the receiver in administering the estate of the corporation."<sup>12</sup> The Attorney-General must be given notice of an application for an order of reference of a claim presented to and rejected by a receiver of a corporation appointed in an action for its dissolution.<sup>13</sup>

**§ 539. Id.: Receivers' Certificates.**—"The right of a court having possession of an insolvent corporation's property to issue certificates and to declare the liens thereof precedent to the existing liens has been asserted after considerable conflict

<sup>9</sup> Gen. Corp. L. § 259 (L. 1909, c. 28).

<sup>10</sup> Gen. Corp. L. §§ 250, 253 (L. 1909, c. 28).

<sup>11</sup> Gen. Corp. L. § 254 (L. 1909, c. 28).

<sup>12</sup> *Ludington v. Thompson*, 153

N. Y. 499, 47 N. E. 903 (1897); 2 R. S. § 467 *et seq.*

<sup>13</sup> *Matter of Eustace v. New York Building-Loan Co.*, 98 A. D. 97, 90 N. Y. Supp. 784 (1904); L. 1883, c. 378, § 8.

in the courts, and is now maintained in the Federal courts (*citations*), and has been recognized by the Court of Appeals in this State (*citation*).''<sup>14</sup> The power of a court of equity to authorize a receiver of a corporation to raise money by issuing certificates which shall be a lien on its property cannot be questioned; but the power will be exercised only to protect the corporate property, and each case will be decided on its own peculiar facts.<sup>15</sup> On final adjustment of demands by a contractor for work done for another, outstanding certificates issued by the receivers for the contractor and their unpaid notes should be treated with equal favor, after what may be reasonably allowed as receivers' charges and for legal outlays.<sup>16</sup> Unsecured claims against a corporation, however meritorious in character, cannot be paid out of the proceeds of sale of a mortgage receiver's certificates in the absence of the consent of the bondholders, even though for nearly a year prior to the date of the mortgage receivership the corporation had been in the hands of a temporary receiver appointed in proceedings for the corporation's dissolution.<sup>17</sup> Certificates issued by a receiver of a railroad, appointed in a sequestration action, pending an action instituted by a trustee under a mortgage to foreclose, but before a receiver had been appointed therein, under a court order on notice to but against the objection (to the court's jurisdiction) of the trustee, to pay overdue interest on the mortgage bonds and the trustee's fees and expenses, and so prevent foreclosure of the principal by the trustee with loss to stockholders and creditors, even though sold and paid for by innocent parties before reversal of such order on appeal, are not a prior lien on the corporate property though so declared by the court's order; because the court, granting it to have the powers of a court of equity, cannot issue certificates paramount to the liens of strangers to the suit unless necessary for the care, maintenance and preservation of the property or fund, in this case the corporate railroad, and certainly not solely for the purpose of appropriating to pay bondholders part of their own property against their protest.<sup>18</sup>

<sup>14</sup> *Passage v. Dansville & Mt. Morris R. R. Co.*, 41 A. D. 182, 58 N. Y. Supp. 770 (1899).

<sup>15</sup> *Rochester Trust & Safe Deposit Co. v. Rochester & Irondequoit R. R. Co.*, 29 Misc. 222, 60 N. Y. Supp. 409 (1899).

<sup>16</sup> *Horton v. McNally Co.*, 168 A. D. 248, 153 N. Y. Supp. 429 (1915).

<sup>17</sup> *Knickerbocker Trust Co. v. Tarrytown, White Plains & Mamaroneck Ry. Co.*, 133 A. D. 285, 117 N. Y. Supp. 871 (1909).

<sup>18</sup> *Knickerbocker Trust Co. v. Oneonta, C. & R. S. Ry. Co.*, 201 N. Y. 379, 94 N. E. 871 (1911).

**§ 540. Id.: Reports.**—All receivers of insolvent corporations who are required by law to make and file reports of their proceedings must at the time of making and filing such reports serve a copy thereof upon the Attorney-General of New York State; and in case they neglect to make and file such report or neglect for the same length of time to serve a copy thereof on the Attorney-General, the latter may make a motion in the Supreme Court for an order to compel the making and filing and serving a copy on him of such report, or for the removal of such receiver from his office.<sup>19</sup>

**§ 541. Id.: Accountings.**—A permanent receiver for sequestration or dissolution must (1) keep an account of all moneys received by him and (2) on the first days of January, April, July and October in each and every year make and file (a) a written statement (b) verified by his oath that such statement is correct and true, (c) showing the amount of money received by him, his agents or attorneys, the amount he has a right to retain and the items for which he claims the same, and the distributive share due each person interested therein.<sup>20</sup> The statutory, quarterly account and statement, and all the books and papers of the corporation in the hands of a permanent receiver must be open at all reasonable times to the inspection of all persons having an interest therein.<sup>1</sup> Receivers for sequestration, dissolution, annulment, foreclosure or preservation of assets must keep a regular account of all moneys received by them as receivers; to which every creditor or other person interested therein is at liberty at all reasonable times to have recourse.<sup>2</sup> The receiver must apply either for a final settlement of his accounts and an order for distribution or for an extension of time within one year from qualifying; and if he seeks extension it must be (1) by application to the court (2) upon notice to the Attorney-General (3) on reasons, duly set forth, showing why he is unable to close his accounts; and the order may be granted in the discretion of the court.<sup>3</sup> The Attorney-General or any creditor or any party interested may apply for an order that the receiver show cause why an accounting and distribution should not be had at any time after the expiration of one year after the receiver qualifies.<sup>4</sup> It is the duty of the Attorney-

<sup>19</sup> Gen. Corp. L. § 248 (L. 1909, c. 28).

<sup>20</sup> Gen. Corp. L. § 107 (L. 1909, c. 28).

<sup>1</sup> Gen. Corp. L. § 107 (L. 1909, c. 28).

<sup>2</sup> Gen. Corp. L. § 247 (L. 1909, c. 28).

<sup>3</sup> Gen. Corp. L. § 268 (L. 1909, c. 28).

<sup>4</sup> Gen. Corp. L. § 268 (L. 1909, c. 28).

General to apply for an order that the receiver show cause why an accounting and distribution should not be had after the expiration of eighteen months from the time the receiver enters upon his duties if the receiver has not applied for a final settlement of his accounts; and notice of such application must be given the receiver.

The Attorney-General may, at any time he deems that the interests of the stockholders, creditors, policy-holders, depositors or other beneficiaries interested in the proper and speedy distribution of the assets of any insolvent corporation will be subserved thereby, make a motion in the Supreme Court, at a special term thereof, in any judicial district, to compel him to account, or for such other additional order or orders as to him may seem proper to facilitate the closing up of the affairs of such receivership.<sup>5</sup> Any appeal from any order made upon any motion under such statute must be made to the Appellate Division of the department in which such motion is made.<sup>6</sup> In case of such application by a party other than the receiver the court must direct the receiver to take steps to account with all convenient speed.<sup>7</sup> The receiver is not required or authorized to file any account except as provided by statute unless by special order of the court.<sup>8</sup> The receivers, previous to rendering their account, must insert a notice of their intention to present it in a newspaper of the county in which notices of dividends are by statute required to be inserted, once in each week for three weeks, specifying the time and place at which such account will be rendered.<sup>9</sup> The receivers must give notice to the sureties on their official bonds of their intention to render their account, not less than eight days before the day set for the hearing of such accounting.<sup>10</sup> A receiver who has executed and filed a bond must before presenting his accounts as receiver give notice to the surety or sureties on his official bond of his intention to present his accounts not less than eight days before the day set for the hearing on such accounting, and the same notice must be given when the accounting is ordered on the petition of a person or persons other than the receiver; and in no case can the receiver's accounts be passed, settled or allowed unless such notice has first been

<sup>5</sup> Gen. Corp. L. § 311 (L. 1909, c. 28).

<sup>6</sup> Gen. Corp. L. § 311 (L. 1909, c. 28).

<sup>7</sup> Gen. Corp. L. § 268 (L. 1909, c. 28).

<sup>8</sup> Gen. Corp. L. § 268 (L. 1909, c. 28).

<sup>9</sup> Gen. Corp. L. § 269 (L. 1909, c. 240).

<sup>10</sup> Gen. Corp. L. § 269 (L. 1909, c. 240), and § 227.

given to the surety or sureties on the receiver's official bond.<sup>11</sup> Upon the coming in of the receivers' report the court must hear the allegations of all concerned therein and allow or disallow the account; and decree it to be final and conclusive upon all the creditors of the corporation, upon all persons who have claims against it, upon any open or subsisting engagement, and upon all the stockholders of the corporation.<sup>12</sup> The referee to whom the account is referred must hear and examine the proofs, vouchers and documents offered for or against the account and report thereon fully to the court.<sup>13</sup> The receivers must also account from time to time in the same manner and with the like effect for all moneys which shall come to their hands after the rendering of such account, and for all moneys which have been retained by them for any of the purposes specified in the statute and must also pay into court all unclaimed dividends.<sup>14</sup> The discretion of a court summarily to grant a petition to compel a receiver to pay over money may properly be exercised when the facts are simple or only legal questions are involved while conflicting claims of third parties are not in issue; but when the contest involves an issue of fraud ordinarily triable by jury, the better practice is for the court to decline jurisdiction.<sup>15</sup> An accounting in a proceeding for voluntary dissolution of a corporation by one appointed temporary receiver, of which the Attorney-General alone receives notice, is not binding upon the creditors of the corporation, who are notified of the accounting of the permanent receiver, if the permanent and temporary receiver be the same person.<sup>16</sup> Decrees settling accounts of receivers of a corporation in other jurisdictions, if valid, protect them in this jurisdiction and halt any investigation in transactions validated thereby.<sup>17</sup> "It accords with the long-established practice of the court to subject the accounts of receivers to the scrutiny of a referee before passing upon them, when . . . large sums have to be accounted for."<sup>18</sup> When objections have been filed by a judgment

<sup>11</sup> Gen. Corp. L. § 227 (L. 1909, c. 240).

<sup>12</sup> Gen. Corp. L. § 270 (L. 1909, c. 28).

<sup>13</sup> Gen. Corp. L. § 271 (L. 1909, c. 28).

<sup>14</sup> Gen. Corp. L. § 272 (L. 1909, c. 28).

<sup>15</sup> *Alden & Co. v. New York Commercial Co.*, 157 A. D. 872, 142 N. Y. Supp. 772 (1913).

<sup>16</sup> *Matter of Simonds Mfg. Co.*, 39 A. D. 576, 57 N. Y. Supp. 776 (1899).

<sup>17</sup> *People v. Republic Savings & Loan Assn.*, 119 A. D. 502, 104 N. Y. Supp. 1136 (1907).

<sup>18</sup> *People v. Oriental Bank*, 129 A. D. 865, 114 N. Y. Supp. 440 (1909).

creditor to the account of a receiver on dissolution of a corporation a referee may be appointed to take and state the account.<sup>19</sup>

**§ 542. Id.: Compensation and Expenses, in General.**—The receivers for sequestration, dissolution, annulment, foreclosure or preservation of assets may first deduct all the necessary disbursements made by them in the discharge of their duty, together with such commissions as may be allowed by law, out of the moneys in their hands.<sup>20</sup> On an application by a corporation to be allowed to resume business in which all parties are before the court it is proper for the court, without any independent proceeding, to fix the compensation of the temporary receivers who have been in charge of the corporation and whose accounts are before the court, as well as of their counsel; and if the amounts allowed below and not objected to by anyone are excessive, the appellate court should reduce them.<sup>1</sup>

**§ 543. Id.: Expenses.**—“ The jurisdiction of the court to appoint receivers of property has for its primary object the care and custody of the property which is the subject of the receivership, pending the determination of the questions involved in the litigation, and to enable the court, by placing the property under the control of its officer, to preserve it to answer the final decree which may be made in the action. But the receiver cannot of his own motion contract debts chargeable upon the fund in litigation. The court must authorize expenditures on account of the property before they can be charged thereon; and while it may, and does in its discretion, allow expenses incurred by a receiver strictly for preservation to be charged upon the fund, although incurred without the prior sanction of the court, it is, nevertheless, the order of the court and not the act of the receiver which creates the charge and upon which its validity depends.”<sup>2</sup>

<sup>19</sup> *Matter of Home Book Co.*, 60 Misc. 560, 112 N. Y. Supp. 1012 (1908); L. 1880, c. 245, 1 L. 1880, p. 368, which make applicable to a receiver appointed under C. C. P. § 2429 and except from repeal §§ 66 to 89 of tit. 4, pt. 3 R. S.

On right of receiver to appeal from decree settling his accounts see note in L.R.A.1915D, 808.

On right of court to surcharge account of receiver, in absence of objection to account, or upon an ob-

jection by *amicus curiae*, see note in 18 L.R.A.(N.S.) 284.

<sup>20</sup> Gen. Corp. L. § 255 (L. 1909, c. 28).

<sup>1</sup> *People v. Knickerbocker Trust Co.*, 127 A. D. 215, 111 N. Y. Supp. 2 (1908); app. dism'd 193 N. Y. 649, 86 N. E. 1129.

On right of surviving partner acting as receiver to compensation, see note in 17 L.R.A.(N.S.) 408.

<sup>2</sup> *Vilas v. Page*, 106 N. Y. 439, 13 N. E. 743 (1887).

Expenses of dissolution proceedings by a corporation, consisting of printing, advertising, attorneys' fees, referee's and stenographers' fees and disbursements, are properly payable out of the funds in the hands of the receiver before all other liens.<sup>3</sup> A receiver may incur expenses for the preservation of the property of the corporation for which he is appointed, but whether he should absolutely be held individually liable for such expenses as he contracts without court authority on his individual liability should be determined as a question of fact on the circumstances of each case, is a moot point.<sup>4</sup> A receiver of a corporation defending an action instituted against it before his appointment will be required to pay, from the funds in his hands as such, the costs of the action, if his answer was a general denial of allegations of the complaint proven on the trial from entries in the corporate books produced by him on subpoena, and copies of which were annexed to the complaint.<sup>5</sup> If a receiver appointed in proceedings for the voluntary dissolution of a corporation completes without any objection a contract by it which it had assigned to another concern, he can charge the expense to such assignee.<sup>6</sup>

The court will not allow counsel fees incurred in attempting to repel an appointment of a receiver for the corporation-client if the client knew it was insolvent and acted in bad faith, however good may have been the faith and however ignorant the mind of the counsel.<sup>7</sup> An order for payment of fees to counsel of a corporate receiver, made upon the latter's petition is valid; but such an order on the petition of the counsel himself, he himself appearing also as attorney for the receiver, may be assailed collaterally by anyone affected by it, especially if the counsel is the receiver's law partner.<sup>8</sup>

**§ 544. Id.: Compensation, Under Statute; Commissions on Voluntary Dissolution.**—A receiver appointed by the Supreme Court in a proceeding for voluntary dissolution of a corporation is entitled in addition to his necessary expenses to commissions upon the sums received and disbursed by him as

<sup>3</sup> *Matter of New Platz & Walkill Valley R. R. Co.*, 27 Misc. 451, 59 N. Y. Supp. 247 (1899); *aff'd* 42 A. D. 622, 59 N. Y. Supp. 1111.

<sup>4</sup> *Rogers v. Wendell*, 54 Hun, 540, 7 N. Y. Supp. 781 (1889). Two only of three judges sitting and each rendering an opinion.

<sup>5</sup> *Locke v. Covert*, 42 Hun, 484 (1886).

<sup>6</sup> *Matter of Chasmar & Co.*, 22 Misc. 680, 50 N. Y. Supp. 1065 (1898).

<sup>7</sup> *People v. Commercial Alliance Insurance Co.*, 91 Hun, 389, 36 N. Y. Supp. 248 (1895); *aff'd* 148 N. Y. 563, 43 N. E. 988.

<sup>8</sup> *Matter of Commonwealth Fire Ins. Co.*, 32 Hun, 78 (1884).

the court by which or the judge by whom he is appointed allows, as follows: On the first twenty thousand dollars, not exceeding five per centum; on the next eighty thousand dollars, not exceeding two and one-half per centum; and on the remainder, not exceeding one per centum; but in case the commissions of a receiver so appointed do not amount to one hundred dollars the court or judge may in his or its discretion allow such receiver such a sum not exceeding one hundred dollars for his commissions as shall be commensurate with the services rendered by such receiver.<sup>9</sup> The commissions of a temporary receiver appointed for a corporation on proceedings for its voluntary dissolution are governed by the thirty-three hundred and twentieth section of the Code of Civil Procedure, and may not exceed, for receiving property, two and one-half per cent of its value, though the value of property (not only cash) may be considered in arriving at the amount of the commissions.<sup>10</sup>

**§ 545. Id.: Commissions in Other Cases.**—A receiver of a corporation, except a receiver appointed in proceedings for its voluntary dissolution, is entitled in addition to his necessary expenses to such commissions not exceeding two and one-half per centum upon the sums received and disbursed by him as the court by which or the judge by whom he is appointed allows; but except upon a final accounting such a receiver must not receive on account of his services for any one year a greater amount than twelve thousand dollars, nor for any period less than a year more than at that rate.<sup>11</sup> A receiver, except as otherwise specially prescribed by statute, is entitled in addition to his necessary expenses to such commissions not exceeding five per centum upon the sums received and disbursed by him as the court by which or the judge by whom he is appointed allows, but if in any case the commissions of a temporary or permanent receiver so computed do not amount to one hundred dollars such court or judge may in its or his discretion allow such receiver such a sum not exceeding one hundred dollars for his commissions as is commensurate with the services rendered by such receiver; and any receiver appointed under section one hundred and eleven of the Real Property Law or under section twenty of the Personal Property Law required by law to give a bond as such may include

<sup>9</sup> Gen. Corp. L. § 277 (L. 1909, c. 28).

<sup>11</sup> Gen. Corp. L. § 278 (L. 1909, c. 28).

<sup>10</sup> *Matter of Smith Co.*, 31 A. D. 39, 52 N. Y. Supp. 877 (1898); C. C. P. § 3320.

as a part of his necessary expenses such a sum not exceeding one per centum per annum upon the amount of such bond paid his surety thereon as such court or judge allows.<sup>12</sup>

§ 546. **Id.: Additional Allowance.**—Upon final accounting the court may make an additional allowance to such receiver not exceeding two and one-half per centum upon the sums received and disbursed by him, if the court is satisfied that he has performed services that fairly entitle him to such additional allowance.<sup>13</sup>

§ 547. **Id.: When More Than One Receiver.**—When more than one receiver is appointed, the compensation provided by statute must be divided between the receivers.<sup>14</sup>

§ 548. **Id.: In General.**—A continuing corporate receiver is entitled to commissions as to the fund which had been collected or received by the late receiver, his predecessor, for paying it out only, and not for receiving it.<sup>15</sup> A referee in a proceeding to fix the compensation of a removed receiver of a corporation cannot have an order that the new receiver pay the compensation.<sup>16</sup> The statutory provision entitling a receiver to such commissions not exceeding five per cent as the court by which he is appointed allows does not prohibit the General Term from reviewing the discretion of the Special Term in regard to the amount allowed.<sup>17</sup> “Receivers are supposed to earn the compensation provided for them by law, and their commissions are for services rendered, and it is not to be presumed, in the absence of a clear intention expressed in the statute, that the legislature meant [by enacting a new law affecting receivers’ compensation] to interfere with compensation that had already been earned.”<sup>18</sup> It cannot be said as matter of law that receivers are entitled to no compensation because the order appointing them has been vacated.<sup>19</sup> A receiver appointed because of disagreements as to the management of a corporation’s affairs cannot receive commissions allowed by a statute for moneys received and paid out

<sup>12</sup> C. C. P. § 3320.

<sup>13</sup> Gen. Corp. L. § 278 (L. 1909, c. 28).

<sup>14</sup> Gen. Corp. L. § 278 (L. 1909, c. 28).

<sup>15</sup> Attorney-General v. Continental Insurance Co., 32 Hun, 223 (1884).

<sup>16</sup> Attorney-General v. Continental Life Insurance Co., 27 Hun, 524; *dism’d* 93 N. Y. 45.

<sup>17</sup> Hanover Insurance Co. v. Germania Insurance Co., 46 Hun, 308

(1887); *dism’d* 109 N. Y. 663, 17 N. E. 868.

<sup>18</sup> People *ex rel.* Newcomb v. McCall, 94 N. Y. 587 (1884), holding that L. 1883, c. 378, § 2, did not affect the compensation of a receiver whose compensation at the time of appointment was governed by L. 1869, c. 902.

<sup>19</sup> People v. Oriental Bank, 129 A. D. 865, 114 N. Y. Supp. 440 (1909).

when he carried on the business through the instrumentality of two persons owning all the stock, without himself receiving or disbursing the money or doing more than supervising somewhat the corporate affairs.<sup>20</sup>

**§ 549. Id.: On What Allowed.**—The commissions allowed a corporate receiver must be confined to the sums received and paid out.<sup>1</sup> A receiver upon the settlement of his accounts or the litigation is entitled to his commissions upon the value of the entire property that came into his hands and was distributed by him by order of court whether to creditors or by settlement and whether consisting of cash, securities, notes, bonds, mortgages, evidences of indebtedness, but probably not realty.<sup>2</sup> A resigning receiver of an insurance association is not entitled to commissions on reassessments made by him upon members or the percentage of such reassessments deemed by him to be collectible, but only upon funds actually received by him.<sup>3</sup>

**§ 550. Id.: Payments and Distribution, Governing Statutes.**—A permanent receiver must pay the distributive share shown by his statutory, quarterly statement to be due each person interested therein to the person or persons entitled thereto, on demand, at any time after such statement.<sup>4</sup> A final judgment in an action brought to dissolve a corporation or to

<sup>20</sup> In the Matter of the Woven Tape Skirt Co., 85 N. Y. 506 (1881); L. 1876, c. 442. The compensation of a receiver of a corporation as well as of an individual, appointed in a foreclosure action, is governed by the Code of Civil Procedure. U. S. Trust Co. v. N. Y., West Shore & Buffalo Ry. Co., 101 N. Y. 478, 5 N. E. 316 (1886); C. C. P. § 3320. The provisions of chapter three hundred seventy-eight of the Laws of eighteen hundred eighty-three, and particularly of section two thereof regulating the compensation of corporate receivers, relate exclusively to receivers of corporations, appointed in proceedings in insolvency. U. S. Trust Co. v. N. Y. West Shore & Buffalo Ry. Co., 101 N. Y. 478, 5 N. E. 316 (1886); L. 1883, c. 378, § 2. Two different percentages may be allowed a receiver as commissions: first, not over two and a half on sums received and disbursed by him as the court allows, not exceed-

ing \$12,000 for any one year or a proportionate sum for a less period, provided that if there be more than one receiver the compensation prescribed must be divided between them; and, secondly, an additional allowance upon final accounting not exceeding two and a half upon the sums received and disbursed by him if the court is satisfied that he has performed services fairly entitling him to such additional allowance. People v. Brooklyn Bank, 64 Misc. 538, 118 N. Y. Supp. 722 (1909); L. 1906, c. 349, § 2.

<sup>1</sup> Moe v. McNally Co., 138 A. D. 480, 123 N. Y. Supp. 71 (1910); C. C. P. § 3320.

<sup>2</sup> People v. Brooklyn Bank, 64 Misc. 538, 118 N. Y. Supp. 722 (1909); L. 1906, c. 349, § 2.

<sup>3</sup> People v. Mutual Benefit Associates, 39 Hun, 49 (1886).

<sup>4</sup> Gen. Corp. L. § 107 (L. 1909, c. 28).

sequester its property, either against the corporation separately or in conjunction with its stockholders, directors, trustees of other officers, must provide for a just and fair distribution of the property of the corporation and of the proceeds thereof among its fair and honest creditors in the order and in the proportions prescribed by law in case of the voluntary dissolution of a corporation.<sup>5</sup> In case of the neglect or refusal of a permanent receiver for sequestration or dissolution to comply with the statutory requirements that he pay to the person entitled thereto a distributive share shown in his statutory, quarterly statement, and that he keep open for inspection such statement and the corporate books and papers in his hands, or with any duty imposed upon him, the Supreme Court, at either an appellate division or special term, must on the application of the party aggrieved, unless such neglect or refusal is satisfactorily explained to the court, forthwith remove such receiver and appoint some suitable person as receiver in his place. Such receiver is also liable to pay the party interest at the rate of ten per centum per annum on all moneys due to such party and retained by him more than one day after demand of such party's distributive share as shown by the receiver's statutory, quarterly statement.<sup>6</sup>

The receivers for sequestration, dissolution, annulment, foreclosure or preservation of assets must distribute the residue of the moneys in their hands among all those who have exhibited their claims as creditors and whose debts have been ascertained, as follows: (1) All debts due by the corporation to the United States and all debts entitled to a preference under the laws of the United States; (2) all debts that may be owing by the corporation as guardian, executor, administrator or trustee — and if there be not sufficient to pay all debts of the character above specified, then a distribution must be made among them, in proportion to their amounts respectively; (3) judgments actually obtained against such corporation, to the extent of the value of the real estate on which they are respectively liens; (4) all other creditors of such corporation, in proportion to their respective demands without giving any preference to debts due on specialties.<sup>7</sup> Every creditor who has neglected to exhibit his demand before the first dividend and who delivers his account to the receivers before the second dividend must receive the sum he

<sup>5</sup> Gen. Corp. L. § 112 (L. 1909, c. 28).

<sup>7</sup> Gen. Corp. L. § 261 (L. 1909, c. 28).

<sup>6</sup> Gen. Corp. L. § 107 (L. 1909, c. 28).

would have been entitled to on the first dividend before any distribution is made to the other creditors.<sup>8</sup> The receivers must make a second dividend (1) of all moneys in their hands (2) among the creditors entitled thereto (3) within one year after the first dividend (4) if the whole of the property of such corporation is not distributed on the first dividend.<sup>9</sup> Notice (1) of a second dividend and (2) that it will be a final dividend, must be (3) inserted (a) once a week (b) for three weeks in a newspaper printed in the county where the principal place of business of the corporation was situated.<sup>10</sup> Such second dividend must be made in all respects in the same manner provided by statute in relation to the first dividend, and no other must be made thereafter among the creditors of such corporation, except (1) to the creditors having suits against (a) the corporation or (b) the receivers pending at the time of such second dividend, and (2) of the moneys which may be retained to pay such creditors, as provided by statute.<sup>11</sup>

The receivers must distribute any surplus remaining in their hands after the second dividend is made among the stockholders of such corporation in proportion to the respective amounts paid in by them severally on their shares of stock.<sup>12</sup> When any suit pending at the time of the second dividend is terminated the receivers must apply the moneys retained in their hands for that purpose to the payment of the amount recovered and their necessary charges and expenses; and if nothing has been recovered they must distribute such moneys after deducting their expenses and costs among the creditors and stockholders of the corporation in the same manner as directed by statute in respect to a second dividend.<sup>13</sup> The receivers must consider as relinquished and distribute on any subsequent dividend among the other creditors any dividend which has been declared and remains unclaimed by the person entitled thereto for one year after it was declared.<sup>14</sup> The receivers are not answerable to any creditor of the corporation or to any person having claims against the corporation by virtue of any open or subsisting engagement after such second dividend has been made unless the

<sup>8</sup> Gen. Corp. L. § 262 (L. 1909, c. 28).

<sup>9</sup> Gen. Corp. L. § 263 (L. 1909, c. 28).

<sup>10</sup> Gen. Corp. L. § 263 (L. 1909, c. 28).

<sup>11</sup> Gen. Corp. L. § 263 (L. 1909, c. 28).

<sup>12</sup> Gen. Corp. L. § 264 (L. 1909, c. 28).

<sup>13</sup> Gen. Corp. L. § 265 (L. 1909, c. 28).

<sup>14</sup> Gen. Corp. L. § 266 (L. 1909, c. 28).

demands of such creditor have been exhibited and the engagements upon which such claims are founded have been presented to such receivers in detail and in writing before or at the time specified by them in their notice of a second dividend.<sup>15</sup>

§ 551. **Id.: In General.**—A reference cannot be granted of course upon the consent of the parties in an action against a corporation to obtain the distribution of its property unless it is brought by the Attorney-General; and if the parties consent to a reference the court may in its discretion grant or refuse a reference, and if a reference is granted the court must designate the referee and if the referee refuses to serve or a new trial of the action is granted the court must upon the application of either party appoint another referee.<sup>16</sup> “A corporation is created by the edict of the legislature and dies at its command. Knowledge is imputed to all who deal with it that when it suspends business the law takes charge of its affairs, liquidates its debts, converts its assets and distributes the proceeds among its creditors. Those who contract with it do so ‘with the knowledge of the statutory conditions, and these must be deemed to have permeated the agreement and constituted elements of the obligation’ (*citations*). The process of administration provided by law is through a receiver, as the executive arm of the court. He is appointed for the benefit of all the creditors, both preferred and unpreferred, and holds the assets under the direction of the court, in trust primarily for them and finally for the corporation or its stockholders. Thereupon by operation of law the creditors become the equitable owners of the assets and the administration of affairs is for their benefit as such. The claims of creditors against the defunct corporation differ from their claims against its assets in sequestration, for they are not proved against the insolvent and dissolved nonentity, but against the fund in the receiver’s hands. In the distribution of that fund the general rule applicable to insolvent estates, that equality is equity, should prevail so far as the statute, when reasonably construed, will permit.”<sup>17</sup> The general assets of a corporation are to be administered at the home of the corporation in case of its insolvency for the benefit of all creditors wherever residing and the courts of one state have no right to favor domestic creditors on distribution; and

<sup>15</sup> Gen. Corp. L. § 267 (L. 1909, c. 28).

<sup>16</sup> C. C. P. § 1012.

<sup>17</sup> *People v. American Loan & Trust Co.*, 172 N. Y. 371, 65 N. E. 200 (1902).

when the ancillary receiver in a state foreign to the corporation's home state is about to transmit the fund under his control to the home state, the court may impose such conditions as are just and reasonable to protect domestic creditors *e. g.*, by requiring the assignee in the home state to give security before receiving the fund collected in the foreign jurisdiction.<sup>18</sup> A receiver *pendente lite* of all a corporation's property in a proceeding foreclosing a corporate mortgagor who has also been appointed receiver in proceedings supplementary to an execution on a judgment had by a creditor cannot be compelled to apply to payment of such judgment a sum equal to the amount thereof until it has been determined otherwise than in the supplementary proceedings that there is a surplus applicable to the discharge of such judgment over the amount properly applicable to the claims in the foreclosure action.<sup>19</sup> A creditor of an insolvent corporation is entitled, on administration and settlement of its estate by a receiver in a court of equity, to prove and receive a dividend upon the full amount of the debt due from the insolvent estate, without being compelled to deduct from the amount of the proved debt the value of any collateral securities or of any proceeds thereof.<sup>20</sup> "Before a claim for 250 days' service, rendered between November 5, 1902, and September 12, 1903, at \$100 a day can be allowed against an insolvent corporation, evidence highly satisfactory and most convincing must be presented that the services were, in fact, actually rendered."<sup>1</sup> "The claims of creditors [of an insolvent corporation] are presentable when the receiver is appointed, and that date fixes their status and amount, regardless of when they are in fact presented."<sup>2</sup> "In *People v. Metropolitan Surety Co.* (205 N. Y. 135, 98 N. E. 412) it was held that claims against the funds in the hands of the receiver [of a dissolved corporation] must be valued and determined and their status fixed as of the date of the commencement of the action for dissolution and that contingent claims cannot share in the distribution."<sup>3</sup> Claims under undertakings of an insurance company which has been dissolved for insolvency

<sup>18</sup> *People v. Granite State Provident Assn.*, 161 N. Y. 492, 55 N. E. 1053 (1900).

<sup>19</sup> *Kenney v. South Shore Natural Gas & F. Co.*, 201 N. Y. 89, 94 N. E. 606 (1911); C. C. P. § 2447.

<sup>20</sup> *People v. Remington*, 121 N. Y. 328, 8 L.R.A. 458, 24 N. E. 793 (1890).

<sup>1</sup> *People v. New York Building-Loan Banking Co.*, 112 A. D. 166, 98 N. Y. Supp. 290 (1906).

<sup>2</sup> *People v. American Loan & Trust Co.*, 172 N. Y. 371, 65 N. E. 200 (1902).

<sup>3</sup> *People v. Metropolitan Surety Co.*, 158 A. D. 651, 144 N. Y. Supp. 235 (1913).

and placed in the hands of a receiver in an action instituted by the Attorney-General must be valued and determined and their status fixed as of the date of the commencement of the action for dissolution.<sup>4</sup>

In the settlement of the affairs of insolvent corporations "while interest is allowed as against the corporation itself, or its stockholders, if the assets are sufficient for the purpose, as between preferred and unpreferred creditors no interest is allowed after the law takes charge through the appointment of a receiver."<sup>5</sup> ". . . in an action brought by the Attorney-General to wind up the affairs of an insolvent bank, . . . interest at the contract rate should be allowed and credited upon the accounts of its creditors to the date that the receiver took possession of its assets; that thereafter interest is not allowable as between the creditors themselves, but is allowable against the corporation; and if the assets are sufficient after payment of the principal of the indebtedness, as established at the time the receiver took possession, the interest should be paid at the legal rate before the distribution of the surplus to the stockholders."<sup>6</sup>

**§ 552. Id.: Preferred Claims, Governing Statutes.**—The receivers for sequestration, dissolution, annulment, foreclosure, or preservation of assets must distribute the residue of the moneys in their hands among all those who have exhibited their claims as creditors and whose debts have been ascertained, as follows: (1) All debts due by the corporation to the United States and all debts entitled to a preference under the laws of the United States; (2) all debts that may be owing by the corporation as guardian, executor, administrator or trustee—and if there be not sufficient to pay all debts of the character above specified, then a distribution must be made among them, in proportion to their amounts respectively; (3) judgments actually obtained against such corporation, to the extent of the value of the real estate on which they are respectively liens; (4) all other creditors of such corporation, in proportion to their respective demands, without giving any preference to debts due on specialties.<sup>7</sup> Upon the appointment of a receiver of a corporation organized

<sup>4</sup>People v. Metropolitan Surety Co., 205 N. Y. 135, 98 N. E. 412 (1912).

<sup>5</sup>People v. American Loan & Trust Co., 172 N. Y. 371, 65 N. E. 200 (1902); Gen. Bank. L. § 130; L. 1872, c. 868; L. 1884, c. 260, § 3.

<sup>6</sup>People v. Merchants' Trust Co., 187 N. Y. 293, 79 N. E. 1004 (1907).

<sup>7</sup>Gen. Corp. L. § 261 (L. 1909, c. 28).

under the laws of and doing business in New York State (other than a moneyed corporation), the wages of the employees of such corporation are preferred to every other debt or claim.<sup>8</sup> The term "employee," when used in the Labor law preferring the claims of the employees of corporations when receivers are appointed for the latter, means a mechanic, workingman, or laborer who works for another for hire.<sup>9</sup> No corporation which has refused to pay any of its notes or other obligations when due in lawful money of the United States nor any of its officers or directors must transfer any of its property to any of its officers, directors or stockholders directly or indirectly for the payment of any debt or upon any other consideration than the full value of the property paid in cash; and no conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent with the intent of giving a preference to any particular creditor over other creditors of the corporation is valid, except that laborers' wages for services are preferred claims and are entitled to payment before any other creditors out of the corporation assets in excess of valid prior liens or encumbrances; and every person receiving by means of any such prohibited act or deed any property of the corporation is bound to account therefor to its creditors or stockholders or other trustees; and no stockholder can make any assignment or transfer of his stock to any person in contemplation of its insolvency; and every transfer or assignment or other act done in violation of the foregoing prohibitions is void; and every director or officer of a corporation who violates or is concerned in violating any of such prohibitions is personally liable to the creditors and stockholders of their corporation to the full extent of any loss such creditors or stockholders may respectively sustain by such violation.<sup>10</sup>

**§ 553. Id.: In General.**—A preference given by statute on the appointment of a receiver of a corporation to payment of the wages of its employees, operatives and laborers is not assignable before the appointment of the receiver is made.<sup>11</sup>

<sup>8</sup> Labor L. § 9 (L. 1909, c. 36).

<sup>9</sup> Labor L. § 2 (L. 1909, c. 36).

<sup>10</sup> St. Corp. L. § 66 (L. 1909, c. 61).

Generally on the question of preferences among creditors given

by insolvent corporation, see note in 22 L.R.A. 802.

<sup>11</sup> *People v. Remington*, 45 Hun, 329; *aff'd* 109 N. Y. 631, 16 N. E. 680; L. 1885, c. 376.

When a corporation gave for sums due its laborers orders on itself payable to the order of merchants which were delivered by the laborers to the payees for goods purchased, this amounted to a payment of the laborers' wages, so that on appointment of a receiver for the corporation there is no preference of such wages to be taken advantage of by anyone.<sup>12</sup>

The distribution of the assets of an insolvent corporation involves the payment of taxes before creditors.<sup>13</sup> When a receiver appointed in proceedings for the voluntary dissolution of a corporation is directed by the court to take possession of two classes of its property, first, that on which the sheriff had levied under attachment by some of its creditors, and, second, that on which no attachment or levy had been made, on sale of both classes by the receiver, he must pay from the proceeds, first the administration expenses and his fees, second the claims of the attaching creditors, third, taxes due municipal and state authorities, and fourth, the general creditors.<sup>14</sup> Claimants against a corporation, who had recovered judgment against it after the appointment of a receiver for it in an action by a stockholder because of its insolvency, but where action was begun before the stockholder's proceeding was instituted, cannot have a preference on the grounds that at the time of their recovery the company owned realty on which their judgment was a lien and that the appointment of the receiver was void, if the company was represented on the appointment, as, in whatever action he was designated, the receiver was the court in holding the property, and it will be considered held for the benefit of all creditors.<sup>15</sup> "An officer of a corporation, with knowledge of its insolvency, cannot by a bookkeeping entry appropriate property of the corporation to pay a debt due to him."<sup>16</sup> A lawyer whose claim against a temporary receiver of a corporation for services rendered him is by agreement between them and its directors made a lien upon its then assets which were about to be turned over to it and the receiver discharged, may recover on the basis of an equitable lien, in preference to

<sup>12</sup> *People v. Remington*, 45 Hun, 329; *aff'd* 109 N. Y. 631, 16 N. E. 680; L. 1885, c. 376.

<sup>13</sup> *In re Receivership of Columbian Ins. Co.*, 42 N. Y. (3 Keyes) 123 (1866).

<sup>14</sup> *Matter of Atlas Iron Construction Co.*, 19 A. D. 415, 46 N. Y. Supp. 467 (1897).

<sup>15</sup> *Attorney-General v. Continental Life Insurance Co.*, 28 Hun, 360 (1882); *aff'd* 93 N. Y. 630.

<sup>16</sup> *Rock Island Butter Co. v. Freeman*, 83 Misc. 7, 144 N. Y. Supp. 317 (1913); *St. Corp. L.* § 66.

creditors when the corporation later goes permanently into another receiver's hands.<sup>17</sup> One holding notes of a corporation's receiver issued by the latter without authority of court has no valid claim to share with the holders of notes issued by the receiver by authority of the court.<sup>18</sup> A subtenant of an insolvent corporate lessee for which a receiver has been appointed cannot set off against a claim by the receiver for rent which accrued during a period of tenancy mainly at the receiver's hands a debt of the insolvent corporation.<sup>19</sup> A fund, collected by an ancillary receiver appointed in this State for an insolvent foreign corporation, from a special deposit in this State's Banking Department made as a statutory condition of the corporation's right to transact business in New York, the statute providing for the distribution of the deposit among New York creditors on the appointment of a receiver in this State, is not a part of the corporation's general assets distributable to all creditors but a specific deposit reserved to New York creditors.<sup>20</sup>

**§ 554. Id.: Who Are Laborers, and Employees.**—Upon the appointment of a receiver of a corporation (other than a moneyed corporation) organized under the laws of and doing business in New York State, the wages of its employees—defined by statute to be mechanics, workmen or laborers who work for another for hire—are preferred to every other debt or claim.<sup>1</sup> When a corporation refuses to pay its notes or other obligations when due or is insolvent or its insolvency is imminent, however invalid other preferences may be, yet laborers' wages for services are preferred claims and are entitled to payment before any other creditors out of the corporation assets in excess of valid prior liens or incumbrances.<sup>2</sup> Wages earned by laborers prior to the passage of an act preferring them in payment on the appointment of a receiver for their corporate employer are not entitled to a preference.<sup>3</sup> The important word in the statute preferring to other claims against a corporation for which a receiver has been appointed the wages of the employees, operatives and laborers thereof is the word “wages,” which “is applied in common

<sup>17</sup> *Whitehead v. O'Sullivan*, 12 Misc. 577, 33 N. Y. Supp. 1098 (1895).

<sup>18</sup> *Wesson v. Chapman*, 77 Hun, 144, 28 N. Y. Supp. 431 (1894).

<sup>19</sup> *Matter of Arkell Publishing Co.*, 29 Misc. 145, 60 N. Y. Supp. 832 (1899).

<sup>20</sup> *People v. Granite State Provi-*

*dent Assn.*, 161 N. Y. 492, 55 N. E. 1053 (1900).

<sup>1</sup> Labor L. §§ 9 and 2 (L. 1909, c. 36).

<sup>2</sup> St. Corp. L. § 66 (L. 1909, c. 61).

<sup>3</sup> *People v. Remington*, 45 Hun, 329; *aff'd* 109 N. Y. 631, 16 N. E. 680; L. 1885, c. 376.

parlance specifically to the payment made for manual labor, or other labor of menial or mechanical kind, as distinguished from salary and from fee, which denotes compensation paid to professional men," and the word "employees" must be limited by the more specific words "operatives" and "laborers," so that there shall be no preference given to the clerical force engaged in transacting the corporation's business, or to the superintendent, foremen or officers of the corporation who are compensated by a fixed yearly salary."<sup>4</sup> "The case of bookkeepers or persons employed to make sales of merchandise, or of property manufactured by the corporation, are . . . 'employees,' within the meaning of the act and their compensation earned is 'wages,' whether such persons are employed by the day, or month, or year, and whether the compensation is denominated 'salary' or 'wages' in the contract or employment."<sup>5</sup> "The term 'employee' is the correlative of 'employer' and neither term has either technically or in general use a restricted meaning by which any particular employment or service is indicated. The terms are as applicable to attorney and client, physician and patient, as to master and servant, a farmer and day laborer or a master mechanic and his workman. To employ is to engage or use another as an agent or substitute in transacting business, or the performance of some service; it may be skilled labor or the service of the scientist or professional man as well as servile or unskilled manual labor."<sup>6</sup> The word "employee" is of "more comprehensive signification than laborers and operatives;" and if not used in a statute to be strictly construed should be given a liberal interpretation.<sup>7</sup> A bookkeeper is an "employee" to be paid his wages as a preferred claim by a receiver of an insolvent corporation.<sup>8</sup>

<sup>4</sup> Matter of Stryker, 158 N. Y. 526, 53 N. E. 525 (1899); L. 1885, c. 376.

<sup>5</sup> Palmer v. Van Santvoord, 153 N. Y. 612, 38 L.R.A. 402, 47 N. E. 915 (1897); L. 1885, c. 376. The employment was to set up, take down and repair machines; to sell them; and to obey orders.

<sup>6</sup> Gurney v. Atlantic & Great Western Ry. Co., 58 N. Y. 358 (1874). The question arose on the claim of an attorney to be paid by a receiver directed to pay debts "owing to the laborers and em-

ployees" of a corporation "for labor and services actually done in connection with that company's railways."

<sup>7</sup> Gurney v. Atlantic & Great Western Ry. Co., 58 N. Y. 358 (1874). See note *supra*.

<sup>8</sup> People v. Beveridge Brewing Co., 91 Hun, 313, 36 N. Y. Supp. 525 (1895); L. 1885, c. 376: "Where a receiver of a corporation . . . shall be appointed, the wages of the employees, operatives and laborers thereof shall be preferred to every other debt or claim against such

A bookkeeper is not a mechanic, workingman or laborer so as to be entitled to a preference in payment of wages on the appointment of a receiver for a corporation by which he is employed.<sup>9</sup> A clerk, a draftsman, a superintendent and a foreman receiving monthly payment for services, though doing manual labor incidentally, if not hired for that are not within the statute preferring the wages of employees, operators and laborers of a corporation of which a receiver has been appointed over others of its creditors.<sup>10</sup> One employed by a corporation to assist the general manager in keeping its books and to clean its office and showroom and assist in putting together, taking apart and shipping wire wicket-fence and weaving machines at forty dollars a month payable in four instalments is entitled to preference in payment by the receiver appointed of the corporation, under a statute preferring the wages of employees, operatives and laborers.<sup>11</sup> One employed at a weekly wage of forty dollars as manager of a corporation, with absolute control over its affairs, doing nothing save to exercise general supervision, and having under him a foreman in the manufacturing department who receives orders from him only, is not an "employee" whose claim for earnings is to be preferred, under the statute, by a receiver appointed for the corporation.<sup>12</sup> An assistant, at a salary of \$700 a month, \$100 in cash and \$600 in securities, to a superintendent in two foreign countries of a domestic corporation, is not a servant or laborer though he occasionally performs manual labor.<sup>13</sup> A superintendent or an attorney is not an employee, operative or laborer of a corporation entitled to preference in payment on appointment of a receiver for it.<sup>14</sup> Sums due attorneys of a corporation for

corporation, and shall be paid by the receiver from the moneys of such corporation which shall first come to his hands."

<sup>9</sup> *Cochran v. A. S. Baker Co.*, 30 Misc. 48, 61 N. Y. Supp. 724 (1900); L. 1897, c. 415, §§ 8, 2.

<sup>10</sup> *Matter of Stryker*, 73 Hun, 327, 26 N. Y. Supp. 209; aff'd 158 N. Y. 526, 53 N. E. 525; L. 1885, c. 376.

<sup>11</sup> *Brown v. A. B. C. Fence Co.*, 52 Hun, 151, 5 N. Y. Supp. 95 (1889); L. 1885, c. 376.

<sup>12</sup> *Matter of American Lace Works*, 30 A. D. 321, 51 N. Y. Supp. 818 (1898); L. 1885, c. 376. "While it is extremely difficult to lay down any exact rule stating precisely

what sort of service it comprehends, it may be said generally that the term 'employees' includes persons employed by a corporation in comparatively subordinate positions who cannot correctly be described either as operatives or laborers; such for example as bookkeepers, clerks, salesmen and agents engaged at a regular compensation in soliciting orders for goods."

<sup>13</sup> *Dean v. DeWolf*, 16 Hun, 186 (1878); aff'd 82 N. Y. 626; L. 1848, c. 40, § 18.

<sup>14</sup> *People v. Remington*, 45 Hun, 329; aff'd 109 N. Y. 631, 16 N. E. 680; L. 1885, c. 376.

professional services rendered upon occasional retainers are not "wages," which are preferred in payment when a receiver is appointed for it.<sup>15</sup> An independent contractor for a corporation is not its employee, operative or laborer so as to have his compensation preferred as a wage on its insolvency.<sup>16</sup> A person to whom a corporation furnishes stock from which, rooms in which and power and machinery with which to manufacture parts of machines and implements, and to whom it pays a fixed price for the articles manufactured, and who employs, discharges and pays his own employees, is not an employee, operative or laborer entitled to preference in payment of the amount due him, as wages, when a receiver for the corporation is appointed.<sup>17</sup> One employed to sell goods abroad for a corporation at an annual salary, plus a commission and traveling expenses is not entitled to preference in payment on the appointment of a receiver for his corporation on the ground that he is an employee, laborer or operative.<sup>18</sup> A traveling salesman is an "employee" of a corporation whose agreed compensation is to be preferred on its insolvency under a statute preferring "the wages of . . . employees, operatives and laborers thereof."<sup>19</sup> One who receives a stated weekly salary, plus a percentage of all sales made by him, from a corporate employer which commands his entire time and controls him at all times, is an

<sup>15</sup> *People v. Remington*, 45 Hun, 329; aff'd 109 N. Y. 631, 16 N. E. 680; L. 1885, c. 376.

<sup>16</sup> *Matter of Charron v. Hale*, 25 Misc. 34, 54 N. Y. Supp. 411 (1898); L. 1885, c. 376, § 1.

<sup>17</sup> *People v. Remington*, 45 Hun, 329; aff'd 109 N. Y. 631, 16 N. E. 680; L. 1885, c. 376. *Hopkins v. Cromwell*, 89 A. D. 481, 85 N. Y. Supp. 839 (1903), on opinion below: One contracting with farmers in a corporation's name for pickles, which he himself sorted, weighed, brined, barrelled and shipped to his corporation, all for pay, is entitled to preference under the statute providing that "in all distribution of assets, under all assignments made in pursuance of this act, the wages or salaries actually owing to the employees of the assignor . . . at the time of the execution of the assignment for services rendered

tion of such assignment, shall be preferred . . ." (L. 1897, c. 624, § 29).

<sup>18</sup> *People v. Remington*, 45 Hun, 329; aff'd 109 N. Y. 631, 16 N. E. 680; L. 1885, c. 376.

<sup>19</sup> *Matter of Fitzgerald*, 21 Misc. 226, 45 N. Y. Supp. 630 (1896); L. 1885, c. 376. "'Employee' is defined by Webster as follows: 'One who is employed.' Worcester defines the same word, 'One who is employed; an official; a clerk; a servant.' In the Standard Dictionary . . . the word is defined: 'A person who is employed; one who works for wages or a salary; one who is engaged in the service of, or is employed by another.' . . . this act . . . must be held to have intended to embrace all classes of employees who are conceded to have rendered services to the corporation prior to

“employee” receiving “wages,” which he is entitled to have paid by a receiver of his employer in preference to other of its debts.<sup>20</sup>

§ 555. **Id.: Tenure of Office, In General.**—The appointment of a receiver for a corporation will not be vacated because of error in the spelling of its name in legal papers used in proceedings looking to such appointment if the corporation served with process was the one intended, knew this and took steps for its protection for five years; and the court will direct the necessary change in the spelling of the name in all the papers of the legal proceedings.<sup>1</sup> A creditor who has obtained an interlocutory judgment on his claim against the receiver of his insolvent corporate debtor and an order of reference to determine the amount of funds held by the receiver from which payment of his claim might be made is not affected by the discharge of the receiver without notice to him pending appeals from such judgment resulting first in a reversal and then in an affirmation thereof.<sup>2</sup> A creditor of an insolvent corporation for which a receiver has been appointed cannot litigate his claim with the receiver after the latter's discharge by the court, even though the discharge took place after the initiation of the creditor's proceedings to collect his claim, and without notice to him: “After such discharge the sole right of the creditor was to apply to the court to vacate its order so that its rights as a creditor might be protected.”<sup>3</sup> A receivership in an action by a stockholder against a corporation and some of its directors for an accounting for their mismanagement and waste of its assets cannot be continued after such directors have been supplanted by others at the corporation's own initiative, even though it is desired that the receivership continue so as to give the corporation time to raise money to pay its debts.<sup>4</sup>

<sup>20</sup> *Matter of Luxton & Black Co.*, 35 A. D. 243, 54 N. Y. Supp. 778 (1898); L. 1885, c. 376.

As to who are laborers, employees, or servants; within the meaning of the statute giving them preferences, see notes in 18 L.R.A. 305 and 30 L.R.A. (N.S.) 85.

<sup>1</sup> *Fisher v. Independent Brothers of Nieshweiser*, 84 Misc. 382, 147 N. Y. Supp. 390 (1904). Municipal Court proceedings, and City Court “Nieshwis” instead of “Nieshweiser.” Mun. Ct. Act, § 177.

<sup>2</sup> *Woodruff v. Jewett*, 115 N. Y. 267, 22 N. E. 156 (1889). He is a judgment creditor not represented by proxy by the Attorney-General as was the unsecured creditor in *N. Y. & W. U. T. Co. v. Jewett*, 115 N. Y. 166.

<sup>3</sup> *New York & Western Union Telegraph Co. v. Jewett*, 115 N. Y. 166, 21 N. E. 1036 (1889).

<sup>4</sup> *Duncan v. Treadwell Co.*, 82 Hun, 376, 31 N. Y. Supp. 340 (1894).

**§ 556. Id.: Renouncing Trust.**—Any receiver who is desirous of renouncing the trust vested in him may apply to the court from whom his appointment was received for an order to all persons interested to show cause why such renunciation should not be accepted; and such application must be accompanied by an account of the receiver's transactions, verified by his affidavit.<sup>5</sup> The account of the receiver's transactions must (1) be full, true and just; (2) of all his transactions; (3) particularly state (a) the property, moneys and effects received by him, (b) all payments made, whether to creditors or otherwise, (c) the remaining effects and property of the corporation in respect of which he was appointed receiver, within his knowledge, and (d) the situation of the same. The affidavit of the receiver annexed to his account must (1) be to the effect that such account is in all respects just and true, according to the best of his knowledge and belief; (2) be subscribed; (3) be sworn to before the court to whom the application is made; and (4) be certified by the clerk of the court.<sup>6</sup> The court must thereupon grant an order directing notice to be given to all persons interested in the property of the corporation in respect to which such receiver was appointed to show cause on a day or at a term and at a place therein to be specified why he should not be permitted to renounce his appointment.<sup>7</sup> Such notice must be published once in each week for six weeks successively in such newspapers as the court shall direct.<sup>8</sup> The court must grant an order allowing the receiver to renounce his appointment if it shall appear (1) that the proceedings of such receiver in relation to his trust have been fair and honest, and particularly in the collection of the property and debts vested in him; (2) that the court is satisfied for any reason it is inexpedient for such receiver to continue in the execution of the duties of his appointment; (3) that the court is satisfied such duties can be executed by another receiver without injury to the property of the corporation or to the creditors; and (4) that no good cause appears to the contrary.<sup>9</sup> Upon such order being granted the receiver must be discharged from the trust reposed in him and his power and authority must thereupon cease; but he must, notwithstanding, remain subject to the

<sup>5</sup> Gen. Corp. L. § 275 (L. 1909, c. 25).

<sup>6</sup> Gen. Corp. L. § 275 (L. 1909, c. 28).

<sup>7</sup> Gen. Corp. L. § 275 (L. 1909, c. 28).

<sup>8</sup> Gen. Corp. L. § 275 (L. 1909, c. 28).

<sup>9</sup> Gen. Corp. L. § 275 (L. 1909, c. 28).

granting of such order, in the management of his trust.<sup>10</sup> The expense of all proceedings in effecting such renunciation must be paid by the receiver making the application.<sup>11</sup>

**§ 557. Id.: Removal.**—The receivers for sequestration, dissolution, annulment, foreclosure or preservation of assets may be removed by the court.<sup>12</sup> A court appointing receivers may remove one of them summarily, though such a practice is not to be commended.<sup>13</sup> Removal of a permanent receiver for sequestration or dissolution for failure to pay on demand a distributive share shown by his statutory, quarterly statement to be due or for neglect or refusal to allow inspection of such statement or the corporate books and papers in his hands does not vitiate or annul any legal proceedings had by such receiver, but such proceedings must be continued by his successor as if no removal had been had.<sup>14</sup> The Attorney-General may, at any time he deems that the interests of the stockholders, creditors, policy-holders, depositors or other beneficiaries interested in the proper and speedy distribution of the assets of any insolvent corporation will be subserved thereby, make a motion in the Supreme Court at a special term thereof, in any judicial district, for an order removing the receiver of any insolvent corporation and appointing a receiver thereof in his stead; or such other and additional order or orders as to him may seem proper to facilitate the closing up of the affairs of such receivership.<sup>15</sup> Any appeal from any order made upon any motion under such statute must be made to the Appellate Division of the department in which such motion is made.<sup>16</sup> An application by the Attorney-General to remove a receiver of a corporation and appoint another will not be granted if the corporation be not insolvent and required by law to file reports of his proceedings, or if notice of the application be given not only to the removed receiver but to all parties who appeared in the action in which he was appointed.<sup>17</sup> The court will not at the motion of the Attorney-General oust from the position of receiver of a

<sup>10</sup> Gen. Corp. L. § 275 (L. 1909, c. 28).

<sup>11</sup> Gen. Corp. L. § 275 (L. 1909, c. 28).

<sup>12</sup> Gen. Corp. L. § 273 (L. 1909, c. 28).

<sup>13</sup> *Horton v. McNally Co.*, 155 A. D. 322, 140 N. Y. Supp. 357 (1913); Gen. Corp. L. § 273.

<sup>14</sup> Gen. Corp. L. § 107 (L. 1909, c. 28).

<sup>15</sup> Gen. Corp. L. § 311 (L. 1909, c. 28).

<sup>16</sup> Gen. Corp. L. § 311 (L. 1909, c. 28).

<sup>17</sup> *Attrill v. Rockaway Beach Improvement Co.*, 25 Hun, 509 (1881); L. 1880, c. 537, as amend'd L. 1881, c. 639.

corporation one whom it has appointed with the approval of about everyone interested in the corporation save a bare majority of its bondholders when it appears that the receiver has increased receipts since appointment and has sued such bare majority to invalidate their holdings on the ground that they belong to the company.<sup>18</sup> A receiver appointed of a corporation on application of its judgment creditor whose execution is unsatisfied will not be removed because the answer to the application charged the judgment was collusively recovered for goods sold the president of the corporation and not the corporation itself, if the corporation refused the court's offer to apply to have the judgment set aside and leave granted it to defend.<sup>19</sup> One appointed receiver of a corporation should not be removed simply because he had been one of its directors and its treasurer; and only on a direct application on which he has reasonable opportunity to present his side of the case.<sup>20</sup>

§ 558. **Id.: Filling Vacancy.**—Any vacancy created by removal, death or otherwise may be supplied by the court.<sup>1</sup>

§ 559. **Id.: Survivor and Successor.**—The survivor or survivors of any receivers for sequestration or dissolution have all the powers and rights given to receivers, and all property in the hands of any receiver at the time of his death, removal or incapacity, must be delivered to the remaining receiver or receivers, if there be any; or to the successor of the one so dying, removed or incapacitated; who may demand and sue for the same.<sup>2</sup> On an order being made, in an accounting before a referee by a predecessor receiver of a corporation for the benefit of a successor receiver, for production by the predecessor of the corporate books which had come to his hands as receiver, it is not necessary that notice of the intended application for the order be given the Attorney-General, but it is sufficient if notice of the motion with a copy of the proposed order is served on him; and it is proper to permit the corporate creditors to be present at the accounting.<sup>3</sup> A successor receiver's executors may be brought into an accounting pending on his and his co-receiver's petition

<sup>18</sup> *Townsend v. Oneonta, Coopers-town and Richfield Springs Ry. Co.*, 41 Misc. 298, 84 N. Y. Supp. 119 (1903).

<sup>19</sup> *Loder v. New York, Utica & Ogdensburgh R. R. Co.*, 4 Hun, 22 (1875).

<sup>20</sup> *Townsend v. Oneonta, Coopers-town & Richfield Springs Ry. Co.*,

86 A. D. 604, 83 N. Y. Supp. 1034 (1903).

<sup>1</sup> Gen. Corp. L. § 274 (L. 1909, c. 28).

<sup>2</sup> Gen. Corp. L. § 237 (L. 1909, c. 28).

<sup>3</sup> *Greason v. Goodwillie-Wyman Co.*, 38 Hun, 138 (1885).

by order reviving and continuing the accounting against them; and no new petition is necessary.<sup>4</sup>

**§ 560. Id.: Court Proceedings, In General.**—An action for the determination of a claim to real property may be maintained as prescribed by statute by or against the receiver or other successor to any corporation.<sup>5</sup> All actions or other legal proceedings, and appeals therefrom or therein, brought by or against a receiver of any insolvent corporation referred to in the statute have a preference upon the calendars of all courts next in order to actions or proceedings brought by the People of the State of New York.<sup>6</sup> A receiver of a corporation who has been directed by the court to make a final accounting as such receiver by a certain date should be granted a preference in the trial of an action being brought by him if its final disposition before such accounting is necessary, even though if the plaintiff were a private individual the preference would be denied him because of laches in failing promptly to commence the action and notice the case for trial.<sup>7</sup> A receiver of a corporation appointed by the court in proceedings to dissolve it "represents the corporation, its creditors, and its stockholders (*citation*), and, hence, the receiver's appearance in all matters relating to the liquidation of the corporate affairs must be deemed an appearance for all concerned, except when there is a conflict between the receiver and those interested, in which event, of course, they appear for themselves."<sup>8</sup> At common law, a judgment obtained against a corporation after its dissolution, though begun before such dissolution, is not binding on a receiver appointed after the action was begun.<sup>9</sup> A receiver of a corporation appointed by order which vested in him the corporate assets may move to vacate a judgment entered against it in an action begun by service of process on one who was not its officer when served.<sup>10</sup> A receiver who is also party as trustee to the same proceeding in which he acts as receiver cannot appeal as receiver from an order made while he was

<sup>4</sup> *Matter of Columbian Insurance Co.*, 30 Hun, 342 (1883); *aff'd* 94 N. Y. 636; C. C. P. §§ 414, 452.

<sup>5</sup> C. C. P. § 1650.

<sup>6</sup> Gen. Corp. L. § 316 (L. 1909, c. 28). The statute referred to is the General Corporation Law in its entirety.

<sup>7</sup> *Schlesinger v. Gilhooly*, 111 A. D. 158, 97 N. Y. Supp. 606 (1906); C. C. P. § 791, subd. 5.

<sup>8</sup> *People v. American Loan & Trust Co.*, 177 N. Y. 467, 69 N. E. 1105 (1904); C. C. P. § 1793, now Gen. Corp. L. § 112.

<sup>9</sup> *Matter of Norwood*, 32 Hun, 196 (1884).

<sup>10</sup> *Yorkville Bank v. Zeltner Brewing Co.*, 80 A. D. 578, 80 N. Y. Supp. 839 (1903); *app. dism'd* 178 N. Y. 572, 70 N. E. 1111.

before the court as trustee, on which he was heard and with which he was content.<sup>11</sup> "As a general rule a receiver may not appeal from an order which discharges him and settles the rights of the parties to the fund in his hands."<sup>12</sup> A warrant of attachment obtained by a creditor of a corporation will be vacated at the instance of a receiver thereafter appointed for it, if, upon discovery of its insolvent condition, the corporation called a meeting of creditors at which the attaching creditor was present, and consented to the appointment of the receiver only after its request for an extension of time had been disapproved by the creditors and they had asked for a receiver.<sup>13</sup> A receiver appointed for an insolvent corporation cannot move to dissolve an attachment against it without first applying to the court to be made a party to the suit and asking an order that it be continued in his name.<sup>14</sup> Under a statute giving a receiver of an insolvent corporation power, for the benefit of creditors, to resist all acts done in fraud of creditors, he may sue to recover a distribution of capital made by it while insolvent among its stockholders and called a dividend, without averring any intent in the directors in making distribution to defraud the creditors.<sup>15</sup> No appeal to the Court of Appeals can be had from an order of the Appellate Division affirming an order of the Special Term directing a receiver appointed for an insolvent corporation in an action by the Attorney-General to dissolve it to pay a creditor's claim.<sup>16</sup> A temporary receiver appointed in an action by the People to dissolve a corporation is not a necessary party to an action to foreclose a mortgage given by it.<sup>17</sup> Temporary receivers of a corporation appointed in an application for its voluntary dissolution are proper, if not necessary parties to a representative action later brought by one of the corporation's creditors against the corporation and its directors to hold the latter to a statutory liability for consenting to an

<sup>11</sup> *Witherbee v. Witherbee*, 55 A. D. 151, 66 N. Y. Supp. 1039 (1900).

<sup>12</sup> *Witherbee v. Witherbee*, 55 A. D. 151, 66 N. Y. Supp. 1039 (1900).

<sup>13</sup> *Thompson v. Queen City Cycle Co.*, 169 A. D. 522, 44 N. Y. Supp. 1049 (1897); C. C. P. § 636, subd. 2.

<sup>14</sup> *Tracy v. First Nat. B'k of Selma*, 37 N. Y. 523 (1868); Code, §§ 121, 122.

<sup>15</sup> *Osgood v. Laytin*, 42 N. Y. (3 Keyes) 521 (1867); L. 1858, p. 506, § 1.

<sup>16</sup> *People v. American Loan & Trust Co.*, 150 N. Y. 117, 44 N. E. 949 (1896); N. Y. Const. art. VI, § 9; C. C. P. § 190.

<sup>17</sup> *Herring v. N. Y., Lake Erie & Western R. R. Co.*, 105 N. Y. 340, 12 N. E. 763 (1887). Nor the People either.

indebtedness by it, not secured by mortgage, in excess of its capital stock.<sup>18</sup>

§ 561. **Id.: By.**—Aside from statutory authority, “ receivers, by virtue of their general powers, have authority to sue for all moneys due to the company, and for all property improperly disposed of in violation of the rights of either creditors or stockholders, for the purpose of paying the debts and dividing the surplus, if any, among the stockholders.”<sup>19</sup> A receiver appointed of a corporation in an action for its dissolution may, pursuant to statutory authority, continue an action begun, before the action for dissolution, in favor of the corporation.<sup>20</sup> A receiver appointed of a corporation in a proceeding to sequester its property to satisfy a creditor is not entitled as of right to be substituted as plaintiff in an action by it, but only in the court’s discretion.<sup>1</sup> On appointment of an ancillary receiver in this State of a corporation which had instituted actions to recover unpaid calls on its outstanding stock and verification by him as such of the amended complaints the actions may be continued in the name of the corporation.<sup>2</sup> A receiver appointed for the winding up of a dissolved corporation is a trustee of an express trust in so far that the statute of limitations does not run in favor of a trustee against claims not barred at the time of his appointment so long as the trust is open and continuing and has not been repudiated or denied.<sup>3</sup> A receiver of a corporation dissolved because it had become a party to an illegal combination cannot sue to recover anything arising from the illegal agreement by which the combination was effectuated.<sup>4</sup> A receiver of a corporation cannot enforce an agreement made by its president with one of its creditors not to receive salary due him during the period of its liquidation.<sup>5</sup> A receiver appointed in this State for a corporation cannot enjoin the corporation’s mortgagee from foreclosing, in a

<sup>18</sup> *Whitney v. Wilcox*, 58 A. D. 57, 68 N. Y. Supp. 667 (1901); old St. Corp. L. § 24 (L. 1892, c. 688).

<sup>19</sup> *Osgood v. Laytin*, 48 Barb. 463 (1867); aff’d 3 Keyes, 521.

<sup>20</sup> *Platt v. Ashman*, 32 Hun, 230 (1884). The statute was 2 R. S. (6th ed.) 392, § 11: “ The dissolution of a corporation . . . shall not abate any suit or proceedings in favor of such corporations . . . ; but all such . . . may be continued by the receiver . . . ”

<sup>1</sup> *Shaped Seamless Stocking Co. v.*

*Snow, Church & Co.*, 20 Misc. 319, 45 N. Y. Supp. 849 (1897); C. C. P. § 756.

<sup>2</sup> *Sigua Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194 (1902); C. C. P. §§ 755, 756.

<sup>3</sup> *Ludington v. Thompson*, 153 N. Y. 499, 47 N. E. 903 (1897).

<sup>4</sup> *Gray v. Oxnard Brothers’ Co.*, 59 Hun, 387, 13 N. Y. Supp. 86 (1891).

<sup>5</sup> *Snow v. Russell Coe Fertilizer Co.*, 58 Hun, 134, 11 N. Y. Supp. 492 (1890).

foreign State, the mortgaged property, in an action to which he is a party and which seeks solely to settle whether the mortgage or certificates issued by the receiver is entitled to priority in payment.<sup>6</sup> A receiver appointed in a proceeding which seeks the appropriation of a debtor-corporation's property for the payment of all of its creditors may institute an action for the recovery of property of the corporation affected by a chattel mortgage which is void for lack of re-filing under the statute.<sup>7</sup> A receiver appointed of a corporation in an action for the sequestration of its property may sue in equity to determine what bonds issued by it are secured by a certain mortgage by it of property unsold.<sup>8</sup> A permanent receiver appointed in proceedings to sequester a corporation's property as distinguished from a receiver in supplementary proceedings, may bring an action at law for conversion, as well as a suit in equity for an accounting, against one who had obtained property of the corporation by bill of sale while it was insolvent.<sup>9</sup> A temporary receiver may maintain an action to recover from a defendant an amount secured through a fraudulent preference by the insolvent corporation, and need not join the insolvent corporation as a party defendant.<sup>10</sup> A receiver of a corporation need not, as a condition precedent to an action for recovery of property delivered by it with intent to prefer while its insolvency was imminent, have published the statutory notice requiring all persons having property of the corporation in their possession to deliver it to him.<sup>11</sup> A receiver of a corporation not insolvent when certain payments from its funds were made *ultra vires* for the individual benefit of its shareholders cannot follow the payments as a trust fund if all the stockholders assented to them.<sup>12</sup> A receiver of a corporation may properly bring, in his name as the representative of the corporation and its creditors, an action to set aside and vacate a judgment against the company upon the ground that it was without consideration and obtained by collusion with the officers of the

<sup>6</sup> *Walton v. The Grand Belt Copper Co.*, 56 Hun, 211, 9 N. Y. Supp. 375 (1890).

<sup>7</sup> *Farmers' Loan & Trust Co. v. Baker*, 20 Misc. 387, 46 N. Y. Supp. 266 (1897).

<sup>8</sup> *Hubbell v. Syracuse Iron Works*, 42 Hun, 182 (1886).

<sup>9</sup> *McQueen v. New*, 45 A. D. 579, 61 N. Y. Supp. 464 (1899).

<sup>10</sup> *Nealis v. American Tube & Iron Co.*, 150 N. Y. 42, 44 N. E.

944 (1896); C. C. P. § 1788, now Gen. Corp. L. § 104.

<sup>11</sup> *Stiefel v. New York Novelty Co.*, 25 Misc. 221, 55 N. Y. Supp. 90 (1898); old St. Corp. L. § 48 (L. 1892, c. 688); 2 R. S. 469, §§ 70, 72. But see *Matter of Stonebridge*, 57 Hun, 441, 10 N. Y. Supp. 727.

<sup>12</sup> *Little v. Garabrant*, 90 Hun, 404, 35 N. Y. Supp. 689 (1895); *aff'd* 153 N. Y. 661, 48 N. E. 1105.

company in fraud of the rights of creditors.<sup>13</sup> A receiver, as representative of a corporation, may sue the directors of the corporation in the form of an action at law for damages resulting from their misconduct or in an equitable action to compel an accounting as to the property wasted and lost.<sup>14</sup> Notice of a warrant issued at the instance of a receiver of a corporation for the examination of one supposed to have possession of property of the corporation must be given the Attorney-General.<sup>15</sup> Stockholders have no absolute right to be made parties to an action brought by a receiver of a corporation to recover assets belonging to it or which vest in a receiver upon his appointment.<sup>16</sup> A claim of one sued by a receiver of a corporation against such corporation will not be allowed as an offset or counterclaim in the suit unless it accrued prior to the corporation's insolvency and the appointment of the receiver.<sup>17</sup> In an action by corporate receivers seeking to recover for acts which were frauds upon the corporate creditors claims by the defendants growing out of transactions entirely independent of such acts and between different parties (*e. g.* the stockholders and defendants) cannot be set off.<sup>18</sup>

**§ 562. Id.: Against.**—The courts cannot against the will of the plaintiff strike from the record of and exclude from an action the name of one who is a necessary defendant, such as a receiver provisionally discharged who has by court order turned over to a co-defendant of which it was receiver all such co-defendant's property.<sup>19</sup> The commencement of an action against a receiver without leave does not present a jurisdictional question, as the court acquires jurisdiction of the receiver by service of the summons, and the remedy is either a stay of proceedings on the part of the plaintiff or to punish him for contempt, or both, because he did not get leave of court to sue the receiver.<sup>20</sup> A receiver appointed of a corpo-

<sup>13</sup> *Whittlesey v. Delaney*, 73 N. Y. 571 (1878).

<sup>14</sup> *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837 (1897).

<sup>15</sup> *Matter of Stonebridge*, 57 Hun, 441, 10 N. Y. Supp. 727 (1890); 4 R. S. (8th ed.) 2524-2534, 2682, § 72; L. 1883, c. 378; 2 R. S. 469, § 70.

<sup>16</sup> *Kimball v. Ives*, 30 Hun, 568 (1883); C. C. P. § 452.

<sup>17</sup> *Hall v. Holland House Co.*, 9 Misc. 245, 30 N. Y. Supp. 263 (1894).

<sup>18</sup> *Osgood v. Ogden*, 43 N. Y. (4 Keyes), 70 (1868).

<sup>19</sup> *Barwin Realty Co. v. Batterman Co.*, 169 A. D. 415, 155 N. Y. Supp. 178 (1915); C. C. P. §§ 756, 1502. The complaint demanded possession of realty of which all defendants were occupants.

<sup>20</sup> *Hirschfield v. Kalischer*, 81 Hun, 606, 30 N. Y. Supp. 1027 (1894).

ration pending an action against it who has advertised for claims pursuant to statute, served the plaintiff and his attorney with notice to present their claim and distributed the corporate assets, reserving only enough for expenses, cannot be substituted thereafter as party defendant in such action.<sup>1</sup> An action by a judgment creditor of one corporation to have a transfer of its property to a second corporation avoided as having been made to create a preference while insolvent, and to have an accounting, in which a receiver of the first corporation appointed after the action was begun was brought in as defendant, who by answer admitted the allegations and joined in the prayer of the complaint, cannot be discontinued as of right thereafter by the second corporation on tender of payment into court of the amount of plaintiff's claim.<sup>2</sup> An injunction by the courts of this State on appointing a receiver for a corporation against any one in New York prosecuting suits, etc., against it does not prevent a foreign corporation from instituting proceedings against the insolvent corporation and enforcing them on any of its property outside this State.<sup>3</sup> A plaintiff suing the receivers of one corporation may bring in as co-defendant with them by supplemental summons and complaint another corporation which has bought the property of the first in the receivers' hands out of which any judgment the plaintiff might have obtained against them would have been made good, particularly if, on such purchase, it assumed certain liabilities of the first company and its receivers.<sup>4</sup> One selling property to a receiver, appointed *pendente lite*, of a corporation, which is necessary to the conduct of its business, may sue him therefor without suing the company or any other party.<sup>5</sup> A discharged receiver in voluntary dissolution proceedings of a corporation is not a necessary party to an action by creditors to hold individually for their debts a corporate officer who bought in the corporate property on its sale by the receiver after preventing creditors from combining or bidding by certain representations.<sup>6</sup>

<sup>1</sup> Owen v. Kellogg, 56 Hun, 455, 10 N. Y. Supp. 75 (1890); C. C. P. § 756.

<sup>2</sup> Raymond v. Security Trust & Life Ins. Co., 101 A. D. 546, 91 N. Y. Supp. 1041 (1905).

<sup>3</sup> Union National Bank v. Leary, 95 A. D. 381, 88 N. Y. Supp. 652

(1904); aff'd 183 N. Y. 546, 76 N. E. 1111.

<sup>4</sup> Winters v. King, 51 A. D. 80, 64 N. Y. Supp. 496 (1900).

<sup>5</sup> Cobb v. Sweet, 46 A. D. 375, 61 N. Y. Supp. 545 (1899).

<sup>6</sup> Lilienthal v. Betz, 185 N. Y. 153, 77 N. E. 1002 (1906).

## CHAPTER XI.

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**§ 563 Taxation: General Statement of Taxes to Which Corporations are Subject.**—The general rule is that all real property within New York State, and all personal property situated or owned within New York State, is taxable unless exempt from taxation by law;<sup>1</sup> and the statute giving the property which is exempt from taxation is quoted hereinafter,<sup>2</sup> while the exemptions from the several kinds of taxes, such as the personal and real property taxes, are discussed in connection with the treatment of these several taxes. The duty of tax assessment boards to report exempt property is prescribed by statute, hereinafter quoted.<sup>3</sup> Every domestic stock corporation must pay an organization tax to the State on its incorporation or on changing its capital or character of

<sup>1</sup> Tax L. § 3 (L. 1909, c. 62).

<sup>3</sup> Tax L. § 15 (L. 1916, c. 323).

<sup>2</sup> See text of Tax Law, *infra*.

its stock or consolidating.<sup>4</sup> Every domestic stock corporation must pay a real property tax on its real property.<sup>5</sup> Every domestic stock mercantile or manufacturing corporation must pay an income tax to the State for the privilege of exercising its corporate franchise,<sup>6</sup> while every other domestic stock corporation, instead of such income tax, must pay the State a personal property,<sup>7</sup> or a capital stock tax<sup>8</sup> and a franchise tax.<sup>9</sup> In addition, the corporation may have to pay United States income or other taxes. Both the State and the United States impose a tax on transfers of its shares of stock. The State also imposes a mortgage tax. All these taxes are perennial except the organization, stock transfer and mortgage taxes. Manufacturing and mercantile domestic corporations pay an income tax for the privilege of exercising their corporate franchises in New York, and by so doing are relieved (1) from being assessed on any personal property, (2) from being assessed or taxed upon their capital stock, and (3) from paying the franchise tax, or making a capital stock or franchise tax report.<sup>10</sup> Corporations wholly engaged in the purchase, sale and holding of real estate for themselves; holding corporations whose principal income is derived from holding the stocks and bonds of other corporations; corporations formed for steam surface railroad, canal, steamboat, ferry, express, navigation, pipe-line, transfer, baggage-express, telegraph, telephone, palace car or sleeping car purposes; corporations owning or operating elevated railroads or surface railroads not operated by steam; corporations formed for supplying water or gas or for electric or steam heating, lighting or power purposes; insurance corporations; trust companies; savings banks; and banks, title guaranty, insurance or surety companies, are, generally speaking, exempt from the State income tax.<sup>12</sup> Other domestic corporations than manufacturing or mercantile ones, instead of an income tax, pay a franchise tax;<sup>13</sup> and a personal property<sup>14</sup> or capital-stock tax.<sup>15</sup> "The system of taxation in this State is so complicated as to

<sup>4</sup> Tax L. § 180 (L. 1917, c. 493); St. Corp. L. § 21 (L. 1917, c. 501); and § 24-e (L. 1917, c. 484).

<sup>5</sup> Tax L. § 11 (L. 1909, c. 62).

<sup>6</sup> Tax L. § 209 (L. 1918, c. 276), § 219-j (L. 1918, c. 271).

<sup>7</sup> Tax L. § 11 (L. 1909, c. 62).

<sup>8</sup> Tax L. § 12 (L. 1909, c. 62).

<sup>9</sup> Tax L. § 182 (L. 1916, c. 323).

<sup>10</sup> Tax L. § 209 (L. 1918, c. 276), § 219-j (L. 1918, c. 271).

<sup>12</sup> Tax L. § 210 (L. 1918, c. 417), § 184 (L. 1914, c. 334), § 185 (L. 1917, c. 710), § 186 (L. 1909, c. 62), § 187 (L. 1909, c. 62); § 188 (L. 1909, c. 62)), and § 189 (L. 1909, c. 62).

<sup>13</sup> Tax L. § 182 (L. 1916, c. 333).

<sup>14</sup> Tax L. § 11 (L. 1909, c. 62).

<sup>15</sup> Tax L. § 12 (L. 1909, c. 62).

involve mistakes on the part of those who are called upon to enforce the law. In some instances the tax is laid upon property and in others upon rights and privileges connected with property. . . . There is, first, an organization tax, payable to the State, which is imposed but once and is exacted for the privilege of becoming a corporation (*statute*). Next, there is a tax upon the real estate owned by the corporation in this State, which is assessed the same as if it were owned by an individual (*statute*). The personal property of the corporation is not directly taxed, but its capital stock and surplus, after deducting the assessed value of its real estate and making some other deductions, is assessed at its actual value (*statute*). Finally, there is a franchise tax on corporations which is payable annually to the State, 'computed upon the basis of the amount of its capital stock employed within this State' (*statute*). This is not a tax upon property, although it is measured by the value of property, but upon the right of a corporation to exist and exercise the powers granted by its charter. These forms of taxation do not all rest upon the same principle. The organization tax is in the nature of a license fee for the right to become a corporation. The tax upon real estate is a direct tax upon real property, and the tax upon capital stock is an indirect tax upon personal property, while the franchise tax is not laid upon property at all, but is imposed upon the corporation for the privilege of carrying on business in this State and exercising the corporate franchises granted by the State."<sup>16</sup> "If we examine the scheme of the Tax Law we shall discover that it recognizes two characters of franchises which are to be taxed upon different theories: There is the franchise to be a corporation . . . and then there is the franchise to do the business . . . ."<sup>17</sup>

§ 564. **Taxation, In General.**—"A curative statute" (concerning a tax law) "acts directly upon the defective assessment and legalizes it without further procedure by the taxing officers. This may legally be done as to such features of the procedure as might have been omitted in the original statute without affecting its validity. When, however, the new act requires something more to be done by the taxing officers and legalizes the assessment, provided those acts

<sup>16</sup> *People ex rel. U. S. A. P. P. Co. v. Knight*, 174 N. Y. 475, 63 L.R.A. 87, 67 N. E. 65 (1903).

<sup>17</sup> *People ex rel. Ridgewood Land & Improvement Co. v. Saxe*, 174

A. D. 344, 160 N. Y. Supp. 752 (1916); *aff'd* 219 N. Y. 637, 114 N. E. 1080; Tax L. §§ 180, 182 (L. 1909, c. 62).

are done, it provides for a reassessment, or the completion of the old assessment. Such legislation is valid, provided the original taxing act was valid and the omission sought to be remedied is not jurisdictional, but an irregularity,"<sup>18</sup> A statute imposing taxes on corporations which states that they "shall be applicable to the payment of the ordinary and current expenses of the State" is not unconstitutional on the ground that it does not state the object to which the tax is to be applied.<sup>19</sup> Assessors of a municipality should not be admitted by the court into a proceeding to litigate a corporation's claim on certiorari of inequality of its assessment by the State Board of Tax Commissioners after payment has been made by the corporation on the court's determination upon such writ after notice to the municipality's corporation counsel.<sup>20</sup> " . . . while a state tax which in substance and effect is a direct tax on interstate commerce, constitutes a state regulation of commerce and is the usurpation of a power exclusively vested in Congress and, therefore, void, yet . . . the commerce provision of the Federal Constitution does not deprive the states of the power to levy a property tax upon property employed in interstate commerce, having a *situs* within the jurisdiction, provided no adverse discrimination is made in the imposition of the tax between such property and other property of a similar character."<sup>20a</sup>

**§ 565. Id.: Organization Tax, What Corporations Must Pay.**—Every stock corporation incorporated under the laws of New York State may pay the State Treasurer the organization tax.<sup>1</sup> On reorganization by purchasers of franchises of a corporation on foreclosure thereof into a new corporate body, pursuant to statutory permission, the tax required to be paid on incorporation must be paid, whether the State directly grants some franchise to the corporation other than

<sup>18</sup> *People ex rel. American Exchange National Bank v. Purdy*, 196 N. Y. 270, 89 N. E. 838 (1909); L. 1909, c. 74, § 1.

<sup>19</sup> *People v. National Fire Ins. Co. of Hartford*, 27 Hun, 188 (1882); L. 1880, c. 542, see now Tax L. § 182; N. Y. Const. art. 3, § 20.

<sup>20</sup> *People ex rel. Rochester Gas Co. v. Priest*, 101 A. D. 334, 91 N. Y. Supp. 772 (1905).

<sup>20a</sup> *People ex rel. Pennsylvania R.*

*Co. v. Wemple*, 138 N. Y. 1 (1893); L. 1880, c. 542; L. 1881, c. 361; L. 1882, c. 151; L. 1885, c. 501; L. 1890, c. 522, § 3. See now Tax L. § 182.

<sup>1</sup> Tax L. § 180 (L. 1917, c. 493). Special provisions govern state and national banks, building, mutual loan, accumulative fund and co-operative associations, and railroads. See text of Tax L. § 180, *infra*.

franchise to be a corporation, or not, and in spite of the tutory grant to the new corporation of all the rights, franchises, etc., of the corporation the property of which is sold.<sup>2</sup> A reincorporation under the Business Corporations Law of an existing corporation organized under the Manufacturing Law of eighteen hundred and forty-eight is not the creation of a new corporation which must pay an organization tax, but a continuation of an existing one.<sup>3</sup>

**566. Id.: Amount and Computation of Tax, In General.**—The amount and computation of the organization tax is gotten differently, according as the stock of the corporation has or has not par value, except that every domestic stock corporation, whether its stock have or have not par value, and at whatever low a figure it be capitalized, must pay a minimum organization tax of ten dollars.<sup>4</sup> If the corporation's stock has par value the tax is one-twentieth of one per centum on the amount of capital stock which the corporation is *authorized* to have.<sup>5</sup> If the corporation issue shares of its stock without designated monetary value, the organization tax is at the rate of five cents on each such share which the corporation is *authorized* to issue.<sup>6</sup>

**567. Id.: On Increase, Decrease, Consolidation or Change from Par to Non-Par.**—A like organization tax—whether the corporation's stock have or have not par value—must be paid on any increase of its capital stock subsequent to the amount for which it was originally incorporated.<sup>7</sup> In case of a decrease of capital stock, upon which the tax required by law has been paid, and a subsequent increase thereof, a tax is to be paid only on so much of such increase as exceeds the amount of capital stock upon which a tax has before been paid.<sup>8</sup> In case of the consolidation of existing corporations into a corporation, such new corporation is required to pay organization tax provided by statute only upon the

People *ex rel.* Schurz v. Cook, N. Y. 443, 18 N. E. 113 (1888); 1874, c. 430, as amend'd L. 1876, 46; L. 1886, c. 143, see now St. p. L. § 9.  
Matter of Kansas City Smelt-Co., 13 A. D. 50, 43 N. Y. Supp. (1897); Bus. Corp. L. § 4 (L. 2, c. 691): "The situation may be deemed to be the same in effect if the original charter . . . has been amended by a special act

of the Legislature conferring new powers and imposing new obligations upon it."

<sup>4</sup> Tax L. § 180 (L. 1917, c. 493).

<sup>5</sup> Tax L. § 180 (L. 1917, c. 493).

<sup>6</sup> St. Corp. L. § 21 (L. 1917, c. 501).

<sup>7</sup> Tax L. § 180, and St. Corp. L. § 21 (L. 1917, chs. 493, 501, respectively).

<sup>8</sup> Tax L. § 180 (L. 1917, c. 493).

amount of its capital stock in excess of the aggregate amount of capital stock of such corporations.<sup>9</sup> A tax imposed on the privilege of consolidation of corporations is not a property tax and may, therefore, be imposed as a condition upon corporations availing themselves of the privileges of consolidation.<sup>10</sup> A consolidated corporation formed from the consolidation of two existing corporations is liable to pay the organization tax imposed by statute.<sup>11</sup> Every corporation which has been organized under any general law and is reorganized so that it may acquire the rights and liabilities of corporations organized with stock having no nominal or par value must pay to the State Treasurer for the privilege of such reorganization a tax of the same amount, and computed in like manner as upon the organization of a new corporation authorized to issue shares of the same number and kinds as the reorganized corporation, less one-half of the aggregate amount of all sums previously paid for the privilege of organizing or of increasing the capital stock; provided such tax shall in no case be less than twenty-five dollars.<sup>11a</sup>

**§ 568. Id.: When Due and Payable.**—The organization tax is due and payable upon the incorporation of the corporation or upon the increase of its capital stock,<sup>12</sup> or upon its reorganization,<sup>12a</sup> as the case may be.

**§ 569. Id.: Effect of Failure to Pay.**—The effect of failure to pay the organization tax is (1) that neither the Secretary of State nor the county clerk will file any certificate of incorporation or article of association, or give any certificate to any such corporation or association (except in the case of a railroad corporation) until he is furnished with a receipt for such tax from the State Treasurer, and (2) that no stock corporation has or can exercise any corporate franchise or powers, or carry on business in this State until such tax has been paid.<sup>13</sup>

<sup>9</sup> Tax L. § 180 (L. 1917, c. 493).

<sup>10</sup> *People v. New York, Chicago & St. Louis R. R. Co.*, 129 N. Y. 474, 15 L.R.A. 82, 29 N. E. 959 (1892); L. 1886, c. 143, § 1, see now Tax L. § 180.

<sup>11</sup> *People ex rel. New York Phonograph Co. v. Rice*, 57 Hun, 486, 11 N. Y. Supp. 249 (1890); *aff'd* 128 N. Y. 591, 28 N. E. 251; L. 1887, c. 284, § 1, see now Tax L. § 180.

<sup>11a</sup> St. Corp. L. § 24-e (L. 1917, c. 484).

On liability for incorporation tax upon extension, reorganization, consolidation or merger of existing corporation, see note in 47 L.R.A. (N.S.) 1066.

<sup>12</sup> Tax L. § 180 (L. 1917, c. 493).

<sup>12a</sup> St. Corp. L. § 24-e (L. 1917, c. 484).

<sup>13</sup> Tax L. § 180 (L. 1917, c. 493); St. Corp. L. § 24-e (L. 1917, c. 484).

**§ 570. Id.: State Income and Franchise Taxes, What Corporations Pay Which Taxes.**—Mercantile and manufacturing corporations pay the State income tax and do not pay the State franchise tax or the State personal property or capital stock tax.<sup>14</sup>

**§ 571. Id.: State Income Tax, In General.**—Every domestic manufacturing or mercantile corporation must annually pay an annual franchise tax to be computed upon the basis of its net income for the privilege of exercising its franchises in this State in a corporate or organized capacity.<sup>15</sup>

**§ 572. Id.: What Corporations Subject To, In General.**—Every domestic manufacturing and every domestic mercantile corporation must pay the franchise tax based on its net income.<sup>16</sup> The tax is an annual franchise tax to be computed by the State Tax Commission upon the basis of the corporation's net income for its fiscal or the calendar year next preceding, and this income is presumably the same as the income upon which such corporation is required to pay a tax to the United States; and is imposed upon the corporation for the

<sup>14</sup> See § 563, *supra*. The statute also makes specific provision to cover cases in which personal property or capital stock taxes have been assessed against the corporation for the year ending December 31, 1917. See Tax L. §§ 219-j and 219-l (L. 1918, c. 271), *infra*.

Generally on the question of taxation of corporate franchise, see note in 57 L.R.A. 34; 58 L.R.A. 564; 10 L.R.A.(N.S.) 693.

As to what property is part of franchise for purpose of taxation, see note in 17 L.R.A. 42.

<sup>15</sup> Tax L. § 209 (L. 1918, c. 276).

<sup>16</sup> Tax L. § 209 (L. 1918, c. 276). "Corporations wholly engaged in the purchase, sale and holding of real estate for themselves, holding corporations whose principal income is derived from holding the stocks and bonds of other corporations and liable to a tax under sections one hundred and eighty-four to one hundred and eighty-nine, inclusive, of this chapter [viz. "every corporation . . . formed for steam surface railroad, canal, steamboat, ferry, except a ferry company operating between any of the boroughs of the city of New York

under a lease granted by the city, express, navigation, pipe line, transfer, baggage express, telegraph, telephone, palace car or sleeping car purposes, and every other transportation corporation not liable to taxation under section one hundred and eighty-five or one hundred and eighty-six of this chapter . . ."

(Tax L. § 184, L. 1914, c. 334) and "every corporation . . . owning or operating any elevated railroad or surface railroad not operated by steam" (Tax L. § 185, L. 1917, c. 710), and "every corporation . . . formed for supplying water or gas, or for electric or steam heating, lighting or power purposes . . . (Tax L. § 186, L. 1909, c. 62), and insurance companies (Tax L. § 187, L. 1906 c. 62), and trust companies and savings banks (Tax L. § 188, L. 1909, c. 62), and banks, title guaranty, insurance or surety companies (Tax L. § 189, L. 1909, c. 62) banks, savings banks, institutions for savings, title guaranty, insurance or surety corporations] shall be exempt from the payment of the taxes prescribed by this article." Tax L. § 210 (L. 1918, c. 417).

privilege of exercising its franchises in New York State in a corporate or organized capacity.<sup>17</sup> The decisions cited in the note are not under the particular statute before the reader for consideration, and should be used with this in mind.<sup>18</sup>

<sup>17</sup> Tax L. § 209 (L. 1918, c. 276).

<sup>18</sup> In determining whether a corporation is exempt as a manufacturing corporation from a capital stock tax it is immaterial under what particular statute it came into existence. *People ex rel. Edison Electric Illuminating Co. of N. Y. v. Wemple*, 129 N. Y. 664, 29 N. E. 812 (1892); L. 1848, c. 37; L. 1879, c. 512. The policy of the legislature in exempting from the annual franchise tax so much of a corporation's capital as is employed in manufacturing in this State is to encourage the business of manufacturing within the State, and in determining whether a given case is within the exemption the courts should consider and give weight to this legislative policy. *People ex rel. E. S. Dairy Co. v. Sohmer*, 218 N. Y. 199, L.R.A.1917A, 48, 112 N. E. 755 (1916); Tax L. § 183. A corporation engaged in other business than manufacturing, *e. g.*, in selling goods from broken, imported packages, is not exempt as to its business of manufacturing. *People ex rel. Matheson & Co. v. Roberts*, 158 N. Y. 162, 52 N. E. 1102 (1899). A foreign corporation chartered to manufacture, buy, sell, lease, or otherwise procure, own and dispose of electric and electric telegraph and telephone instruments and apparatus of all kinds; to acquire by purchase patent and other rights and franchises; to acquire and dispose of capital stock of other corporations, may not only manufacture and sell its own goods but buy and sell others', and is not, therefore, wholly engaged in carrying on manufacture within this State so as to escape taxation on the amount of capital stock it employs here. *People ex rel. Western Electric Co. v. Campbell*, 145 N. Y. 587, 40 N. E. 239 (1895); Corp. Tax Act, § 3

(L. 1880, c. 542, as amend'd L. 1889, c. 193). "The statute of 1889, in exempting from taxation manufacturing corporations 'wholly engaged in carrying on manufacture' within this state, had in view corporations whose corporate powers were confined to the exclusive business of manufacturing, and the limiting words were intended to distinguish between such corporations and corporations which embraced a wider scope of power, but which included the power to engage in the business of manufacture. . . . The statute was not aimed at and did not contemplate the exercise by a corporation of powers *ultra vires*. If a manufacturing corporation is engaged in business outside of its corporate powers, in connection with its manufacturing business, it does not cease to be 'wholly engaged' in the business of manufacture; that is to say, its only legal and authorized business was that of manufacture. It subjected itself to taxation upon that portion of its capital so used, but nevertheless it remained a corporation which, so far as it exercised its legal powers, was 'wholly engaged' in manufacture, and, therefore, entitled to exemption as to its manufacturing business." *People ex rel. Tiffany & Co. v. Campbell*, 144 N. Y. 166, 38 N. E. 990 (1894); Corp. Tax Act, § 3 (L. 1880, c. 542, as amend'd by L. 1889, c. 193).

On right to be a corporation as a franchise within constitutional or statutory provisions subjecting franchises to taxation as property see note in 28 L.R.A.(N.S.) 255.

On the question as to whether structure or improvement in street or highway used in connection with special franchise is taxable element, see note in L.R.A.1916B, 1228.

As to location of street railway

**§ 573. Id.: What Are Manufacturing Corporations.**—The term “manufacturing corporation,” as used in the statute, is not defined thereby.<sup>19</sup> The decisions now given were rendered under other statutes than the one prescribing the income-franchise tax, and should be considered with this in mind. They are given to aid the reader in deciding what are to be considered manufacturing corporations under the State Income Tax Law by referring him to the decisions of the courts as to what were to be considered manufacturing corporations under former statutes affecting that class of companies. A corporation must be held a manufacturing corporation within the meaning of a statute excepting such from taxation on their capital stock if it is such within the meaning of the words “manufacturing corporation” in its usual and ordinary sense, whatever the law may be under which the corporation is organized and by whatever general name, so long as its chief and principal business is the manufacture and sale of artificial products.<sup>20</sup> “According to Webster a manufacturer is one who works raw materials into wares suitable for use. The constructing, using and providing of one or more docks . . . is no more a manufacturing within the meaning of that word than would be the building of warehouses and elevators for the carrying on of the business of warehousemen or the erection of buildings or residences.”<sup>1</sup> “Mr. Webster defines manufacture to be ‘anything made from raw materials by the hand, by machinery, or by art, as cloths, iron utensils, shoes, machinery, saddlery, etc.’ The process of manufacture is supposed to produce some

franchise for purposes of taxation, see note in 5 L.R.A.(N.S.) 174.

On the question of corporate taxation as affected by contract clause in Federal Constitution, in general, see comprehensive note in 60 L.R.A. 33.

<sup>19</sup> Tax L. § 209 (L. 1918, c. 276). The 1917 Law (Tax L. § 208, subs. 2, 3, L. 1917, c. 726), did define a manufacturing corporation as one principally engaged in the business of manufacturing tangible personal property for itself and for others, and it also defined “tangible personal property” as corporeal personal property, such as machinery, tools, implements, goods, wares and merchandise, *not* including money, deposits in bank, shares of stock,

bonds, notes, credits or evidences of an interest in property and evidences of debt. The 1918 amendment of Tax Law, § 208, omitted such third and fourth subdivisions.

<sup>20</sup> Nassau Gas-Light Co. v. City of Brooklyn, 89 N. Y. 409 (1882); L. 1880, c. 542, § 3.

<sup>1</sup> People v. N. Y. Floating Dry-Dock Co., 92 N. Y. 487 (1883); L. 1880, c. 542, § 3. “Defendant was incorporated under chapter 170 of the Laws of 1843 ‘for the purpose of constructing, using and providing one or more dry-docks, or wet-docks, or other conveniences and structures for building, raising, repairing and coppering vessels and steamers of every description.’”

new article by the application of skill and labor to the raw material.”<sup>2</sup> A company holding the stock of a manufacturing company cannot itself claim to be engaged in manufacturing so as to escape a franchise tax.<sup>3</sup> A domestic manufacturing corporation which has its manufacturing plant and its employees in the business of manufacturing its goods in a foreign state where they work and are paid, but which carries on in this State its sales, its bank account, general office and general control and management of its business, is not exempt from the franchise tax, because it is not engaged in carrying on manufacture within this State.<sup>4</sup> “. . . making the paving compound is the production of a new and distinct substance which constitutes manufacturing . . . but . . . the preparation of a street for the laying of the pavement and placing of the pavement thereupon is not in any sense a process of manufacturing within the meaning of the ” law exempting from payment of a corporate franchise tax a corporation’s capital employed in manufacturing in this State.<sup>5</sup> Crushing stone is not manufacturing so as to relieve a domestic corporation doing it from franchise taxation to the extent of its capital employed in this State in crushing and selling the stone.<sup>6</sup> A corporation making asphaltum by compounding different raw materials, none of which alone is of any value for the purpose for which the compound is used, with the aid of applied labor, skill, machinery and mechanical devices, is a manufacturing corporation so far as the franchise tax is concerned.<sup>7</sup> A corporation formed to manufacture lead boilers to be placed inside steel digesters as lining thereto is a manufacturing corporation insofar as taxation goes.<sup>8</sup> Illuminating gas is so much an artificial product that a company making it is a manufacturing company, within the exception of a statute

<sup>2</sup> *People ex rel. Union Pacific Tea Co. v. Roberts*, 145 N. Y. 375, 40 N. E. 7 (1895).

<sup>3</sup> *People ex rel. American Bank Note Co. v. Sohmer*, 157 A. D. 1, 141 N. Y. Supp. 635 (1913); *aff’d* 210 N. Y. 621, 104 N. E. 1137; Tax L. § 183.

<sup>4</sup> *People ex rel. Blackinton Co. v. Roberts*, 4 A. D. 388, 38 N. Y. Supp. 872 (1896); *aff’d* 151 N. Y. 651, 46 N. E. 1150; L. 1880, c. 542, as amend’d L. 1890, c. 522, § 3.

<sup>5</sup> *People ex rel. Paving Co. v. Knight*, 99 A. D. 62, 90 N. Y. Supp.

537 (1904); Tax L. § 183 (L. 1897, c. 785).

<sup>6</sup> *People ex rel. Tompkins Cove Stone Co. v. Saxe*, 176 A. D. 1, 162 N. Y. Supp. 408 (1916); *aff’d* 221 N. Y. 601, 117 N. E. 1081; Tax L. §§ 182, 183 (L. 1909, c. 62).

<sup>7</sup> *People ex rel. Paving Co. v. Morgan*, 61 A. D. 373, 70 N. Y. Supp. 516 (1901); Tax L. § 183 (L. 1897, c. 985).

<sup>8</sup> *People ex rel. Digester Co. v. Knight*, 67 A. D. 365, 73 N. Y. Supp. 743 (1901); Tax L. § 183 (L. 1896, c. 908).

subjecting corporations to a tax on their capital stock.<sup>9</sup> An electric light and power company will be held exempt from payment of a capital stock tax as a manufacturing corporation until the legislature specifically enacts that it is not exempt.<sup>10</sup> A corporation having for its business the collection, storage, preservation, preparation for sale, transportation and sale of natural ice is not a manufacturing corporation so as to be exempt from taxation.<sup>11</sup> A corporation having its factory and doing its work only in New York, which consists in putting partially finished gold pens into holders which it shapes to fit such pens, is a manufacturing corporation, insofar as the determination of the tax on its capital stock goes.<sup>12</sup> The process of refining bullion in an assay office in this State for a foreign corporation paying therefor does not constitute the corporation a manufacturing corporation in determining the tax it must pay.<sup>13</sup> When "tea is taken in the original state, and various kinds are mixed together, producing a compound which is called combination tea," and "coffee is purchased in the raw bean, roasted, ground, and in some instances different kinds of coffee are mixed together, forming, as in the case of the tea, a combination article," the corporation doing these things is not engaged in manufacturing within the meaning of the statute imposing a tax on its capital stock.<sup>14</sup> A corporation the principal business of which is "the purchasing of sheep and lambs, slaughtering them, pulling the wool from the hides or pelts, selling it, selling the hides, taking from the animals the

<sup>9</sup> *Nassau Gas-Light Co. v. City of Brooklyn*, 89 N. Y. 409 (1882); L. 1880, c. 542, § 3. The court discuss the process of furnishing the gas till the final step by which it is "measured out to the consumer through a meter which is the result of considerable inventive skill, but whose accuracy is not always cheerfully admitted."

<sup>10</sup> *People ex rel. Brush Electric Mfg. Co. v. Wemple*, 129 N. Y. 543, 14 L.R.A. 708, 29 N. E. 808 (1892); L. 1880, c. 542, as amend'd L. 1881, c. 361, and L. 1889, c. 353.

<sup>11</sup> *People v. Knickerbocker Ice Co.*, 99 N. Y. 181, 1 N. E. 669 (1885); *Gen. Mfg. Act*. L. 1848, c. 40, as extended L. 1855, c. 301; L. 1880, c. 542, § 3, as amend'd L. 1881, c. 361. "No doubt ice may be

manufactured and frigorific effects produced by artificial means. Corporations exist for that purpose and come literally within our manufacturing laws."

<sup>12</sup> *People ex rel. Waterman Co. v. Morgan*, 48 A. D. 395, 63 N. Y. Supp. 76 (1900).

<sup>13</sup> *People v. Horn Silver Mining Co.*, 105 N. Y. 76, 11 N. E. 155 (1887); L. 1880, c. 542, as amend'd L. 1881, c. 361, and L. 1882, c. 151. Farmer paying to have grain ground, or wool woven; or railroad manufacturing its rolling stock "cannot be properly classified as a manufacturing company."

<sup>14</sup> *People ex rel. Union Pacific Tea Co. v. Romerts*, 145 N. Y. 375, 40 N. E. 7 (1895).

offal, including the blood and lys, converting it into fertilizer, and then reducing the carcasses to a temperature which would retard decomposition, and shipping them to the place of delivery in refrigerator cars " is not " carrying on manufacture " within the statutes exempting such a company from taxes.<sup>15</sup> Assuming, but not deciding, that the printing of a newspaper is manufacturing, yet a corporation not owning or operating any plant for the printing of its paper, but having the type set and the paper printed by third persons at a price agreed upon, and doing no part of the work itself farther than to have a foreman overlook and watch the work as it progresses in the hands of the contractor, is not a manufacturer so as to be assessed for its franchise tax as a manufacturing corporation.<sup>16</sup> The pasteurization of milk by a domestic corporation is not manufacture so as to entitle it to exemption from the annual franchise tax to the extent of its capital actually employed in this State for pasteurization purposes.<sup>17</sup> Other decisions under statutes imposing franchise taxes on manufacturing corporations but which do not deal with the question of what companies are to be classed as manufacturing ones are collected in the note.<sup>18</sup>

<sup>15</sup> *People ex rel. New England Dressed Meat & W. Co.*, 155 N. Y. 408, 41 L.R.A. 228, 50 N. E. 53 (1898); L. 1880, c. 542, as amend'd L. 1896, c. 908, art. 9.

<sup>16</sup> *People ex rel. Jewelers' Pub. Co. v. Roberts*, 155 N. Y. 1, 49 N. E. 248 (1898).

<sup>17</sup> *People ex rel. E. S. Dairy Co. v. Sohmer*, 218 N. Y. 199, L.R.A. 1917A, 48, 112 N. E. 755 (1916); Tax L. § 183.

<sup>18</sup> A law imposing a tax on a manufacturing corporation upon the basis of its capital employed in the State is constitutional. *Matter of the Tax against Tiffany & Co.*, 80 Hun, 486, 30 N. Y. Supp. 494 (1894); L. 1889, c. 353. A manufacturing corporation doing an *ultra vires* business, however small, outside of manufacturing, is subject to the franchise tax. *People ex rel. Stokes Co. v. Roberts*, 90 Hun, 533, 36 N. Y. Supp. 73 (1895); L. 1880, c. 542. The tax on a manufacturing corporation should be imposed on its whole capital employed in

this State if it has not been wholly engaged in carrying on manufacturing business within the State. *Matter of the Tax against Tiffany & Co.*, 80 Hun, 486, 30 N. Y. Supp. 494 (1894); L. 1889, c. 353. A corporation carrying on business in this State which is not wholly that of manufacturing is liable to tax. *People ex rel. Western Electric Co. v. Campbell*, 80 Hun, 466, 30 N. Y. Supp. 472 (1894); aff'd 145 N. Y. 587, 40 N. E. 239; L. 1889, chs. 353, 463. ". . . it is not sufficient to exempt a corporation from taxation that it is a manufacturing corporation, but it must also carry on manufacture within this State." *People v. Horn Silver Mining Co.*, 105 N. Y. 76, 11 N. E. 155 (1887); L. 1880, c. 542, as amend'd L. 1881, c. 361, and L. 1882, c. 151. Land on which no shops of a manufacturing corporation are located and none of its work is done cannot be deemed part of its "capital actually employed . . . in manufacturing" so as to be exempted in determin-

**§ 574. Id.: What Are Mercantile Corporations.**—The term “mercantile corporation,” as used in the statute imposing a tax on the income of a mercantile corporation, is not defined by the statute.<sup>19</sup>

**§ 575. Id.: How to Ascertain Net Income to Be Taxed.**—Whether the tax is on the corporation’s entire net income or only upon a proportion thereof depends upon whether or not the entire business of the corporation be transacted within New York State: if it is, the tax is based upon the entire net income of such corporation as returned to the United States treasury department for such fiscal or calendar year; if it is not, the tax is based upon a proportion only of the net income.<sup>20</sup> To determine such proportion add together (1) the average monthly actual value where located of the real property and the tangible personal property, such as machinery tools, implements, goods, wares and merchandise (not money, deposits in bank, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt) within New York State; (2) the average monthly value of bills and accounts receivable for (a) personal property sold by the corporation from merchandise manufactured by it within New York State, (b) personal property sold by the corporation from merchandise owned by it and located within New York State at the time of the acceptance of the order, but not manufactured by it within New York State, and (c) services performed within the State, excluding bills and

ing the corporation’s franchise tax; though it must be considered, for such purpose, as capital of the corporation, in spite of the fact that it employs its whole capital stock in its business and has a large surplus in which it would seem that such land, not being used in its business, should logically be included. *People ex rel. Steinway & Sons v. Kelsey*, 108 A. D. 138, 96 N. Y. Supp. 42 (1905); *Tax L. § 182* (L. 1901, c. 558).

Electric company as manufacturing company for purposes of taxation, see notes in 64 L.R.A. 59; 38 L.R.A.(N.S.) 907.

Authorities discussing the question as to what are manufacturing corporations for the purposes of taxation are collated in note in 64 L.R.A. 33.

Extension of exemption to addition to, or enlargement of, manufacturing plant, see note in L.R.A. 1916D, 112.

<sup>19</sup> *Tax L. § 209* (L. 1918, c. 276). The 1917 Law (*Tax L. § 208*, subds. 2, 3, L. 1917, c. 726), did define a mercantile corporation as one principally engaged in the business of buying or selling tangible personal property for itself or for others, and it also defined “tangible personal property” as corporeal personal property, such as machinery, tools, implements, goods, wares and merchandise *not* including money, deposits in bank, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt.

<sup>20</sup> *Tax L. § 214* (L. 1918, c. 417).

accounts receivable arising from sales made from a stock of merchandise or other property located at a place of business maintained by the reporting corporation without this State; and (3) the proportion of the average value of the stock of another corporation owned by the corporation in question which the value of the physical property of such other corporation in New York State which represents such stock bears to the value of its physical property outside New York State which represents such stock (but not exceeding ten per centum of the real and tangible personal property segregated to New York State under the statute).<sup>1</sup> Then add together (1) the average actual monthly value where located of all the real property and personal property of the corporation, such as machinery, tools, implements, goods, wares and merchandise (not money, deposits in bank, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt), wherever located; (2) the average total value of bills and accounts receivable for (a) personal property sold by the corporation from merchandise manufactured by it within and without New York State, (b) personal property sold by the corporation from merchandise owned by it at the time of acceptance of the order but not manufactured by it, and (c) services performed both within and without New York State, based on orders received at offices maintained by the corporation, excluding bills and accounts receivable on orders filled from a stock of merchandise or other property maintained by the corporation; and (3) the average total value of the stocks of other corporations owned by the corporation in question, (but not exceeding ten per centum of the aggregate real and tangible personal property set up in the report).<sup>2</sup> The proportion of the net income of the corporation upon which the tax is based is then such portion of its entire net income as the aggregate of the first three items bears to the aggregate of the last three.<sup>3</sup> The net income is the net income of the corporation for the year beginning November first to be computed by the State Tax Commission upon the basis of its net income for its fiscal or calendar year next preceding, which is presumably the same income as that upon which it is required to pay a tax to the United States; except that a corporation which reports to the United States Treasury Department on the basis of its fiscal year may report to the New York State Tax Commission upon the same basis.<sup>4</sup>

<sup>1</sup> Tax L. § 214 (L. 1918, c. 417).

<sup>4</sup> Tax L. § 209 (L. 1918, c. 2'6),

<sup>2</sup> Tax L. § 214 (L. 1918, c. 417).

and § 212 (L. 1917, c. 726).

<sup>3</sup> Tax L. § 214 (L. 1918, c. 417).

**§ 576. Id.: Amount of Tax.**—The State franchise tax on income is at the rate of three per centum of the net income of the corporation, or the portion thereof taxable within New York State, determined as provided by statute.<sup>5</sup> The minimum tax and the tax when the stock has no par value are given in the note.<sup>5a</sup>

**§ 577. Id.: Reports, Who to Make, When and to Whom.**—Every corporation subject to the State income tax (as well as foreign corporations having officers, agents or representatives within New York State) must annually on or before July first, or within thirty days after the making of its report on net income to the United States Treasury Department for any fiscal or calendar year, transmit to the Tax Commission a report of its income.<sup>6</sup> If any corporation takes over by merger or consolidation the assets or franchise of another corporation doing business in New York State during the year ending with the thirty-first day of October, such corporation must make a consolidated report for all the corporations so merged or consolidated, as though the merged or consolidated corporation had existed and done business as an entity throughout the year for which the report is made, and must be taxed for the year to ensue upon the basis of such report and as provided by statute.<sup>6a</sup> The Tax Commission may for good cause shown extend the time within which any corporation is required to report by statute.<sup>7</sup>

**§ 578. Id.: Contents and Form.**—The report must be in the form prescribed by the Tax Commission.<sup>8</sup> Blank forms of report must be furnished by the Tax Commission, on application, but failure to secure such a blank does not release any corporation from the obligation of making a report under the statute.<sup>9</sup> The statements to be contained in a corporation's State income tax report depend upon whether or not it incorporates therein a consent to be taxed upon its entire net income. If it does so consent, the report must specify: (1)

<sup>5</sup> Tax L. § 215 (L. 1917, c. 726).

<sup>5a</sup> Tax L. § 214 (L. 1918, c. 417). The minimum tax is \$10 and not less than one mill on each dollar of the apportionment of the face value of its issued capital stock apportioned to New York State, determined by dividing the amount of the real and tangible personal property in New York State by the entire amount of the real and tangible personal property as shown in the report, and multiplying the quotient by the face

value of the issued capital stock; and if the corporation has stock without par value, the base of the tax is on such a portion of its paid in capital as its real and tangible personal property in New York State bears to its entire real and tangible personal property.

<sup>6</sup> Tax L. § 211 (L. 1918, c. 417).

<sup>6a</sup> Tax L. § 214-a (L. 1918, c. 292).

<sup>7</sup> Tax L. § 217 (L. 1917, c. 726).

<sup>8</sup> Tax L. § 211 (L. 1918, c. 417).

<sup>9</sup> Tax L. § 213 (L. 1917, c. 726).

Its consent to be taxed upon its entire net income; (2) the (a) name of the corporation, (b) location of its principal place of business; (c) state under the laws of which organized; (d) date of organization and (e) kind of business transacted; (3) the amount of its net income, either (a) for the preceding calendar year or (b) for its preceding fiscal year if it reports to the United States treasury department on the basis of its fiscal year, but in either case the amount must be the same as was shown in its last return of annual net income made by it to the United States treasury department; (4) (a) the average monthly value for the fiscal or calendar year of its real property and tangible personal property in each city, village or portion of a town outside of a village within New York State, and (b) the average monthly value of all its real property and tangible personal property wherever located, or, if it has no such real or tangible personal property, the city, village or portion of a town outside of a village in New York State in which is located the office in which its principal financial concerns within New York State are transacted; and (5) such other facts as the Tax Commission may require for the purpose of making the computation required by the statute.<sup>9a</sup> If it does not so consent, the report, in lieu of specifying its consent to be taxed upon its entire net income, must, in addition to the other items required of a corporation so consenting, specify: (6) the (A) average monthly value for the fiscal or calendar year of bills and accounts receivable for (a) personal property sold by the corporation from merchandise manufactured by it within New York State, (b) personal property sold by the corporation from merchandise owned by it and located within New York State at the time of the acceptance of the order, but not manufactured by it within New York State, and (c) services performed, based on all orders received at offices maintained by the corporation within New York State, excluding bills and accounts receivable arising from sales made from a stock of merchandise or other property located at a place of business maintained by the reporting corporation within New York State, and (B) average monthly total value for the fiscal or calendar year of bills and amounts receivable for (a) personal property sold by the corporation from merchandise manufactured by it within and without New York State, (b) personal property sold by the corporation from merchandise owned by it at the time of the acceptance of the order but not manufactured by it, and (c) services performed, based on orders received at

<sup>9a</sup> Tax L. § 211 (L. 1918, c. 417).

offices maintained by the corporation, excluding bills and accounts receivable on orders filled from a stock of merchandise or other property maintained by the reporting corporation; (7) the (a) average total value for the fiscal or calendar year of the stock of other corporations owned by the corporation and (b) the proportion of the average value of the stock of such other corporations within the State of New York, in the proportion which the value of the physical property of such other corporations in New York State which represents such stock bears to such property out of New York State; (8) the city, village or portion of a town outside of a village in New York State in which is located the office in which its principal financial concerns within New York State are transacted, if it has no real or tangible personal property within New York State.<sup>10</sup> The Tax Commission may require a further or supplemental report to contain further information and data necessary for the computation of the tax.<sup>11</sup> Every report must have annexed to it the affidavit of the president, vice-president, secretary or treasurer of the corporation to the effect that the statements contained therein are true.<sup>12</sup> The form of report on merger is stated in the last section.<sup>12a</sup>

**§ 579. Id.: Effect of Failure to Make or Fraudulent Statement in.**—Any corporation which fails to make any report required by the statute is liable to a penalty of not more than five thousand dollars to be paid to the State and to be collected in a civil action at the instance of the Tax Commission; and any officer of any such corporation who makes a fraudulent return or statement with intent to defeat or evade the payment of the taxes prescribed by the statute is liable to a penalty of not more than one thousand dollars, to be collected in like manner.<sup>13</sup> If any report is not made as required by statute the Tax Commission is authorized to make an estimate of the net income of the corporation and of the amount of tax due by law from any information in its possession, and to order and state an account according to such estimate for the taxes, penalties and interest due New York State from the corporation.<sup>14</sup>

**§ 580. Id.: Notice of Tax.**—Notice of tax assessment must be sent by mail to the postoffice address given in the corpora-

<sup>10</sup> Tax L. § 211 (L. 1918, c. 417).

<sup>11</sup> Tax L. § 213 (L. 1917, c. 726).

<sup>12</sup> Tax L. § 213 (L. 1917, c. 726).

<sup>12a</sup> Tax L. § 214a (L. 1918, c. 292.)

<sup>13</sup> Tax L. § 216 (L. 1917, c. 726):

“All moneys recovered as penalties, for a failure to report or for making fraudulent reports, shall be paid to the state comptroller.”

<sup>14</sup> Tax L. § 217 (L. 1917, c. 726).

tion's report, and the record that such notice has been sent is presumptive evidence of the giving of the notice and must be preserved by the Tax Commission; and if the tax imposed is based upon an estimate by the Tax Commission made in default of a report by the corporation, notice thereof and of a time and place at which opportunity will be given to be heard in respect thereof must be mailed to the postoffice address of the corporation.<sup>15</sup>

**§ 581. Id.: Review and Revision of, by Tax Commission, on Application Within Year.**—The Tax Commission must grant a hearing on any application for revision filed with it by a corporation against which an account is audited and stated within one year from the time of such audit and statement; and must resettle the tax according to law and the facts and adjust the account for taxes accordingly and send notice of its determination thereon to the corporation and State Comptroller forthwith, if it is made to appear upon any such hearing by evidence submitted to the Tax Commission or otherwise (a) that any such account included taxes or other charges which could not have been lawfully demanded or (b) that payment has been illegally made or exacted of any such account.<sup>16</sup>

**§ 582. Id.: When Tax Based on Estimate by Commission.**—If the State Income Tax imposed upon any corporation is based upon an estimate of its income made by the Tax Commission under the statute permitting it to do so if the corporation does not make the report required of it by law, the Commission must notify the corporation of a time and place at which opportunity will be given it to be heard in respect thereof, by notice mailed to the postoffice address of the corporation.<sup>17</sup>

**§ 583. Id.: When U. S. Changes Its Tax.**—If the Commissioner of Internal Revenue, or other officer of the United States, or other competent authority, changes or corrects the amount of the annual net income of any corporation, taxable under the State Income Tax Law, as returned to the United States Treasury Department, the corporation must within ten days after receipt of notice of such change or correction make return under oath or affirmation to the Tax Commission of such changed or corrected net income and must either concede the accuracy of such determination or state wherein it is erroneous. The Tax Commission must ascertain, from such return and any other information in its possession, the net income of such corporation for the fiscal or calendar year

<sup>15</sup> Tax L. §§ 219-b and 217 (L. 1917, c. 726).

<sup>16</sup> Tax L. § 218 (L. 1917, c. 726).

<sup>17</sup> Tax L. § 217 (L. 1917, c. 726).

for which such change or correction has been made by such Commission of Internal Revenue or other officer or authority; and all the authority conferred on it by the provisions of section one hundred and ninety-five of the Tax Law is granted to it in respect of the ascertainment of such net income. The Tax Commission must thereupon reaudit and restate the account of such corporation for taxes based upon the net income for such fiscal or calendar year, such reaudit to be according to the net income so ascertained by the Tax Commission. The proceedings and determination of the Tax Commission in the making of such reassessment may be revised and readjusted and reviewed in the manner provided by sections two hundred and eighteen and two hundred and nineteen of the Tax Law, as in the case of an original assessment of the tax. If from such reassessment it appears that such corporation has paid an excess State Income Tax for the year for which such reassessment is made, the Tax Commission must return a statement of the amount of such excess to the Comptroller, who must credit such corporation with such amount. If from such reassessment it appears that an additional tax is due from such corporation for such year, it must within thirty days after notice has been given by the Commission pay such additional tax.<sup>18</sup>

**§ 584. Id.: By Certiorari.**—The determination of the Tax Commission upon any application made to it by any corporation for revision and resettlement of any account, as prescribed in the State Income Tax Law, may be reviewed in the manner prescribed by and subject to the statute regulating certiorari; but no certiorari to review any audit and statement of an account or any determination by the Commission can be granted unless notice of the application therefor is made within thirty days after the service of the notice of such determination. Eight days' notice must be given to the Commission of the application for such writ; and the full amount of the taxes, percentage, interest and other charges audited and stated in such account must be deposited with the State Comptroller before making the application and an undertaking filed with the Commission, in such amount and with such sureties as a Justice of the Supreme Court approves, to

<sup>18</sup> Tax L. § 219-d (L. 1918, c. 276).  
“Such credit may be assigned by the corporation in whose favor it is allowed to a corporation liable to pay taxes under this article, and the assignee of the whole or any part of such credit on filing with the commission such assignment

shall thereupon be entitled to credit upon the books of the comptroller for the amount thereof on the current account for taxes of such assignee in the same way and with the same effect as though the credit had originally been allowed in favor of such assignee.”

the effect that if such writ is dismissed or the determination of the Commission affirmed, the applicant for the writ will pay all costs and charges which may accrue against it in the prosecution of the writ, including costs of all appeals.<sup>19</sup>

**§ 585. Id.: When and to Whom Payable.**—The State Income Tax must be paid to the State Comptroller on or before the first day of January of each year or within thirty days after notice of the tax has been given by mail to the corporation by the Tax Commission as provided by statute if such notice is given subsequent to the first day of December of the year for which such tax is imposed;<sup>20</sup> and if it appears that, by reason of a change or correction made by the United States Treasury Department in the amount of the corporation's annual net income, and the State Tax Commissions' reassessment, that an additional tax is due by the corporation, the latter must pay such additional tax within thirty days after notice has been given it by the State authorities.<sup>20a</sup>

**§ 586. Id.: Penalty and Lien of Tax from Non-payment.**—If the State Income Tax is not paid on or before January first, or, in the case of additional taxes, within thirty days after the notice for them has been given and such notice of additional tax is given subsequent to the first day of December of the year for which such additional tax is imposed, the corporation liable to pay the tax must pay to the State Comptroller, in addition to the amount of such tax, as additional tax, ten per centum of such amount, plus one per centum for each month the tax, or additional tax, remains unpaid; and each such tax, or additional tax, is a lien upon and binding upon the real and personal property of the corporation liable to pay it from the time when it is payable until it is paid in full.<sup>1</sup>

**§ 587. Id.: Auditing, Apportionment, Collection and Deposit of Tax and Powers of Commission.**—The statute imposing the income tax provides for the powers of the Tax Commission,<sup>2</sup> for the auditing and apportionment of the tax in New York State,<sup>3</sup> for warrants and action for its recovery,<sup>4</sup> for the

<sup>19</sup> Tax L. § 219 (L. 1918, c. 417).  
See Tax L. §§ 199, 200.

<sup>20</sup> Tax L. § 219-c (L. 1918, c. 271).

<sup>20a</sup> Tax L. § 219-d (L. 1918, c. 276).

<sup>1</sup> Tax L. § 219-c (L. 1918, c. 271):  
"No such penalty or charge shall be added to the amount of such tax or additional tax imposed for the year beginning November first, nineteen hundred and seventeen, if such tax or additional tax is paid within thirty days after the passage of this act."

<sup>2</sup> Tax L. § 217 (L. 1917, c. 726):

"All the authority and powers conferred on the tax commission by the provisions of section one hundred and ninety-five of the tax law shall have full force and effect in respect of corporations which may be liable hereunder."

<sup>3</sup> Tax L. 219-a (L. 1917, c. 726).

<sup>4</sup> Tax L. §§ 219-e, 219-f (L. 1917, c. 726).

deposit and disposition of the revenues thereof,<sup>5</sup> for secrecy of State officials having to do with the tax,<sup>6</sup> for preservation of tax reports for three years,<sup>7</sup> and for the statute of limitations in income tax proceedings.<sup>8</sup>

**§ 588. Id.: Franchise Tax In General.**—"The general franchise of a corporation is its right to live and do business by the exercise of the corporate powers granted by the State."<sup>9</sup> "The right to hold stock in other corporations and to have its officers eligible to the board of directors of such other corporations is clearly a franchise . . ."<sup>10</sup> The statute imposing a franchise tax "does not impose a property tax, but merely exacts a payment for the privilege of exercising corporate powers within the State. . . . The legislature is not bound to impose the same conditions upon all corporations for the privilege of doing business in New York. It may grant or withhold the privilege in the case of each corporation as it sees fit."<sup>11</sup> "A franchise stock corporation owns three things: 1. Its capital, existing in money or property. 2. Its surplus, if any. 3. Its franchise. The franchise is the thing taxed, and the tax is 'computed upon the basis of the amount of its capital stock employed within the state.' The share stock, or in other words, the paper certificates held and owned by individuals, are not *employed within this State*. It is the capital represented by such certificates that is so employed. The total share stock of a domestic corporation may be held by non-residents, and yet all of its capital may be employed within the State. . . . In construing this section [182] of the Corporation Tax Law, the authorized issue of the share stock of a corporation needs to be considered only as fixing the limit beyond which a corporate franchise cannot be taxed in a case where all the corporate capital is employed within this State."<sup>12</sup> The tax upon the capital stock of a corporation "is not imposed upon property, but in the case of a domestic corporation on its franchises, and of a foreign corporation on its business."<sup>13</sup> "The tax

<sup>5</sup> Tax L. § 219-g (L. 1917, c. 726), and § 219-h (L. 1918, c. 417).

<sup>6</sup> Tax L. § 219-i (L. 1917, c. 726).

<sup>7</sup> Id.

<sup>8</sup> Tax L. § 219-k (L. 1917, c. 726).

<sup>9</sup> *People ex rel. H. R. & P. R. R. Co. v. Tax Commissioners*, 215 N. Y. 507, L.R.A.1916B, 1222, 109 N. E. 569 (1915).

<sup>10</sup> *Venner v. New York Central & H. R. R. Co.*, 160 A. D. 127, 145 N. Y. Supp. 725 (1914); *aff'd* 217 N. Y. 615 and 617, 111 N. E. 487; *St. Corp. L. § 52*.

*Co. v. Glynn*, 194 N. Y. 387, 87 N. E. 434 (1909); Tax L. § 182, *dictum*.

<sup>12</sup> *People ex rel. Commercial Cable Co. v. Morgan*, 178 N. Y. 433, 67 L.R.A. 960, 70 N. E. 967 (1904); Tax L. § 182.

<sup>13</sup> *People ex rel. Singer Mfg. Co. v. Wemple*, 150 N. Y. 46, 44 N. E. 787 (1896); *Corp. Tax Act*, L. 1880, c. 542, as amend'd L. 1885, c. 501. See now Tax L. § 182; *People ex rel. Badische Fabrik v. Roberts*, 152 N. Y. 59 (1897); L. 1880, c. 542,

[on capital] when imposed on a domestic corporation is a tax on its corporate franchises; when imposed on a foreign corporation is a tax on its business, a distinction based on the fact that corporate franchises are only taxable within the jurisdiction which creates them, and where alone they can be said to have a *situs*.”<sup>14</sup> The statute imposing a franchise tax on corporations is constitutional.<sup>15</sup> A law imposing a franchise tax upon corporations sufficiently states its object, under the Constitutional mandate that the object shall distinctly be stated in a statute’s title, if it says that it is “applicable to the payment of the ordinary and current expenses of the State.”<sup>16</sup> A statute imposing a franchise tax is not obnoxious to any provision of the Federal Constitution, if confined to capital employed in this State by an entity existing under its laws.<sup>17</sup> An annual franchise tax based on dividends declared is not on property and cannot be held violative of any provision of the Constitution of the United States if there is no discrimination made between one corporation and another.<sup>18</sup> The statute providing for the imposition of a franchise tax upon corporations “repeals by implication any other act not dealing exclusively with taxation in conflict with it, insofar as taxation is concerned.”<sup>19</sup> When two meanings are inferrable from a statute imposing a franchise tax, the taxpayer is entitled to the more favorable reading.<sup>20</sup> The franchise tax “acts are prospective in operation and the tax thereby imposed is payable annually, not for the past, but for the future enjoyment of the franchise. The framers of the act had to solve the problem of ascertaining the value of such enjoyment, and for that purpose alone was reference made to dividends. . . . The amount of dividends made or declared during the year are thus made simply the measure

<sup>14</sup> *People ex rel. Pennsylvania R. Co. v. Wemple*, 138 N. Y. 1, 19 L.R.A. 694, 33 N. E. 720 (1893); L. 1880, c. 542; L. 1881, c. 361; L. 1882, c. 151; L. 1885, c. 501; L. 1890, c. 522, § 3. See now Tax L. § 182.

<sup>15</sup> *People v. Gold Stock Telegraph Co.*, 8 N. Y. 67 (1885); L. 1881, c. 361, see now Tax L. § 182.

<sup>16</sup> *People v. Home Insurance Co.*, 92 N. Y. 328 (1883); L. 1880, c. 542, § 9, see now Tax L. § 182; N. Y. Const. art. 3, § 20.

<sup>17</sup> *People ex rel. Platt v. Wemple*, 117 N. Y. 136, 6 L.R.A. 303, 22 N. E. 1046 (1889); L. 1880, c. 542, as amend’d L. 1881, c. 361, § 3, and L. 1885, c. 501, see now Tax L. § 182.

<sup>18</sup> *People ex rel. Matheson & Co. v. Roberts*, 158 N. Y. 162, 52 N. E. 1102 (1899); L. 1880, c. 542; *People ex rel. A. S. Fountain Co. v. Roberts*, 158 N. Y. 168, 52 N. E. 1104 (1899); L. 1880, c. 542, amend’d by L. 1890, c. 522, see now Tax L. § 182.

<sup>19</sup> *People v. Gold & Stock Telegraph Co.*, 98 N. Y. 67 (1885); L. 1881, c. 361; L. 1853, c. 471, see now Tax L. § 182.

<sup>20</sup> *People ex rel. American Bank Note Co. v. Sohmer*, 157 A. D. 1, 141 N. Y. Supp. 635 (1913); aff’d 210 N. Y. 621, 104 N. E. 1137; Tax L. § 182.

of the annual value of the franchise upon which the tax is to be annually paid.”<sup>1</sup> All the data used in fixing a franchise tax must be of past transactions as the tax is not on property or on business to be done but upon business done.<sup>2</sup> The franchise tax of a corporation organized for less than a year when the tax becomes due should be determined at such a part of the full year’s tax as the time since its organization bears to one year.<sup>3</sup> “An annual tax is a tax reckoned by the year the same as annual rent or annual interest. An ‘annual’ tax imposed ‘annually,’ means a tax that is imposed once a year, computed by the year.”<sup>4</sup> If an act “imposes annually an annual tax for doing business, but does not say whether, if business is done for only part of a year, the tax shall be fixed in accordance with the time business is done, or for the entire year, including that part when not only no business was done, but there was no right to do any,” the tax “should be based upon the period that the privilege was extended and enjoyed.”<sup>5</sup> A corporate transferee of a corporation which has been credited by the Comptroller on resettlement of its franchise tax payments for past years with a certain amount cannot offset the amount transferred to it by the corporation against a franchise tax due by it.<sup>6</sup> In collecting a franchise tax from a corporation “when the property of a corporation is already sequestrated and a receiver appointed, and where, in addition thereto, foreclosure proceedings are pending against it to foreclose mortgages to an amount in excess of all its property, and a receiver has also been appointed under such proceedings, and where the corporation is largely and hopelessly insolvent and all its property in the hands of the receiver appointed by the court, and where the money to pay

<sup>1</sup> *People v. Albany Insurance Co.*, 92 N. Y. 458 (1883); L. 1880, c. 542, as amend’d L. 1881, c. 361, see now Tax L. § 182.

<sup>2</sup> *People ex rel. Brooklyn Rapid Transit Co. v. Morgan*, 57 A. D. 335, 68 N. Y. Supp. 21 (1901); mod. 168 N. Y. 672, 61 N. E. 1132, 9 v.; Tax L. § 182 (L. 1896, c. 908). “It is not for the privilege to do business that the tax is imposed. The organization tax takes care of that, but it is the business actually done, and after it is done, and can be ascertained and measured, that this tax lights upon; it is not for the privilege of doing business in the future. That also is provided for by the organization tax. It is for no privilege at all.”

<sup>3</sup> *People ex rel. Paving Co. v. Knight*, 99 A. D. 62, 90 N. Y. Supp. 537 (1904).

<sup>4</sup> *People ex rel. Mutual Trust Co. v. Miller*, 177 N. Y. 51, 69 N. E. 124 (1903); Tax L. § 187-a.

<sup>5</sup> *People ex rel. Mutual Trust Co. v. Miller*, 177 N. Y. 51, 69 N. E. 124 (1903); Tax L. § 187-a: A company which had carried on business for but six days before the fiscal year expired is taxable for a proportionate part only of the year and not for the whole year.

<sup>6</sup> *People ex rel. Western Union Telegraph Co. v. Roberts*, 30 A. D. 78, 51 N. Y. Supp. 747 (1898); aff’d 156 N. Y. 693, 51 N. E. 1093; L. 1889, c. 463, see now Tax L. § 182.

the taxes has arisen from the gross earnings, and an amount sufficient to pay them is in the hands of the receiver, . . . the proceedings to obtain payment of those taxes thus in the receiver's hands are not confined to those provided for by the act . . . , but . . . a direct application for an order on the receiver for their payment may be made to the court by petition . . . , having made the corporation and the receiver a party thereto."<sup>7</sup>

**§ 589. Id.: What Corporations Subject to, In General.**—Corporations, other than manufacturing and mercantile corporations, doing business in New York State, must pay annually a tax computed upon the basis of the amount of their capital stock employed during the preceding year in New York State and commonly called the "Franchise Tax," except (1) certain financial, insurance, surety, trust and title companies, (2) laundering companies at least forty percentum of the capital stock of which is invested in property in New York State and used by it in its laundering, (3) mining companies wholly engaged in mining ores within New York State and at least forty percentum of the capital stock of which is invested in property in New York State and used by it in its mining business in New York State, (4) certain transmission and transportation corporations.<sup>8</sup> The decisions concerning manufacturing corporations and payment by them of the State Franchise Tax—to which they were subject—are found in

<sup>7</sup> *Central Trust Co. v. New York City and Northern R. R. Co.*, 110 N. Y. 250, 1 L.R.A. 260, 18 N. E. 92 (1888); L. 1881, c. 361, see now Tax L. § 182. "If there are any disputed questions of fact to be determined, the court may direct an action to be brought, or may determine it in some other and more summary way."

Generally on the question of taxation of corporate franchise, see comprehensive note in 57 L.R.A. 33.

<sup>8</sup> Tax L. § 182, and § 210 (L. 1918, c. 417). As to the certain financial, insurance, surety, trust and title corporations, see Tax L. § 183 (L. 1909, c. 62). As to laundering companies see the same. As to mining companies, see the same. As to the certain transmission and transportation companies, see Tax L. § 184 (L. 1914, c. 334), and § 185 *et seq.* The statute (L. 1918, c. 271, Tax L. § 219-j) imposing a State

income tax on manufacturing and mercantile corporations says that they are not "required to pay the franchise tax imposed by section one hundred and eighty-two" of the Tax Law. It also says (Tax L. § 210, L. 1918, c. 417) that "corporations wholly engaged in the purchase, sale and holding of real estate for themselves, holding corporations whose principal income is derived from holding the stocks and bonds of other corporations, and corporations liable to a tax under sections 184 to 189 inclusive" of the Tax Law, "banks, savings banks, institutions for savings, title guaranty, insurance or surety corporations" are exempt from the State income tax. Therefore, the broad statement in the text that "corporations, other than manufacturing and mercantile corporations, . . . must pay . . . a tax . . ." etc.

that section of this work which relates to the State Income Tax; for the reason that such decisions relate principally to the question of what are and what are not manufacturing corporations, and are therefore more valuable in the text relating to the State Income Tax which is now imposed upon manufacturing corporations.<sup>9</sup> "The word 'incorporated' . . . [in the statute subjecting 'every corporation, joint-stock company or association whatever . . . incorporated or organized under any law of this State' to a franchise tax] is not to be taken in a technical or restricted meaning and confined to an association brought into being according to the formula of a statute, but as including any combination of individuals upon terms which embody or adopt as rules or regulations of business the enabling provisions of the statutes."<sup>10</sup> A corporation in a receiver's hands and operated by him "is operated under and by virtue of the franchise which has been conferred upon the corporation by the State, and . . . when he receives the gross earnings arising from its operation and has in his hands money enough to pay these taxes, the State has a paramount right to collect them before the moneys applicable to such payment shall be paid away by the receiver."<sup>11</sup> "There would seem to be no question that domestic corporations, engaged in both state and interstate commerce, may lawfully be subjected by the state to a franchise tax, measured by its whole capital or business, or in any other way in the discretion of the legislature, without taking notice of the part of its business arising from interstate commerce, provided no hostile discrimination is made against such part. Nor would there seem to be any valid reason why a foreign corporation, engaged in the business both of state and interstate transportation in this state, should not be subject to taxation in common with domestic corporations."<sup>12</sup> ". . . the State legislature has no power to impose a tax upon the bonds or

<sup>9</sup> See §§ 572 and 573, *supra*.

<sup>10</sup> *People ex rel. Platt v. Wemple*, 117 N. Y. 136, 6 L.R.A. 303, 22 N. E. 1046 (1889); L. 1880, c. 542, as amend'd L. 1881, c. 361, § 3, and L. 1885, c. 501. See now Tax L. § 182. The United States Express Company was held subject to the franchise tax because it enjoyed by the statutes of the State permanent investment of capital, the right of succession, the transfer of property by an assignment of the certificate of ownership, and the

prosecution of suits in the name of one person.

<sup>11</sup> *Central Trust Co. v. New York City and Northern R. R. Co.*, 110 N. Y. 250, 1 L.R.A. 260, 18 N. E. 92 (1888); L. 1881, c. 361. See now Tax L. § 182.

<sup>12</sup> *People ex rel. Pennsylvania R. R. Co. v. Wemple*, 138 N. Y. 1, 19 L.R.A. 694, 33 N. E. 720 (1893); L. 1880, c. 542; L. 1881, c. 361; L. 1882, c. 151; L. 1885, c. 501; L. 1890, c. 522, § 3. See now Tax L. § 182.

securities . . . issued as a means of borrowing money upon the credit of the United States, whether such bonds and securities are held by individuals or corporations. . . . such exemption cannot be evaded by any mere change of form or name in the law by which the tax is imposed. If, in fact, the tax is laid upon such bonds or securities, then, by whatever form of words the imposition is laid, it is illegal. . . . The powers and privileges which constitute the franchises of a corporation, are in a just sense property, and quite distinct and separate from the property which by the use of such franchises the corporation may acquire;" and may be subjected to taxation, even though the corporation has invested in United States bonds or securities.<sup>13</sup> ". . . while a tax can not be assessed upon property that is exempt by act of Congress, it may be imposed upon the franchise of a corporation to which such exempt property belongs and may be measured by the value thereof. The principle applies with the same force to patent rights as to United States bonds, both of which are exempt from taxation." <sup>14</sup> The Comptroller may impose a tax on the capital stock of a domestic corporation though it be engaged in both state and interstate commerce.<sup>15</sup> Neither upon the theory that a corporation which has so liquidated that it has paid back one-twentieth of its capital stock to its stockholders in cash and is continuing to distribute the rest of its property representing the rest of its capital as it reduces it to cash is distributing dividends, nor upon the theory that by holding a purchase-money mortgage and

<sup>13</sup> *Monroe Savings Bank v. City of Rochester*, 37 N. Y. 365 (1867).

<sup>14</sup> *People ex rel. U. S. A. P. P. Co. v. Knight*, 174 N. Y. 475, 63 L.R.A. 87, 67 N. E. 65 (1903).

<sup>15</sup> *People ex rel. Postal Telegraph Cable Co. v. Campbell*, 70 Hun, 507, 24 N. Y. Supp. 208 (1893); L. 1889, c. 463, § 20. See now Tax L. § 182 *et seq.* ". . . the imposition of a tax upon the [corporations'] capital employed in manufacturing, when it was also engaged in selling goods manufactured outside, was not in conflict with the Federal Constitution which prohibits the laying of any imposts or duties on imports or exports, and confers upon Congress the power to regulate commerce. By this statute domestic and foreign corporations are

taxed alike upon their franchise or business transacted within the state, and if they are engaged in state as well as interstate business, they are taxable upon both." *People ex rel. A. S. Fountain Co. v. Roberts*, 158 N. Y. 168, 52 N. E. 1104 (1899); L. 1880, c. 542, as amend'd L. 1890, c. 522. See now Tax L. § 182. A corporation engaged in business other than manufacturing, even though such other business be interstate commerce, is liable to state taxation if there be no hostile discrimination against it in the tax assessment. *People ex rel. A. S. Fountain Co. v. Roberts*, 158 N. Y. 168, 52 N. E. 1104 (1899); L. 1880, c. 542, amend'd by L. 1890, c. 522. See now Tax L. § 182.

distributing its principal and interest as collected it is employing its capital in this State, can it be subjected to a franchise tax.<sup>16</sup> A railroad agreeing to pay a municipality an annual sum in addition to all franchise and other taxes must do so, whatever the law may provide in general terms for deduction of sums in the nature of a tax from a corporation's franchise tax.<sup>17</sup>

**§ 590. Id.: Capital Stock Employed in State.**—The cases discussed in the next succeeding section should also be considered in determining whether or not a corporation's capital stock is employed in the State. "The franchise tax is imposed upon that part of the capital stock of the corporation which is employed within the State. It is the stock and not the dividend which is taxable. Where a corporation pays no dividend the stock is appraised and the tax is computed upon the appraised value. Where a dividend is paid it is an indication of the value of the stock, and the tax upon the stock is determined by the amount of such dividend."<sup>18</sup> "It is apparent, of course, that this section [182, Corporation Tax Law] applies to two classes of corporations. In the first class are those that declare and pay dividends of six percentum or more upon the capital stock; and in the second class are those that declare and pay dividends of less than six percentum upon their capital stock. The tax upon corporations in the first class is 'to be computed upon the basis of the amount of its capital stock employed within this State,' while the tax upon corporations in the second class is 'upon such portion of the capital stock at par as the amount of capital employed within this State bears to the entire capital of the corporation.' It will be observed that in either case the tax can only be based upon the capital stock employed in this State although the methods for ascertaining the amount

<sup>16</sup> *People ex rel. Ridgewood Land & Improvement Co. v. Saxe*, 174 A. D. 344, 160 N. Y. Supp. 752 (1916); *aff'd* 219 N. Y. 637, 114 N. E. 1080; Tax L. § 182 (L. 1909, c. 62).

<sup>17</sup> *City of Ithaca v. Ithaca St. R. Co.*, No. 3, 145 A. D. 675, 130 N. Y. Supp. 359 (1911); *aff'd* 204 N. Y. 626; Tax L. § 48. While a subway corporation may not be assessable for a franchise tax under § 185 of the Tax Law because it operates some elevated road, yet it may be

taxable in respect of its equipment, maintenance and operation of the subway road under §§ 182 and 184 of the Tax Law. *People ex rel. Interborough Rapid Transit Co. v. Williams*, 200 N. Y. 93, 93 N. E. 505 (1910); Tax L. §§ 182, 184, 185.

As to what organizations are subject to franchise tax, see note in 57 L.R.A. 73.

<sup>18</sup> *People ex rel. Pullman Co. v. Glynn*, 130 A. D. 332, 114 N. Y. Supp. 460 (1909); *aff'd* 198 N. Y. 605, 92 N. E. 1097; Tax L. § 182.

thereof are different.”<sup>19</sup> It seems “that the chartered privileges of a corporation as defined in its certificate of incorporation, which is invariably framed in the language of the incorporators, should be the index to its relations to the State, rather than the possibly sporadic and shifting exercise of any one or more of a large number of the powers delegated to it;” so that a corporation empowered to acquire and sell realty, “and to carry on any other business which may seem to the board . . . capable of being conveniently conducted in connection with the purposes above set forth,” or calculated directly or indirectly to increase the profits of said corporation, etc., cannot claim exemption from license and franchise taxation on the ground that it is organized for the sole purpose of holding and owning lands, the capital to purchase which was not “employed within this State” but simply invested.<sup>20</sup> The capital stock of a corporation is employed in this State within the meaning of the franchise tax law when it is being used for the purpose specified in its certificate of incorporation, viz., buying realty from individuals which it paid for with its stock, leasing such realty and using the net rentals for dividends.<sup>1</sup> From the moment a corporation (whether it be organized to buy, sell, lease, rent and own realty and build thereon, or otherwise) begins to use its money to purchase property, *e. g.*, real estate for the purposes of its incorporation, it employs capital in this State within the purview of the Tax Law, whether it has or has not earned dividends or derived any benefit or advantage from its capital.<sup>2</sup> “. . . a corporation whose only business is owning and managing an apartment house is employing its capital stock within the State and is taxable under section 182 of the Tax Law.”<sup>3</sup> The capital of a corporation is invested rather than “employed within the State,” within the meaning of the franchise tax law, and is not therefore subject to such tax, when it consists solely of realty owned by a

<sup>19</sup> *People ex rel. Commercial Cable Co. v. Morgan*, 178 N. Y. 433, 67 L.R.A. 960, 70 N. E. 967 (1904); Tax L. § 182.

<sup>20</sup> *People ex rel. Wall & H. St. R. Co. v. Miller*, 181 N. Y. 328, 73 N. E. 1102 (1905); Tax L. §§ 181, 182. But see concurring opinion of Vann, J., justifying the tax not on the corporation's charter but unexercised powers but on those actually used. See Tax L. § 210 (L. 1918, c. 417).

<sup>1</sup> *People ex rel. Vandervoort R. Co. v. Glynn*, 194 N. Y. 387, 87 N. E. 434 (1909); Tax L. § 182.

<sup>2</sup> *People ex rel. Fifth Ave. Bldg. Co. v. Williams*, 198 N. Y. 238, 91 N. E. 638 (1910); Tax L. § 182 *et seq.*

<sup>3</sup> *People ex rel. Hubert Apartment Assn. v. Kelsey*, 110 A. D. 617, 96 N. Y. Supp. 745 (1906); *aff'd* 184 N. Y. 573, 77 N. E. 1194; Tax L. § 182.

decendent and put into the shape of the corporation's stock after his death only for the purpose of saving it from sale or foreclosure, and when no improvements have been made to it.<sup>4</sup> In determining what capital stock of a corporation is "employed within this State" so as to subject it to tax, an investment by it in real estate not used by it in the usual course of its business, or in non-taxable municipal bonds, cannot be included.<sup>5</sup> Under a statute imposing an annual tax upon corporations computed on the basis of the amount of capital stock employed in the State (but not, as it then stood, on capital stock employed *in business*), capital stock of a company represented by realty and structures thereon belonging to it, is taxable if it was formed to hold realty.<sup>6</sup> Land on which in some place dwelling-houses are built and earning an annual rent and the balance of which is held for sale when a satisfactory buyer can be had is employed in this State by its corporate, manufacturing owner, so as to be considered for the purpose of the franchise tax as capital actually employed in New York.<sup>7</sup> Stock of one corporation acquired by another along with the former's entire assets, property and privileges except its corporate franchise and some non-assignable contracts, for which the holding company issued bonds in payment and as security for which bonds it deposited the stock of the selling company, is nevertheless to be regarded as capital of the holding corporation employed in this State and subject to the franchise tax; because the selling company is still a corporation the stockholders of which can do the business authorized in its charter.<sup>8</sup> When a corporation in compensation for its grants of patent rights to local corporations receives stocks of the latter, this is an employment of its capital in the purchase of such stocks, and when such local corporations are situated outside of this State, then, to the extent that it held their certificates of stock, its property is outside the State and its capital cannot be said to be employed here; so that a tax on an estimate of its capital stock which

<sup>4</sup> *People ex rel. Fort George Realty Co. v. Miller*, 179 N. Y. 49, 71 N. E. 463 (1904); Tax L. § 182.

<sup>5</sup> *People ex rel. Union Ferry Co. v. Roberts*, 66 A. D. 157; 72 N. Y. Supp. 950 (1901); Tax L. §§ 182, 190 (L. 1896, c. 908).

<sup>6</sup> *People ex rel. Waclark R. Co. v. Williams*, 198 N. Y. 54, 28 L.R.A. (N.S.) 371, 91 N. E. 266 (1910); Tax L. § 182.

<sup>7</sup> *People ex rel. Steinway & Sons v. Kelsey*, 108 A. D. 138, 96 N. Y. Supp. 42 (1905); Tax L. § 182 (L. 1901, c. 558).

<sup>8</sup> *People ex rel. Commercial Cable Co. v. Morgan*, 178 N. Y. 433, 67 L.R.A. 960, 70 N. E. 967 (1904); Tax L. § 182.

takes into consideration its property in shares of corporations outside the State is erroneous.<sup>9</sup> An amount carried on a corporation's books as "Bills receivable," made up of its expenditures on railroad lines leased by it, for which no direct return is expected and for which the corporation holds no obligation for reimbursement, constitutes no part of its property within the State for the purpose of the franchise tax.<sup>10</sup> The determination of whether or not a corporation's average bank balance for a year ending October thirty-first is capital employed in the State for franchise tax purposes depends on the facts.<sup>11</sup> Bonds, for example of railroads, a newspaper company and the United States, held by a corporation within this State, are to be treated as capital employed within this State and therefore as a part of the basis upon which the corporation's franchise tax is to be computed, if purchased with its capital as distinguished from its surplus, but not if bought with surplus; and the fact that the corporation has more assets than share stock raises no presumption that capital would be invested in properties relating to its business, while surplus would be invested in safe interest-bearing securities.<sup>12</sup> The rolling stock of a domestic corporation used upon its lines in this State, though transferred to other roads and run outside the State to facilitate transportation of goods and persons, if always returned to this State after such temporary use without it, is to be considered as capital employed in this State in assessing the corporation's franchise tax.<sup>13</sup>

**§ 591. Id.: Exercising Franchises or Doing Business in State.**

—The cases discussed in the last preceding section should also be considered in determining whether or not a corporation is exercising franchises or doing business in the State.

<sup>9</sup> *People ex rel. Edison Electric Light Co. v. Temple*, 148 N. Y. 690, 43 N. E. 176 (1896); L. 1880, c. 542, as amend'd L. 1882, c. 151, and L. 1885, c. 501. See now Tax L. § 182.

<sup>10</sup> *People ex rel. New York Central, etc., R. R. Co. v. Knight*, 173 N. Y. 255, 65 N. E. 1102 (1903).

<sup>11</sup> *People ex rel. Brooklyn Rapid Transit Co. v. Miller*, 85 A. D. 178, 83 N. Y. Supp. 96 (1903); aff'd 181 N. Y. 582, 74 N. E. 1123.

<sup>12</sup> *People ex rel. Commercial Cable Co. v. Morgan*, 178 N. Y. 433, 67 L.R.A. 960, 70 N. E. 967 (1904); Tax L. § 182.

<sup>13</sup> *People ex rel. New York Central, etc., R. R. Co. v. Knight*, 173 N. Y. 255, 65 N. E. 1102 (1903), opinion by Haight, J., concurred in by majority of court. An office and office furniture had by a corporation as incidents to its manufacturing business do not make their value capital stock separate from that employed in its manufacturing business, so as to make it taxable. *People ex rel. Standard Wood Co. v. Roberts*, 20 A. D. 514, 47 N. Y. Supp. 122 (1897); L. 1880, c. 542, as amended. See now Tax L. § 182.

“ To render a corporation liable to the imposition of a franchise tax under that section [the one hundred and eighty-second] it must be doing business or exercising its corporate franchise in this State and must have capital stock employed within the State during the year for which the tax is assessed.”<sup>14</sup> That a corporation does an *ultra vires* business is no ground for relieving it from payment of a franchise tax.<sup>15</sup> Only a corporation (whether domestic or foreign) which is doing business in this State need pay the annual statutory, franchise tax; a corporation, the sole activity of which is to maintain its corporate existence is not doing business in this State.<sup>16</sup> A corporation doing a trust company’s business is not relieved from payment of a franchise tax on the ground that it is not exercising its franchise simply because the State Superintendent of Banks notifies it that he would take legal action if it continued to receive deposits in its then condition.<sup>17</sup> A corporation is liable to a franchise tax as doing business in this State if it takes care of its plant, keeps its organization, principal office, secretary and superintendent; rents houses on property owned by it; borrows money; pays rent; and makes its annual State franchise tax report, though it do none of the business for which it was mainly formed.<sup>18</sup> “. . . corporations organized for the purpose of buying, selling, leasing, renting and owning real estate, and of erecting buildings or other structures thereon

<sup>14</sup> *People ex rel. Vandervoort R. Co. v. Glynn*, 194 N. Y. 387, 87 N. E. 434 (1909); Tax L. § 182. The proper construction of the act imposing a tax on the capital stock of every corporation which is incorporated in this State or under the laws of any other state or country and is doing business in this State is that the words “and doing business in this State” refer only to foreign corporation; so that domestic corporations are liable to the tax whether they do business in the State or not, and a just measure of liability is arrived at, in those cases in which the capital stock is partially employed in this State, by fixing the basis for the tax by the amount which is employed here. *People ex rel. American Contracting & Dredging Co. v. Wemple*, 129 N. Y.

558, 29 N. E. 812 (1892); L. 1880, c. 542, as amended L. 1881, c. 361; L. 1882, c. 151; L. 1885, c. 359 and c. 501. See now Tax L. § 182.

<sup>15</sup> *People ex rel. Coney Island Jockey Club v. Sohmer*, 155 A. D. 842, 140 N. Y. Supp. 507 (1913); *aff’d* 210 N. Y. 549, 104 N. E. 1137; Tax L. § 182.

<sup>16</sup> *People ex rel. Lehigh & N. Y. R. R. Co. v. Sohmer*, 217 N. Y. 443, 112 N. E. 181; Tax L. § 182 (as it stood in 1913 after 1906 amendment).

<sup>17</sup> *People v. Holland Trust Co.*, 139 A. D. 353, 123 N. Y. Supp. 935 (1910).

<sup>18</sup> *People ex rel. Coney Island Jockey Club v. Sohmer*, 155 A. D. 842, 140 N. Y. Supp. 507 (1913); *aff’d* 210 N. Y. 549, 104 N. E. 1137; Tax L. § 182.

are taxable under the Tax Law.”<sup>19</sup> A corporation is doing business within the State within the meaning of the franchise tax law when its own petition to review a tax imposed states that it began business here on a specified date, and its own report to the comptroller declares its principal place of business is at a stated place in the State, and its certificate of incorporation declares its purpose to be to acquire a certain tract of realty in the State.<sup>20</sup> A corporation holding realty, which its charter gave it no power to do and which it bought as an investment, is doing business so as to be subject to a franchise tax.<sup>1</sup> A corporation formed to hold real property which was in litigation and in which several persons were interested so as to expedite service of papers in the litigation is engaged in business so as to be subject to a franchise tax.<sup>2</sup> A domestic corporation empowered by its charter to buy, hold and lease real estate is not liable to a franchise tax if all it does is to hold a piece of realty consisting of unimproved swamp land from which it yearly collects forty-five dollars for the grass crop, and on which it pays taxes.<sup>3</sup> A corporation which may under its charter powers do a general business in the purchase, sale and exchange of real property, including the erection and management of buildings and the purchase and sale of mortgages, and also stocks and bonds, is subject to pay a franchise tax though it in fact is on holding and leasing real estate.<sup>4</sup>

**§ 592. Id.: How to Ascertain Tax, Governing Statutes.—** The franchise tax is based on the amount of the corporation's capital stock, and upon each dollar of such amount, which was employed during the preceding year within New York State; and that amount is determined for corporations the stock of which has a par value as follows: First: Find the gross assets employed by the corporation in any business within New York State and the gross assets employed

<sup>19</sup> *People ex rel. Fifth Ave. Bldg. Co. v. Williams*, 198 N. Y. 238, 91 N. E. 638 (1910); Tax L. § 182 *et seq.*

<sup>20</sup> *People ex rel. Vandervoort R. Co. v. Glynn*, 194 N. Y. 387, 87 N. E. 434 (1909); Tax L. § 182.

<sup>1</sup> *People ex rel. Coney Island Jockey Club v. Sohmer*, 155 A. D. 842, 140 N. Y. Supp. 507 (1913); *aff'd* 210 N. Y. 549, 104 N. E. 1137; Tax L. § 182.

<sup>2</sup> *People ex rel. Tetragon Co. v. Sohmer*, 162 A. D. 433, 147 N. Y.

Supp. 611 (1914); *aff'd* 213 N. Y. 702, 108 N. E. 1105; Tax L. § 182.

<sup>3</sup> *People ex rel. Hydraulic Co. v. Roberts*, 30 A. D. 180, 57 N. Y. Supp. 771 (1898); *aff'd* 157 N. Y. 676, 51 N. E. 1093; L. 1880, c. 542, § 3. See now Tax L. § 182.

<sup>4</sup> *People ex rel. Fourteenth St. Realty Co. v. Kelsey*, 110 A. D. 797, 97 N. Y. Supp. 197 (1906); *aff'd* 184 N. Y. 572, 77 N. E. 1194.

On state taxation of property, franchises or processes of national bank, see note in 45 L.R.A. 739.

by it in business anywhere and ascertain what proportion the former are to the latter; Second: Take the corporation's issued capital stock; and that proportion thereof which the gross assets employed in New York has been found to bear to the gross assets employed anywhere is the measure of the amount of the capital stock employed in New York State which is the basis of the franchise tax.<sup>5</sup> For corporations the stock of which has no par value the way to find the basis of the franchise tax is: First, to ascertain its gross assets employed in any business within New York State; Second, to ascertain its entire gross assets employed in business anywhere; Third, to ascertain the proportion between the first and second items; and, Fourth, to take that proportion, whatever it is, of the net assets of the corporation—which proportion is the basis of the tax.<sup>6</sup>

§ 593. **Id.: What and Where Are Capital Stock, Assets, Earnings and Dividends.**—" . . . so long as a corporation continues business under its charter the privilege of so doing is of some pecuniary value to it, and . . . there is no valid reason why the value of the capital stock may not be used as an element for determining the amount of tax levied upon franchise, and why it will not in each year approximate its variable taxable value quite as accurately as any other method."<sup>7</sup> In valuing the stock of a corporation for taxation purposes the Comptroller must determine its present as distinguished from its prospective value.<sup>8</sup> "While the statute makes the basis of taxation the amount of the capital stock employed, the words 'capital stock' and 'capital' are practically the equivalent of each other when considered as a basis for a franchise tax (*citation*). By the value of capital stock is meant the value of its net assets."<sup>9</sup> "It must be deemed settled that the words 'capital stock' as used in . . . [the sections of the Tax Law imposing a franchise tax on manufacturing corporations] refer to the property of

<sup>5</sup> Tax L. § 182 (L. 1916, c. 323).

<sup>6</sup> St. Corp. L. § 21 (L. 1917, c. 501).

<sup>7</sup> *People v. Home Insurance Co.*, 92 N. Y. 328 (1883); L. 1880, c. 542, as amended L. 1881, c. 361. See now Tax L. § 182.

<sup>8</sup> *People ex rel. Staten Island R. T. R. Co. v. Roberts*, 4 A. D. 334, 38 N. Y. Supp. 724 (1896); L. 1880, c. 542. See now Tax L. § 182. The income was insufficient to pay

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dividends on the stock or interest on income bonds of \$4,500,000 which were a lien prior to the stock. Ten dollars a share was held a proper value for each share of the one hundred dollar par value stock.

<sup>9</sup> *People ex rel. Coney Island Jockey Club v. Sohmer*, 155 A. D. 842, 140 N. Y. Supp. 507 (1913); *aff'd* 210 N. Y. 549, 104 N. E. 1137; Tax L. § 182.

a corporation contributed by the stockholders, or otherwise obtained by it, and not the shares of stock (*citations*). It is the actual and not the par value of the capital stock of a corporation employed within this State which is the basis for computing the franchise tax."<sup>10</sup> "The theory of the statute [Tax Law], as disclosed by its successive amendments, seems to indicate that when the capital stock is the basis upon which the tax is to be assessed, there shall be an appraisal or valuation of the capital stock at its actual value."<sup>11</sup> In computing the franchise tax on a corporation's capital stock, the basis to be used is the actual and not the par value of the stock.<sup>12</sup> To ascertain the franchise tax due from a domestic corporation, "from the value of all its assets, deduct its liabilities, and add to the remainder the value of its good will, unless . . . it has already been included in the value of its assets, and such proportion of that sum as is employed in this State is the sum on which the tax is to be levied."<sup>13</sup> The statute assessing for franchise taxation the capital stock of a corporation "contemplates that the whole capital stock of a corporation may not be employed within this State and . . . seeks to impose a franchise tax proportionate to or measured by only that part of the capital which is so employed. The direction that the tax shall be 'upon such portion of the capital stock at par as the amount of capital employed within this State bears to the entire capital of the corporation' was not intended to establish or fix the rate at which such capital stock was to be assessed, but a rule for the computation of the amount of capital stock on which assessment was to be made. . . . But having determined that \$ ——— of capital stock is to be deemed as employed within this State, then that capital stock is, under section 190, to be taken at 'its actual cash value' for the purpose of computing the franchise tax."<sup>14</sup> A corporation the articles of association of which

<sup>10</sup> *People ex rel. Standard Oil Co. v. Saxe*, 179 A. D. 721, 166 N. Y. Supp. 887 (1917); Tax L. §§ 182, 183 (L. 1909, c. 62).

<sup>11</sup> *People ex rel. New York Mail & N. T. Co. v. Gaus*, 198 N. Y. 250, 91 N. E. 634 (1910); Tax L. § 182.

<sup>12</sup> *People ex rel. New York Central, etc., R. R. Co. v. Knight*, 173 N. Y. 255, 65 N. E. 1102 (1903); Tax L. §§ 182, 190. The Comptroller cannot fix the value of a corporation's capital stock by assuming

without evidence that its par was its actual value, and by deducting therefrom each year the indebtedness incurred; but must take the value of the property and deduct therefrom the indebtedness. *People ex rel. Lorena Co. v. Morgan*, 55 A. D. 265 (1900).

<sup>13</sup> *People ex rel. Rees' Sons v. Miller*, 90 A. D. 591, 86 N. Y. Supp. 193 (1904); Tax L. §§ 182, 190 (L. 1901, c. 558).

<sup>14</sup> *People ex rel. N. Y. & E. R. F.*

declare that the money represented by its certificates of stock constitutes a part of its capital stock is estopped from asserting to the contrary in a proceeding to determine their liability to the franchise tax when the construction of the certificates is clearly debatable.<sup>15</sup>

In determining the franchise tax the Comptroller should levy on the average capital employed during the year and that average may be accurately found by multiplying the amount of capital employed during any period of days by the number of days, adding together the products so obtained and dividing by the number of days in the year.<sup>16</sup> As a corporate franchise tax is an annual one, the capital stock appraised should be apportioned throughout the entire year; so that if the company have for seven months, say, but five hundred dollars derived from the sale of . . . shares needed to effect its incorporation, and employed no capital and did no business for such period; but during the other five months had large assets employed, five-twelfths only of such assets should be assumed as carried by the company through the entire year.<sup>17</sup> The law requiring payment of an annual franchise tax "to be computed upon the basis of the amount of its capital stock, employed during the preceding year within this State, and upon each dollar of such amount" does not mean that all such capital stock must be employed during the entire year but that capital stock employed *during* the preceding year is taxable: the statute does not necessarily contemplate computing the tax upon the amount of the capital stock outstanding on October 31st.<sup>18</sup> When a trust company increases its capital stock in the course of the tax year, it is proper to assess the tax on the basis of the whole outstanding stock at the end of the tax year, even though the increased stock was outstanding during only a part of the year and it might therefore well be argued that the assessment should be made on the average amount of stock during the year.<sup>19</sup>

Co. v. Roberts, 168 N. Y. 14, 60 N. E. 1043 (1901); Tax L. §§ 182, 190.

<sup>15</sup> People *ex rel.* Cohn & Co. v. Miller, 180 N. Y. 16, 72 N. E. 525 (1904).

<sup>16</sup> People *ex rel.* Brooklyn R. T. Co. v. Morgan, 57 A. D. 335, 68 N. Y. Supp. 21 (1901); mod. 168 N. Y. 672, 61 N. E. 1132 *q. v.*; Tax L. § 182 (L. 1896, c. 908).

<sup>17</sup> People *ex rel.* Rees' Sons v. Miller, 90 A. D. 591, 86 N. Y. Supp.

193 (1904); Tax L. §§ 182, 190 (L. 1901, c. 558).

<sup>18</sup> People *ex rel.* Mercantile Safe Deposit Co. v. Sohmer, 158 A. D. 110, 143 N. Y. Supp. 313 (1913); *aff'd* 217 N. Y. 605, 111 N. E. 1097; Tax L. § 182.

<sup>19</sup> People *ex rel.* New York Central & Hudson River R. R. Co. v. Gaus, 200 N. Y. 328, 93 N. E. 988 (1911); Tax L. §§ 182, 187a. But the amendment to § 182, Tax L., after the decision in People *ex rel.*

“ . . . the surplus of the corporation has been defined to be ‘ the accumulations of the company of moneys or property in excess of the par value of the stock issued by it.’ ”<sup>20</sup> Because the surplus of a corporation constitutes no part of its capital stock in determining the tax thereon, it does not follow that the surplus escapes taxation, as the surplus exercises a controlling influence in fixing the amount of the tax by swelling the dividends declared or increasing the valuation of the capital stock.<sup>1</sup> “ . . . while it may be conceded that the words ‘ par value ’ ordinarily are to be given the same meaning as face value when applied to bonds and stocks having a face value, yet when used as applying to the surplus and undivided earnings and not limited to bonds and stocks, the meaning may be very different,” *e. g.*, in determining the surplus and undivided earnings of a savings bank, on which a franchise tax is imposed, its interest-paying stocks and bonds must not be estimated above their par value or above their market value if below par.<sup>2</sup> An amount accumulated by a domestic corporation, by passing dividends in order to pay for stock and bonds of another company nearly the entire business of which consisted in transporting the purchasing corporation’s goods to its mines and the products from the mines, is surplus, even though placed in such railway securities as an independent investment; and it cannot be regarded as part of the corporation’s capital stock employed in this State for taxation purposes.<sup>3</sup>

In determining the franchise tax due from a corporation “ capital of a corporation which must first be invested before it begins to earn anything cannot be said to be a part of the earnings of such corporation merely because it is turned into cash and thus in one sense becomes a receipt of the corporation.”<sup>4</sup> “ The profits and earnings of a corporation are not

Mutual Trust Co. v. Miller, 177 N. Y. 51, 69 N. E. 124, while it did not affect companies taxed under § 187a, Tax L., did affect other corporations.

<sup>20</sup> People *ex rel.* McClure Publications, Inc. v. Purdy, 161 A. D. 541, 146 N. Y. Supp. 646 (1914); *aff’d* 213 N. Y. 658, 107 N. E. 1084; Franchise tax.

<sup>1</sup> People *ex rel.* Singer Mfg. Co. v. Wemple, 150 N. Y. 46, 44 N. E. 787 (1896); Corp. Tax Act, L. 1880, c. 542, as amended L. 1885, c. 501. See now Tax L. § 182.

<sup>2</sup> People *ex rel.* Bank for Savings v. Miller, 177 N. Y. 461, 69 N. E. 1103 (1904); Tax L. § 187b; Banking L. §§ 123, 124.

<sup>3</sup> People *ex rel.* U. V. Copper Co. v. Roberts, 156 N. Y. 585, 51 N. E. 293 (1898); L. 1880, c. 542. See now Tax L. § 182.

<sup>4</sup> People *ex rel.* Brooklyn Union Gas Co. v. Morgan, 114 A. D. 266, 99 N. Y. Supp. 711 (1906); *aff’d* 195 N. Y. 616, 89 N. E. 1108. The company bought coal and oil to make gas. For the year part of its capital was invested in coal and oil

capital, though they may be converted into capital. If no such conversion has taken place, they furnish no basis for taxation . . . , except incidentally as the dividends may be increased, upon which the tax in many cases is computed.”<sup>5</sup> In determining the franchise tax upon a light and power company an amount paid by it from its gross receipts to another corporation for electricity purchased is properly taken into consideration as part of its “gross earnings.”<sup>6</sup> Good will is an asset to be considered in fixing the amount of capital employed by a corporation for franchise taxation purposes, and the Comptroller may value it at the same amount at which stock was issued therefor when it was acquired by the corporation.<sup>7</sup> The Comptroller, in determining the tax on a domestic corporation’s capital stock, may consider the amount of its monthly bank balances, the gross amount paid for salaries, wages, labor, etc., and the total amount paid for rent.<sup>8</sup> Real estate and United States bonds which are part of a corporation’s capital and are in another State on deposit for the benefit of its policyholders are not to be considered as part of its capital used or employed within this State for tax assessment purposes.<sup>9</sup> “. . . the State authorities, in taxing corporations under the statutes . . . [imposing franchise taxes] are [not] obliged to deduct the amount of stock which such corporations hold in bonds of the United States from the total amount of their capital stock and compute the tax only upon the dividends derived from the remainder of such capital;” because the tax is a franchise and not a property tax.<sup>10</sup> The Comptroller need not, in esti-

which was converted into gas and came back to the company as cash, being part of the selling price of gas.

<sup>5</sup> *People ex rel. Chicago Junction Rys., etc., v. Roberts*, 154 N. Y. 1, 47 N. E. 974 (1897); L. 1880, c. 542, and amendments. See now Tax L. § 182.

<sup>6</sup> *People ex rel. Genesee Light & Power Co. v. Sohmer*, 162 A. D. 207, 147 N. Y. Supp. 726 (1914); aff’d 212 N. Y. 598, 106 N. E. 1040; Tax L. § 186, clause added in 1907. “The term ‘gross earnings’ . . . means all receipts from the employment of capital, without any deduction,” does away with decision in *People ex rel. Brooklyn Union Gas Co. v. Morgan*, 114 A. D. 266, 99 N. Y. Supp. 711.

<sup>7</sup> *People ex rel. Koechl & Co. v. Morgan*, 96 A. D. 110, 88 N. Y. Supp. 1066 (1904); aff’d 183 N. Y. 574, 76 N. E. 1105; Tax L. § 182 (L. 1896, c. 908).

<sup>8</sup> *People ex rel. Postal Telegraph Cable Co. v. Campbell*, 70 Hun. 507, 24 N. Y. Supp. 208 (1893); L. 1889, c. 463, § 20. See now Tax L. § 182 *et seq.*

<sup>9</sup> *People ex rel. American Surety Co. of N. Y. v. Campbell*, 74 Hun. 101, 26 N. Y. Supp. 462 (1893); aff’d 143 N. Y. 625, 37 N. E. 827.

<sup>10</sup> *People v. Home Insurance Co.*, 92 N. Y. 328 (1883); L. 1880, c. 542, as amended L. 1881, c. 361. See now Tax L. § 182.

inating the amount of a domestic corporation's capital stock employed within this State, deduct therefrom its real estate subject to local taxation.<sup>11</sup> An item of less than one per cent for uncollectible accounts is properly deducted in determining a franchise tax.<sup>12</sup>

Patent rights may not be assessed by the State under its taxing power.<sup>13</sup> Patents held by a domestic corporation for the purpose of disposing of them eventually to domestic and foreign corporations are employed at its home office and are to be included in its capital to be estimated for taxation.<sup>14</sup> Stock in domestic corporations received by a domestic corporation as consideration for patents held by it and transferred to them is capital of such corporation employed in this State for the purpose of ascertaining its taxable capital stock.<sup>15</sup> Stock in foreign corporations received by a domestic corporation as consideration for patents held by it and transferred to them is not capital of the domestic corporation taxable as part of its capital stock.<sup>16</sup> Bonds of foreign corporations held by a domestic corporation as consideration for patent rights granted by it to them are part of its capital stock employed in this State subject to taxation.<sup>17</sup> There is no better method of ascertaining the value of the rights of a corporation under

<sup>11</sup> *People ex rel. Postal Telegraph Cable Co. v. Campbell*, 70 Hun, 507, 24 N. Y. Supp. 208 (1893); L. 1889, c. 463, § 20. See now Tax L. § 182 *et seq.*

<sup>12</sup> *People ex rel. Queens County Water Co. v. Woodbury*, 67 Misc. 490, 123 N. Y. Supp. 599 (1910); *aff'd* 143 A. D. 618, 128 N. Y. Supp. 522.

<sup>13</sup> *People ex rel. Edison El. Il. Co. v. Assessors*, 156 N. Y. 417, 42 L.R.A. 290, 51 N. E. 269 (1898). The Court refused to answer the question: "Assuming that patent rights are not taxable by the states and that the capital stock of an electric company is used to pay for the use of methods and appliances of a parent company, protected by patents, can it be said that this stock is invested in patent rights within the general principles that patents are not taxable?"

<sup>14</sup> *People ex rel. Edison Electric Light Co. v. Campbell*, 138 N. Y.

543, 20 L.R.A. 453, 34 N. E. 370 (1893); Corp. Tax Act, L. 1880, c. 542, as amended L. 1881, c. 361, and L. 1885, c. 501. See now Tax L. § 182.

<sup>15</sup> *People ex rel. Edison Electric Light Co. v. Campbell*, 138 N. Y. 543, 20 L.R.A. 453, 34 N. E. 370 (1893); Corp. Tax Act, L. 1880, c. 542, as amended L. 1881, c. 361, and L. 1885, c. 501. See now Tax L. § 182.

<sup>16</sup> *People ex rel. Edison Electric Light Co. v. Campbell*, 138 N. Y. 543, 20 L.R.A. 453, 34 N. E. 370 (1893); Corp. Tax Act, L. 1880, c. 542, as amended L. 1881, c. 361, and L. 1885, c. 501. See now Tax L. § 182.

<sup>17</sup> *People ex rel. Edison Electric Light Co. v. Campbell*, 138 N. Y. 543, 20 L.R.A. 453, 34 N. E. 370 (1893); Corp. Tax Act, L. 1880, c. 542, as amended L. 1881, c. 361, and L. 1885, c. 501. See now Tax L. § 182.

patents for the purposes of license and franchise tax than to assume that they are worth what was paid for them.<sup>18</sup>

The courts are not interested in the form of a transaction in determining if it results in a dividend so as to subject the corporation profiting by it to a franchise tax, but if it results in the receipt or earning by the corporation of money otherwise than by contribution from stockholders the substance of its division among them is a dividend and will be so considered.<sup>19</sup> A sum returned by directors of a corporation to its stockholders as part of their cash contribution to its surplus, made prior to its merger with another corporation, and for which no additional stock was issued, cannot be regarded as paid from surplus profits so as to be considered a dividend in computing the corporation's franchise tax.<sup>20</sup> A corporation the stock of which was issued for real estate, which it held and leased till it was taken in condemnation proceedings, after which it did nothing save what was incidental to its corporate organization and the condemnation proceedings; and which has never declared a dividend, cannot be held to have done business after the award in the condemnation proceedings was made, and the surplus above the par value of its capital stock resulting on payment of such award cannot be considered in the nature of a dividend made and declared, for taxation purposes.<sup>1</sup> In determining a corporation's franchise tax, an amount paid in on cancellation of a lease under which it was lessee over the value at which it had carried it, which is divided among its stockholders, represents not capital but the product of capital, being derived from an increase in value of the company's assets, and is therefore a dividend from surplus profits.<sup>2</sup> The State Comptroller is justified in assessing a corporation at the sum paid by it for a building in which its

<sup>18</sup> *People ex rel. Vending Co. v. Kelsey*, 101 A. D. 325, 91 N. Y. Supp. 955 (1905); *aff'd* 181 N. Y. 512, 73 N. E. 1130; Tax L. § 181 (L. 1901, c. 558).

<sup>19</sup> *People ex rel. Queens County Water Co. v. Travis*, 171 A. D. 521, 157 N. Y. Supp. 943 (1916); St. Corp. L. §§ 28, 55. The Q. C. W. Co. bought land it did not need; its stockholders formed and controlled the N. Co. and the N. Co. took over the land for all its stock which was entirely distributed among the stockholders of Q. C. W. Co. This was held a dividend.

<sup>20</sup> *People ex rel. North American Trust Co. v. Knight*, 96 A. D. 120, 89 N. Y. Supp. 72 (1904); Tax L. § 182 (L. 1896, c. 908).

<sup>1</sup> *People ex rel. Jerome Park Co. v. Roberts*, 41 A. D. 21, 58 N. Y. Supp. 254 (1899); *aff'd* 169 N. Y. 582.

<sup>2</sup> *People ex rel. Mercantile Safe Deposit Co. v. Sohmer*, 158 A. D. 110, 143 N. Y. Supp. (1913); *aff'd* 217 N. Y. 605, 111 N. E. 1097; Tax L. § 182.

stockholders had leases of apartments from the corporation even though the stock has no cash value because stockholders' profits are in the form of the leases.<sup>3</sup> A sum taken in a certain year from a corporation's surplus fund and divided among stockholders, which was all acquired before the passage of an act taxing corporate franchises, is not a dividend within the meaning of such act and cannot be considered a dividend upon which to base the computation of the franchise tax due from the corporation.<sup>4</sup> In determining the franchise tax upon a corporation owning and managing an apartment house the value of the property and stock may be assessed with reference to its present rental value, if the stockholders receive by means of leases to them the benefits which ordinarily accrue to a stockholder under the name of dividends.<sup>5</sup> Anticipated dividends, *i. e.*, dividends not declared, on stock of other corporations held by a corporation should not be considered in determining the capital stock of the holding corporation for the purpose of imposing a franchise tax upon it.<sup>6</sup> A stock dividend distributed as a lump in one year instead of yearly is properly the basis for computing the franchise tax for that year.<sup>7</sup> "Whether a distribution of stock *pro rata* among the stockholders of a corporation is a dividend representing profits or an adjustment of capital account depends upon the circumstances of each case, and if such distribution represents surplus earnings it may fairly be treated as a dividend and as the income from the original stock."<sup>8</sup> A stock dividend stands upon the same basis as a dividend in cash in determining the annual franchise tax due from a domestic corporation.<sup>9</sup>

For purposes of taxation, the capital of a corporation invested in the stock of another corporation is deemed to be assets located where the physical property represented by

<sup>3</sup> *People ex rel. Gramercy Co. v. Roberts*, 91 Hun, 146, 36 N. Y. Supp. 277 (1895); *aff'd* 158 N. Y. 709, 53 N. E. 1130; L. 1880, c. 542. See now Tax L. § 182.

<sup>4</sup> *People v. Albany Insurance Co.*, 92 N. Y. 458 (1883); L. 1880, c. 542, as amended L. 1881, c. 361. See now Tax L. § 182.

<sup>5</sup> *People ex rel. Hubert Apartment Assn. v. Kelsey*, 110 A. D. 617, 96 N. Y. Supp. 745 (1916); *aff'd* 184 N. Y. 573, 77 N. E. 1194; Tax L. § 182.

<sup>6</sup> *People ex rel. New York Central,*

*etc.*, R. R. Co. v. Knight, 173 N. Y. 255, 65 N. E. 1102 (1903).

<sup>7</sup> *People ex rel. Pullman Co. v. Glynn*, 130 A. D. 332, 114 N. Y. Supp. 460 (1909); *aff'd* 198 N. Y. 605, 92 N. E. 1097; Tax L. § 182.

<sup>8</sup> *People ex rel. Pullman Co. v. Glynn*, 130 A. D. 332, 114 N. Y. Supp. 460 (1909); *aff'd* 198 N. Y. 605, 92 N. E. 1097; Tax L. § 182.

<sup>9</sup> *People ex rel. E. S. Dairy Co. v. Sohmer*, 218 N. Y. 199, L.R.A.1917A, 48, 112 N. E. 755 (1916); Tax L. § 183.

such stock is located.<sup>10</sup> The statute imposing the franchise tax upon corporations "declares the basis upon which the assessment is to be made, and makes no distinction as to the locality where the money was earned which was divided" in dividends, *i. e.*, whether the dividends were earned in its business transacted outside the State of New York or not.<sup>11</sup> Coal and supplies outside the State owned by a railroad company should be excluded from consideration in determining its capital stock subject to franchise tax.<sup>12</sup> The earnings of a corporation "derived from the transportation of property in transit from one state to another, that is to say, in conveying it by means of elevators and railroad trucks from the boats on the lake to the railroad cars on the land, are 'earnings of an interstate character,'" under the franchise tax law, even though all the corporation's operations are conducted within this State; and such earnings are therefore exempt from any State franchise tax.<sup>13</sup> In determining the franchise tax due from a domestic corporation bills receivable for merchandise sold out of the State and which never came within the State are not to be considered capital employed within New York, even though entered in the books of the company at its office in New York.<sup>14</sup> In assessing the franchise tax upon a domestic corporation which has assets both in and out of the State, and liabilities, too, the law requires "a reduction from the value of the assets in this State only of such proportionate amount of the liabilities of the corporation as is represented by the ratio of the capital stock employed within this State to the entire capital of the corporation."<sup>15</sup>

**§ 594. *Id.*: Rate of Tax, When Dividends Are Six Per Cent or More.**—If the dividends upon the capital stock amount to six, or more than six per centum upon the par value of the capital stock during any year ending with the thirty-first day of October, the tax is at the rate of one-quarter of one mill for each one per centum of dividends made or declared upon the

<sup>10</sup> Tax L. § 182 (L. 1916, c. 323).

<sup>11</sup> *People ex rel. New England Dressed Meat & W. Co. v. Roberts*, 155 N. Y. 408, 41 L.R.A. 228, 50 N. E. 53 (1898). The fact that the business conducted in New York was without profit was held immaterial.

<sup>12</sup> *People ex rel. New York Central, etc., R. R. Co. v. Knight*, 173 N. Y. 255, 65 N. E. 1102 (1903).

<sup>13</sup> *People ex rel. Connecting Ter-*

*minal R. R. Co. v. Miller*, 178 N. Y. 194, 70 N. E. 472 (1904); Tax L. § —.

<sup>14</sup> *People ex rel. Rees' Sons v. Miller*, 90 A. D. 591, 86 N. Y. Supp. 193 (1904); Tax L. §§ 182, 190 (L. 1901, c. 558).

<sup>15</sup> *People ex rel. Hyde & Sons v. Miller*, 90 A. D. 599, 85 N. Y. Supp. 522 (1904); *aff'd* 179 N. Y. 564, 71 N. E. 1136.

par value of the capital stock during such year.<sup>16</sup> "It will be observed that when the [franchise] tax is based upon dividends, it is upon the capital stock at par value, but, when no dividends have been declared, it must be assessed upon the appraised capital. . . . The distinction made between share stock and capital stock in other cases in the construction of other statutes is in this statute fully recognized. Capital stock on its par value is known in other cases as share stock, while appraised capital is known as capital stock."<sup>17</sup> The rule enunciated by the Legislature for determining the rate of tax on a corporation's capital stock, according as its dividends are less or more than six per cent, is legal and proper, even though it result in taxing a corporation declaring a dividend of less than six per cent but the stock of which is worth more than par at a greater rate than if a corporation had declared a dividend of more than six per cent.<sup>18</sup> Under the statutory provision that the rate of the annual corporate franchise tax is one-fourth of a mill for each one per cent of dividends on the par value of stock employed during the year if a dividend in excess of six per cent has been declared, and three-quarters of a mill on the amount of capital employed in the State if dividends of less than six per cent or no dividend have been declared, when the stock is doubled in the middle of the year by declaration of a dividend of one hundred per cent in stock but no dividend is declared on such stock dividend during the remainder of the year, the corporation is assessable upon half of its corporate stock at its par value at the rate of one-quarter of a mill for each one per cent of dividend and upon the other half at the rate of three-quarters of one mill.<sup>19</sup>

**§ 595. Id.: When No Dividends or Less Than Six Per Cent.**

—If the dividends upon the capital stock amount to less than six per centum upon the par value of the capital stock, the tax is at the rate of three-fourths of one mill on each dollar of the amount of capital stock employed in New York State provided (1) the assets do not exceed the liabilities, exclusive of capital stock, or (2) the average price at which such stock sold during the preceding year did not equal or exceed its par value, or (3) no dividend was declared; but the tax is at

<sup>16</sup> Tax L. § 182 (L. 1916, c. 323).

<sup>17</sup> *People ex rel. Jewelers' Pub. Co. v. Roberts*, 155 N. Y. 1, 49 N. E. 248 (1898).

<sup>18</sup> *People v. Delaware & Hudson Canal Co.*, 54 Hun, 598, 7 N. Y. Supp. 890 (1889); *aff'd* 121 N. Y.

666, 24 N. E. 1093; L. 1881, c. 361. See now Tax L. § 182.

<sup>19</sup> *People ex rel. E. D. Dairy Co. v. Sohmer*, 218 N. Y. 199, L.R.A. 1917A, 48, 112 N. E. 755 (1916); Tax L. § 183.

the rate of one and one-half mills on each dollar of the valuation of the capital stock employed in this State if (1) the assets exceed the liabilities, exclusive of capital stock, by an amount equal to or greater than the par value of the capital stock, or (2) the average price at which such stock sold during the preceding year is equal to or greater than the par value.<sup>20</sup> But in the latter case the valuation of the capital stock employed in this State must not be less than (1) the par value of such stock, (2) the difference between the assets and liabilities, exclusive of capital stock, (3) the average price at which such stock sold during the preceding year.<sup>1</sup> Non-dividend paying corporations, or corporations, the assets of which do not exceed their liabilities, exclusive of capital stock, or the stock of which has been sold during the year at an average price which does not equal or exceed its par value, are not therefore to be taxed upon the basis of the par value of their capital stock; but are to be taxed upon the basis of the actual value of their capital stocks.<sup>2</sup> If there have been sales of a corporation's stock during the year and the Comptroller's fixing of its value is the average price thereof the corporation cannot complain of a franchise tax based on such valuation.<sup>3</sup> When a corporation has declared no dividends and there have been no sales of its stock, the method to be adopted in determining the value of its capital stock for the purpose of fixing its franchise tax is to compute the actual value of its assets, after deducting its liabilities, and adding to the sum then remaining the value of the good will of the business, including its right to conduct it under its franchise.<sup>4</sup> In assessing for taxation the capital stock of a corporation which has declared no dividends the Comptroller may base his figures on the market value of the stock, even though this place its value above par and tax the surplus of the corporation as part of its capital stock.<sup>5</sup> In determining the franchise tax of a corporation not declaring dividends, its surplus may be considered

<sup>20</sup> *Id.*; Tax L. § 182 (L. 1916, c. 323).

<sup>1</sup> Tax L. § 182 (L. 1916, c. 323).

<sup>2</sup> *People ex rel. Fifth Ave. B'ld'g Co. v. Williams*, 198 N. Y. 238, 91 N. E. 638 (1910); Tax L. §§ 182, 190; *People ex rel. New York Mail & N. T. Co. v. Gaus*, 198 N. Y. 250, 91 N. E. 634 (1910); Tax L. § 182.

<sup>3</sup> *People ex rel. Brooklyn Elevated R. R. Co. v. Roberts*, 90 Hun, 537, 36 N. Y. Supp. 34 (1895); L. 1880, c. 542. See now Tax L. § 182.

<sup>4</sup> *People ex rel. Wiebusch & H. Co. v. Roberts*, 154 N. Y. 101, 47 N. E. 980 (1897); L. 1880, c. 542, as amend'd (before 1896). See now Tax L. § 542.

<sup>5</sup> *People ex rel. Colonial Trust Co. v. Morgan*, 47 A. D. 126, 62 N. Y. Supp. 191 (1900); aff'd 162 N. Y. 654, 57 N. E. 1116; Tax L. § 190 (L. 1896, c. 908), § 182.

in estimating the value of its capital stock.<sup>6</sup> In determining if the average sale of corporate stock during a year is less than par, for the purpose of determining the franchise tax due from the corporation, "the average price is to be determined by the different sales irrespective of the amount sold upon the respective sales."<sup>7</sup> The estimate and appraisal by the officers of a corporation declaring no dividend of its capital stock for franchise tax purposes may be disregarded by the Comptroller, who may estimate the value of the capital stock himself at a sum not less than the average market price.<sup>8</sup> The sales price of stock is the minimum but not the maximum limit of its valuation if it pays no dividends, for franchise tax purposes, and the actual value must be the basis of assessment; and if the corporation gives its actual value, that value must be adopted by the taxing authorities, however discrepant it may be with its sales value.<sup>9</sup>

**§ 596. Id.: When More Than One Kind of Capital Stock and Dividends Are Declared.**—If the corporation (a) has more than one kind of capital stock, and (b) dividends have been declared upon at least one of such kinds of stock, amounting to six per centum or more upon the par value thereof, the tax is based both on such dividend of six per centum or more and upon the capital stock on which no dividend, or one less than six per centum, was declared; and at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the capital stock upon the par value of which dividends were made or declared of six or more per centum, and at the same rate or as has hereinbefore been set forth as the rate for the taxation of capital stock upon which no dividend was made or declared or upon which the dividend or dividends made or declared did not amount to six per centum on the par value, upon the capital stock upon which either no dividend was made or declared or the dividends made or declared did not amount to six per centum upon the par value.<sup>10</sup> "The

<sup>6</sup> People *ex rel.* Metropolitan Securities Co. v. Kelsey, 101 A. D. 248, 91 N. Y. Supp. 711 (1905); Tax L. § 182 (L. 1901, c. 558).

<sup>7</sup> People *ex rel.* American Bank Note Co. v. Sohmer, 157 A. D. 1, 141 N. Y. Supp. 635 (1913); *aff'd* 210 N. Y. 621, 104 N. E. 1137; Tax L. § 182. "For instance, if one hundred shares be sold at forty-eight upon one day and ten shares at fifty upon the next day the av-

erage price for the two days would be forty-nine."

<sup>8</sup> People *ex rel.* Metropolitan Securities Co. v. Kelsey, 101 A. D. 248, 91 N. Y. Supp. 711 (1905); Tax L. § 182 (L. 1901, c. 558).

<sup>9</sup> People *ex rel.* City Investing Co. v. Saxe, 177 A. D. 16, 163 N. Y. Supp. 942 (1917); *aff'd* 221 N. Y. 585, 117 N. E. 1080; Tax L. §§ 182, 193.

<sup>10</sup> Tax L. § 182 (L. 1916, c. 323).

law substantially directs that if a corporation has more than one kind of stock and on the different kinds of stock the dividends vary, the tax should be computed for each kind of stock separately. This provision evidently contemplates the ordinary case of preferred and common stock. It has no application to a condition such as is presented " by a corporation increasing its capital stock during the course of the tax year, and paying six per cent dividends on all stock outstanding at the time of the dividends, but declaring the dividends quarterly so that those paid on the new stock necessarily aggregated less than six per cent, if all this stock is still of one kind, *i. e.*, common."<sup>11</sup>

**§ 597. Id.: When Stock Has No Par Value.**—The rate of tax upon a corporation the capital stock of which has no par value is determined by the same process as is prescribed for a corporation the capital stock of which has a par value, with this preliminary step to be borne in mind: that the rate of dividends must be computed by dividing the total amount of dividends which has been paid during the year by the amount of the net assets of the corporation upon the first day of such year.<sup>12</sup>

**§ 598. Id.: In All Other Cases.**—All other corporations must be taxed in an amount not less than would be produced by an assessment of one and one-half mills on each one dollar of the actual value of its capital stock, determined to be employed in New York State as provided by the statutes hereinbefore discussed, or one and one-half mills upon each dollar of such capital stock at the average price at which such stock sold during such year.<sup>13</sup>

**§ 599. Id.: Review.**—Review by certiorari of a franchise tax is discussed in the six hundred and sixtieth and succeeding sections of this work. A corporation assessed for franchise tax has the right to make application to the Comptroller for resettlement and readjustment of the account on which he assessed the tax upon the same evidence, papers, proofs and proceedings as were had upon the original statement of the account when the corporate officers were examined; and unless further evidence is actually offered on such proceeding it is his duty to resettle and readjust the account if it is clearly made to appear that it is erroneous or illegal, and if it is not so clearly made to appear, then an order should be entered

<sup>11</sup> *People ex rel. New York Central & Hudson River R. R. Co.*, 200 N. Y. 328, 93 N. E. 988 (1911); Tax L. § 182.

<sup>12</sup> St. Corp. L. § 21 (L. 1917, c. 501).

<sup>13</sup> Tax L. § 182 (L. 1916, c. 323).

denying the application for such resettlement and readjustment and thus enable the corporation feeling itself aggrieved to bring the matter up before the court for review; and if he do not, peremptory mandamus will issue that he forthwith send written notice to the relator of his determination.<sup>14</sup> Corporations are not limited as to the time within which they may apply to the State Comptroller for the revision of any tax levied upon them under the law providing for the taxation of certain corporations; but all the Comptroller can do if he finds they have paid too much is to credit their account with the excess so that it may be applied on their future taxes: he cannot refund the excess, as only the Legislature can do this.<sup>15</sup> On revision and readjustment of a corporation's account for taxes the State Comptroller cannot increase the assessment theretofore made.<sup>16</sup> The State Comptroller is not required to resettle and revise a tax assessed by him upon the report of a corporation voluntarily made and filed by it in his office and the tax upon which has been voluntarily and without objection paid into the State treasury, although made under a mistake of law and the courts later held the tax was illegal as the corporation was exempt.<sup>17</sup>

**§ 600. Id.: Local Real Estate and Personal Property (Including Corporate Capital) Taxes; Real Property Tax, In General.**—The Legislature cannot pass a private or local bill

<sup>14</sup> *People ex rel. Studebaker Co. v. Knight*, 66 A. D. 150, 72 N. Y. Supp. 929 (1901); Tax L. § 195 (L. 1896, c. 908).

<sup>15</sup> *People ex rel. Edison Electric Illuminating Co. of N. Y. v. Wemple*, 133 N. Y. 617, 30 N. E. 1002 (1892); L. 1889, c. 463. See now Tax L. § 182 *et seq.*

<sup>16</sup> *People v. Miller*, 84 A. D. 166, 82 N. Y. Supp. 607 (1903); Tax L. § 195 (L. 1896, c. 908).

<sup>17</sup> *People ex rel. Edison Electric Co. v. Wemple*, 69 Hun, 367, 23 N. Y. Supp. 661 (1893); Corp. Tax Act (L. 1889, c. 463), § 19. See now Tax L. § 182 *et seq.* The Comptroller may not repeatedly revise and readjust the tax imposed on a corporation's capital stock, for, when any tax has been once revised or readjusted and the Comptroller has rendered his decision thereon, he cannot do so again;

and so certiorari does not lie from his order declining to revise his former revision. *People ex rel. American Surety Co. v. Campbell*, 64 Hun, 417, 19 N. Y. Supp. 652 (1892); L. 1889, c. 463, § 20; L. 1885, c. 501, § 17. See now Tax L. § 182 *et seq.* Once a corporation, by its proper officer, has made and filed its report with the State Comptroller, paid the capital stock tax found by him due therefrom, taken a receipt therefor, and sought no appeal or review therefrom within the time limited by statute, it cannot overhaul its report, on the ground even of pure mistake of law, and recover an alleged excessive payment from the State board of audit. *Cerbat Mining Co. v. State*, 29 Hun, 81 (1883); L. 1880, c. 542, § 1. See now Tax L. § 182.

granting to any corporation an exemption from taxation on real or personal property; but must pass general laws providing for such a matter.<sup>18</sup> In all cases the assessment of taxes on corporate realty is deemed as against the real property itself and the property is to be held and liable to sale for any tax levied upon it.<sup>19</sup>

**§ 601. Id.: What Corporations Subject To.**—The general rule is that a corporate owner of real estate must pay the tax thereon, and the policy of the law is to confine exceptions within the narrow limits of charitable corporations or corporations other than the business corporations which are discussed in this work.

**§ 602. Id.: What Is Taxable Real Property and How Valued.**—The terms “land,” “real estate,” and “real property” as used in the Tax Law include (1) the land itself above and under water; (2) all buildings and other articles and structures, substructures and superstructures erected upon, under or above, or affixed to the same; (3) all wharves and piers, including the value of the right to collect wharfage, crannage or dockage thereon; (4) all bridges, all telegraph lines, wires, poles and appurtenances; (5) all supports and inclosures for electrical conductors and other appurtenances upon, above and under ground; (6) all surface, underground or elevated railroads, including the value of all franchises, rights or permission to construct, maintain or operate the same in, under, above, on or through, streets, highways or public places; (7) all railroad structures, substructures and superstructures, tracks and the iron thereon; (8) branches, switches and other fixtures permitted or authorized to be made, laid or placed in, upon, above or under any public or private road, street or ground; (9) all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place for conducting steam, heat, water, oil, electricity or any property, substance or product capable of transportation or conveyance therein or that is protected thereby, including the value of all franchises, rights, authority or permission to construct, maintain or operate, in, under, above, upon, or through, any streets, highways or public places, any mains, pipes, tanks,

<sup>18</sup> N. Y. Const. of 1894, art. 3, § 18.

<sup>19</sup> Tax L. § 9 (L. 1911, c. 315).

As to when capital of corporation invested in real estate deemed “employed” within statute taxing amount of capital stock employed

within State, see note in 28 L.R.A. (N.S.) 371.

On taxation of capital stock of corporation in the United States, see comprehensive note in 58 L.R.A. 513.

conduits or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil or other substance, or electricity for telegraphic, telephonic or other purposes; (10) all trees and underwood growing upon land; and (11) all mines, minerals, quarries and fossils in and under land except mines belonging to the State.<sup>20</sup> A franchise, right, authority or permission just mentioned is for the purpose of taxation known as a "special franchise," and is deemed to include the value of the tangible property of a corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise, and the tangible property so included is taxed as a part of the special franchise; but the term "special franchise" is not deemed to include the crossing of a street, highway or public place outside the limits of a city or incorporated village where such crossing is less than two hundred and fifty feet in length, unless such crossing be the continuation of an occupancy of another street, highway or public place (save as respects an elevated railroad).<sup>1</sup> All lands which have been sold by the State, although not conveyed, are assessable in the same manner as if the purchaser were the actual owner, and improvements not acquired by the State but situate on land purchased by the State are assessable to the owner thereof; and when land is leased by the State, such leasehold interest except in cases where by the terms of the lease the State is to pay the taxes imposed upon the property leased, must be assessed to the lessee or occupant in the tax district where the land is situated.<sup>2</sup> A tunnel constructed under a river under a grant by the State of a right of way necessary therefor is not exempt from inclusion in the special franchise tax of the grantee as real estate subject to local taxation.<sup>3</sup> Machinery delivered to a corporation and attached to realty is assessable as real estate irrespective of the question in whom the strict legal title lay.<sup>4</sup> For the purpose of assessment for taxation against a corporation owning it, machinery essential to the conduct of its business and annexed to its realty permanently, is to be taxed as realty.<sup>5</sup> Machinery used

<sup>20</sup> Tax L. § 2, subd. 6 (L. 1916, c. 323).

<sup>1</sup> Tax L. § 2, subds. 6, 7 (L. 1916, c. 323).

<sup>2</sup> Tax L. § 5 (L. 1916, c. 323).

<sup>3</sup> *People ex rel. Bryan v. State*, Tax Commrs., 61 Misc. 508, 124 N. Y. Supp. 711 (1910); *aff'd* 142 A. D. 796, 127 N. Y. Supp. 858;

Tax L. § 2, subd. 3 (L. 1896, c. 908, as amend'd L. 1899, c. 712).

<sup>4</sup> *People ex rel. New York Edison Co. v. Wells*, No. 3, 135 A. D. 644, 119 N. Y. Supp. 1057 (1909); *aff'd* 198 N. Y. 607, 92 N. E. 1097; Tax L. § 2, subd. 3 (L. 1899, c. 712); *Greater N. Y. Charter*, § 894.

<sup>5</sup> *People ex rel. National Starch*

in connection with mains or wires for generating and sending forth electricity on the lines or gas through the mains of a corporation is taxable as real estate under the statute.<sup>6</sup> The foundations, columns and superstructure of a corporation's elevated railroad are taxable as real estate.<sup>7</sup> Tax commissioners may not treat subways of a corporation as equally valuable as real estate unrestricted in its use, but must consider its restriction to a specific use, the financial condition of the company and the control which the municipality has over it.<sup>8</sup> While sometimes property affixed to the freehold should be assessed for real estate tax purposes at its replacement value, yet ordinarily it should be assessed as nearly as possible at its actual value.<sup>9</sup> "The general rule for the assessment of the real estate of a railroad corporation within the boundaries of a town where the railroad itself . . . traverses several towns, is that the reasonable cost of reproducing the railroad structures, added to the value of the roadbed as land, is presumptively the value of the railroad considered as real property for the purposes of assessment for taxation."<sup>10</sup>

**§ 603. Id.: Place of Taxation.**—The real estate of all incorporated companies liable to taxation must be assessed in the tax district in which it lies, in the same manner as the real estate of individuals.<sup>11</sup>

**§ 604. Id.: Personal Property Tax, Including Tax on Capital; What Corporations Subject To.**—What corporations are subject to a tax on their personal property has already been discussed.<sup>12</sup> ". . . the capital stock of an incorporated company, which is legally a resident of this State, may be taxed here, notwithstanding that the property which that

Co. v. Waldron, 26 A. D. 527, 50 N. Y. Supp. 523 (1898); R. S. 9th ed. p. 1676, §§ 2, 3, 6.

<sup>6</sup> Herkimer County Light & Power Co. v. Johnson, 37 A. D. 257, 55 N. Y. Supp. 924 (1899); Tax L. § 2, subd. 3: "all mains, pipes, and tanks laid or placed in, upon, above, or under any public or private street or place for conducting . . . electricity or any property . . . capable of transportation or conveyance therein or that is protected thereby" is real estate.

<sup>7</sup> People *ex rel.* New York Ele. B. C. N. Y.—47

vated R. R. Commr's of Taxes, 82 N. Y. 459 (1880).

<sup>8</sup> People *ex rel.* Consolidated Telegraph, etc., Co. v. Barker, 7 A. D. 27, 39 N. Y. Supp. 776 (1896); *aff'd* 151 N. Y. 639, 45 N. E. 1133.

<sup>9</sup> People *ex rel.* New York Edison Co. v. Wells, No. 6, 135 A. D. 647, 119 N. Y. Supp. 1060.

<sup>10</sup> People *ex rel.* New York Central & Hudson River R. R. Co. v. Hanking, 152 A. D. 488, 137 N. Y. Supp. 365 (1912).

<sup>11</sup> Tax L. § 11 (L. 1909, c. 62).

<sup>12</sup> See § 563, *supra*.

stock represents is situated in a foreign state.”<sup>13</sup> A corporation seeking to escape taxation in this State on its personalty on the ground that it is situated and taxed in another state is bound to make its foreign *situs* clear to the tax commissioners and “a mere statement that all of its assets were in another state was not sufficient to relieve it from taxation.”<sup>14</sup> A domestic corporation which moves its office for transacting business to another state and does all its business there, save that it has a bank account in New York, is taxable only on the amount of such account in determining the tax due on its capital stock.<sup>15</sup> A joint-stock company is not taxable upon its capital.<sup>16</sup> A company is not excused from paying a municipal personal tax for the statutory reason that it is “unable for want of property to pay the tax in whole or in part” if it is a going concern, though insolvent in the sense that its liabilities exceed by a very substantial sum the value of its assets, provided it have property of a value greater than the amount of the tax.<sup>17</sup> In order to enable a corporation to claim a statutory exemption from taxation of “the personal estate of every incorporated company not made liable to taxation on its capital” the corporation must have a capital not liable to taxation as such, as the words “incorporated company” were intended to designate only such business and stock corporations as are exempted under special circumstances from taxation on their capital, and do not embrace corporations not having a capital.<sup>18</sup>

**§ 605. Id.: What is Taxable, Governing Statutes.**—All personal property situated or owned within New York State is taxable unless exempt from taxation by law.<sup>19</sup> The terms “personal estate” and “personal property” as used in the Tax Law include (1) chattels; (2) moneys; (3) things in

<sup>13</sup> *People ex rel. Zulie Steam Navigation Co. v. Commissioners of Taxes*, 51 Hun, 312, 3 N. Y. Supp. 885 (1889).

<sup>14</sup> *People ex rel. Orinoka Mills v. Barker*, 84 A. D. 469, 83 N. Y. Supp. 33 (1903); Tax L. §§ 3, 11, 12, L. 1896, c. 908).

<sup>15</sup> *People ex rel. Davis-Colby Co. v. Campbell*, 66 Hun, 146, 21 N. Y. Supp. 7 (1892) “. . . in determining the amount of capital stock employed in this State, the same principle applies to a domestic as to a foreign corporation.”

<sup>16</sup> *People ex rel. Winchester v. Coleman*, 133 N. Y. 279, 16 L.R.A. 183, 31 N. E. 96 (1892); 1 R. S. 414, § 1.

<sup>17</sup> *City of New York v. Chase, Talbot & Co.*, 206 N. Y. 1, 99 N. E. 143 (1912); Tax L. § 301.

<sup>18</sup> *People ex rel. Savings Bank of New London v. Coleman*, 135 N. Y. 231, 31 N. E. 1022 (1892); 1 R. S. 388, § 4, subd. 71.

<sup>19</sup> Tax L. § 3 (L. 1909, c. 62).

action; (4) debts due from solvent debtors, whether (a) on account, (b) contract, (c) note, (d) bond or (e) mortgage; (5) debts and obligations for the payment of money due or owing to persons residing within New York State, however secured or wherever such securities are held; (6) debts due by inhabitants of New York State to persons not residing within the United States for the purchase of any real estate; (7) public stocks; (8) stocks in moneyed corporations; and (9) such portion of the capital of incorporated companies, liable to taxation on their capital, as is not invested in real estate.<sup>20</sup> The following property is exempt from taxation as against a domestic private business stock corporation: (1) All property exempt by law from execution;<sup>1</sup> (2) bonds of New York State or any civil division thereof;<sup>2</sup> (3) all vessels registered at any port in New York State and owned by any corporation incorporated under the laws of the State of New York, engaged in ocean commerce between any port in the United States and any foreign port;<sup>3</sup> (4) a bond, mortgage, note, contract, account or other demand sent to or deposited in New York State for collection and belonging to any person not a resident of New York State;<sup>4</sup> (5) the products of another state consigned to his agent in this State for sale on commission for the benefit of the owner, who is a non-resident;<sup>4</sup> (6) moneys under the control or in the possession of his agent in New York State transmitted by a non-resident for the purpose of investment or otherwise;<sup>4</sup> (7) the stock in another incorporated company liable to taxation on its capital which may be held or owned by the corporation in question.<sup>5</sup> All personal property subject to taxation must be assessed at the full value thereof, provided, however, that the owner of personal property must be allowed a deduction from the full value of all his taxable personal property to the extent of the just debts owing by him; but no such deduction can be allowed (1) by reason of the indebtedness of the owner contracted or incurred in the purchase of nontaxable property or securities owned by him or held for his benefit, (2) nor for or on account of any indirect liability as surety, guarantor, indorser or otherwise, (3) nor for or on account of any debt or liability

<sup>20</sup> Tax L. § 2, subd. 8 (L. 1916, c. 323).

<sup>1</sup> Tax L. § 4, subd. 5 (L. 1914, c. 278).

<sup>2</sup> Tax L. § 4, subd. 6 (L. 1917, c. 97).

<sup>3</sup> Tax L. § 4, subd. 12 (L. 1909, c. 62).

<sup>4</sup> Tax L. § 4, subd. 13 (L. 1909, c. 62).

<sup>5</sup> Tax L. § 4, subd. 16 (L. 1909, c. 62).

contracted or incurred for the purpose of evading taxation.<sup>6</sup> Every company must pay a tax on its capital stock and its surplus profits or reserve funds. The assessment of such capital stock for taxation must be at its actual value, except for the deduction of (1) such part of such capital stock as (a) has been excepted in the assessment-roll or (b) is exempt by law, (2) ten per cent of its capital constituting surplus profits or reserve funds, (3) its real estate at its assessed value, and (4) all shares of stock in other corporations actually owned by the company in question which are taxable upon their capital stock under the laws of New York.<sup>7</sup>

**§ 606. Id.: Personal Property, In General.**—The general aspect of the personal property tax payable by corporations has been previously considered.<sup>8</sup> “. . . where personal property has an actual *situs* in another State, and thus becomes in that other State subject to taxation, it is not taxable in this State, although its owner is an actual resident here.”<sup>9</sup> A domestic corporation is taxable in New York on cash in bank payable on its cheques, and on bills and accounts receivable for property sold to persons outside New York and payable at its office in New York, save a certain portion payable in another State and to be deposited there to its credit.<sup>10</sup> Payments made by an elevated railroad company to owners of adjacent property in acquiring easements with a perpetual right to operate the company's railroad in front of such abutting property, *i. e.*, fee damages, represent property that may be assessed against the company for municipal taxation.<sup>11</sup> When the original packages in which goods were imported by a domestic corporation have been broken, and the goods taken therefrom and placed in store upon sale, thereby becoming mixed with other property, they become subject to the taxing power of the State.<sup>12</sup>

<sup>6</sup> Tax L. § 6 (L. 1914, c. 277).

<sup>7</sup> Tax L. § 12 (L. 1909, c. 62).

<sup>8</sup> See § 563, *supra*.

<sup>9</sup> *People ex rel. Orinoka Mills v. Barker*, 84 A. D. 469, 83 N. Y. Supp. 33 (1903); Tax L. §§ 3, 11, 12 (L. 1896, c. 908).

<sup>10</sup> *People ex rel. United States Verde Copper Co. v. Feitner*, 54 A. D. 217, 66 N. Y. Supp. 769 (1900); *aff'd* 165 N. Y. 645, 59 N. E. 1129; Tax L. § 2, subd. 4, and § 3 (L. 1896, c. 908).

<sup>11</sup> *People ex rel. Manhattan Ry.*

*Co. v. Barker*, 165 N. Y. 305, 59 N. E. 151 (1901).

<sup>12</sup> *People ex rel. Matheson & Co. v. Roberts*, 158 N. Y. 162, 52 N. E. 1102 (1899); U. S. Const. art. 1, §§ 8, 10. In determining the tax on a corporation's capital stock the commissioners should hold non-assessable investments in shares of other corporations (L. 1857, c. 456, § 3); investments in United States securities (U. S. R. S. § 3701); goods imported and held in unbroken packages; property outside

§ 607. **Id.: Corporate Capital, in General.**—The statute includes in its definition of personal property and personal estate “such portion of the capital of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate.”<sup>13</sup> It further provides that the capital stock of every company liable to taxation, except such part of it as has been excepted in the assessment-roll or is exempt by law, together with its surplus profits or reserve funds exceeding ten per centum of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of New York, must be assessed at its actual value.<sup>14</sup> “The law is equally well settled as to what is the subject of assessment, and in what way the value of a corporation’s capital is to be ascertained for the purposes of taxation: (1) The capital stock of every company liable to taxation shall be assessed at its actual value. (2) It is not the value of the capital stock, but the value of the capital that is to be ascertained. (3) To ascertain the capital subject to taxation requires the valuation of the whole property owned by the corporation, whether real or personal or both, and from the aggregate is to be deducted the assessed value of the real estate, and the balance is the capital subject to assessment, after deducting debts and any exemptions allowed by law. (4) The franchises of the corporation are not part of its taxable capital.”<sup>15</sup> “The general scheme of the statute for the assessment of the property of corporations other than real estate for the purposes of taxation, is to assess their capital at its actual value, and their surplus funds, deducting therefrom the value of their real estate, and of shares of other corporations held by them, liable to taxation.”<sup>16</sup> The meaning of the phrase capital stock of a corporation, as used in a statute taxing it is “the company’s capital existing in money or property, or both.”<sup>17</sup> “. . . by the phrase ‘capital

the State; and surplus on capital stock (L. 1857, c. 456, § 3); while the assessed valuation of real estate should be deducted from gross assets. (L. 1857, c. 456, § 3). *People ex rel. Sloane v. Barker*, 76 Hun, 454, 27 N. Y. Supp. 1082 (1894).

<sup>13</sup> Tax L. § 2, subd. 8 (L. 1916, c. 323).

<sup>14</sup> Tax L. § 12 (L. 1909, c. 62).

<sup>15</sup> *People ex rel. Consolidated Telegraph, etc., Co. v. Barker*, 7 A. D. 27, 39 N. Y. Supp. 776 (1896); *aff’d* 151 N. Y. 639, 45 N. E. 1133.

<sup>16</sup> *People ex rel. Bay State Shoe & Leather Co. v. McLean*, 80 N. Y. 254 (1880); 1 R. S. 414, L. 1853, c. 654; *id.* 1857, c. 456. See now Tax L. § 12.

<sup>17</sup> *People ex rel. Rochester R. Co.*

stock ' the statute [imposing a tax thereon] means not the share stock, but the capital owned by the corporation; the fund required to be paid in and kept intact as the basis of the business enterprise, and the chief factor in its safety." <sup>18</sup> The statutory provisions making "personal property" of a corporation subject to taxation to include "such portions of the capital of incorporated companies liable to taxation on their capital" has reference to the actual value of the tangible property of incorporated companies and not to the value of its share stock, which would include its franchise and good will, which is taxable under another statute. <sup>19</sup> The meaning of the statute that "the capital stock of every company liable to taxation . . . together with its surplus profits or reserved funds exceeding ten per cent of its capital after deducting the assessed value of its real estate . . . shall be assessed," etc., is: "The capital stock of every company shall be assessed at its actual value, 'after deducting the assessed value of its real estate,' thus transposing the latter clause so as to give it its true effect, or that clause may be put in parenthesis and have the same effect." <sup>20</sup> Under a statute imposing a tax upon the capital stock of corporations "the capital stock of a corporation, less the part thereof owned by the State, or by literary or charitable institutions, or exempted from taxation by the Revised Statutes, is to be assessed at its actual value, whether more or less than its nominal amount, deducting, however, from such actual value, the assessed value of its real estate and shares owned by it in other taxable corporations, and also from its surplus or reserve, if any, an amount not exceeding ten per cent of its capital." <sup>1</sup> Assessors cannot deduct from the capital stock of corporations anything not authorized by statute. <sup>2</sup> The law does not prescribe how the value of the capital stock of a corporation is to be ascertained and it is left to the judgment of the assessing officers. <sup>3</sup> "It would seem to be easy to pro-

v. Pond, 37 A. D. 330, 57 N. Y. Supp. 490 (1899); Tax L. § 12 (L. 1896, c. 908).

<sup>18</sup> People *ex rel.* Union Trust Co. v. Coleman, 126 N. Y. 433, 12 L.R.A. 762, 27 N. E. 818 (1891); L. 1857, c. 456, § 3. See now Tax L. § 12.

<sup>19</sup> People *ex rel.* Cornell S. Co. v. Dederiek, 161 N. Y. 195, 55 N. E. 927 (1900); Tax L. § 2, subd. 4.

<sup>20</sup> People *ex rel.* Twenty-third St. R. R. Co. v. Comm'rs of Taxes, 95 N. Y. 554 (1884); L. 1857, c. 456;

L. 1853, c. 654. See now Tax L. § 12.

<sup>1</sup> People *ex rel.* Panama R. R. Co. v. Comrs. of Taxes, 104 N. Y. 240, 10 N. E. 437 (1887); L. 1857, c. 456. See now Tax L. § 12.

<sup>2</sup> People *ex rel.* National Surety Co. v. Feitner, 166 N. Y. 129, 59 N. E. 731 (1901).

<sup>3</sup> United States Trust Co. of N. Y. v. The Mayor, etc., of New York, 144 N. Y. 488, 39 N. E. 383 (1895); L. 1880, c. 269.

vide a formula for arriving at the actual value of corporation stock, viz., to ascertain the value of all the corporate real and personal property, and from the aggregate deduct the value of the real estate and the corporate indebtedness.”<sup>4</sup> “The law does not prescribe how the actual value of the capital stock of a corporation is to be ascertained [in assessing it for taxation]. That is left to the judgment of the assessors, and in appraising the actual value they have a right to resort to all the tests and measures of value which men ordinarily adopt for business purposes in estimating and measuring values of property. They may take into account the business of the corporation, its property, the value of its actual assets, the amount and nature of its present and contingent liabilities, the amount of its dividends and the market value of its shares of stock in the hands of individuals. They may resort to any or all of these as to them seems best, and they are not confined to one of them. They may take that test which they think will be most likely to give them the actual value of the stock, and they may disregard the others.”<sup>5</sup> “One mode of arriving at the actual value of the capital stock of a corporation [for the purpose of assessing the tax thereon] is to take what is sometimes called the book value, which is reached by estimating all the assets as they appear upon the corporate books, and deducting all the liabilities and other matters required to be deducted by law, and taking the balance as the measure of value for assessment. This seems to be a proper method for arriving at the value of the capital stock in the case of a corporation which is about to discontinue business, wind up its affairs and distribute its assets among its shareholders. But it cannot always, or usually, be a fair or correct method of assessment in the case of a going corporation whose assets are to remain at the risk of its business. In the case of an insurance company, the actual value of its capital stock must usually be less than the book value, and the same must frequently be true of other corporations which are engaged in business attended with many hazards and fluctuations. In the case of a corporation the value of whose capital stock is largely made up of its franchise, good will and business advantages, the book value of its capital stock will be less than the actual value.”<sup>6</sup> In

<sup>4</sup> *People ex rel. New York & Queens Gas Co. v. Feitner*, 58 A. D. 555, 69 N. Y. Supp. 27 (1901); Tax L. § 12 (L. 1896, c. 908).

<sup>5</sup> *People ex rel. Knickerbocker Fire Ins. Co. v. Coleman*, 107 N. Y. 541, 14 N. E. 431 (1887); L. 1857, c. 456, § 3. See now Tax L. § 12.

<sup>6</sup> *People ex rel. Knickerbocker*

assessing the tax upon a corporation's capital stock "the earnings of a corporation may be considered by the assessors, and where they are such as to enable the company to pay its running expenses, necessary repairs, interest upon its indebtedness and declare a dividend of six per cent and still have a surplus, it may be assumed that its capital stock remains unimpaired and that there are assets over and above sufficient to pay its outstanding indebtedness (*citation*). This method, however, may include the value of the franchises, which should be deducted in order to determine the amount of property liable for assessment."<sup>7</sup> In determining the value of leases in which a corporation is lessee in a proceeding to assess for taxation its capital stock and surplus profits, the commissioners cannot estimate the value of the real and personal property leased and include that value in the amount of the corporation's property, but must find the actual value of the lease.<sup>8</sup> In assessing a corporation-lessee for its capital and surplus the value of the lease, deducting therefrom the value of the right to use the franchises of the leased corporations, should be ascertained and added to the value of the corporation's real estate and personal property, and from this total the deductions made which are allowed by the statute.<sup>9</sup>

**§ 608. Id.: Not Share Stock.**—"The capital stock of a company is one thing; that of the shareholders is another and different thing. That of the company is simply its capital, existing in money or property, or both; while that of the shareholders is representative, not merely of that existing and tangible property, but also of surplus, of dividend earning power, of franchise and the good will of an established and prosperous business. The capital stock of the company is owned and held by the company in its corporate character; the capital stock of the shareholders they own and hold in different proportions as individuals. The one belongs to the corporation; the other to the corporators. The franchise of the company, which may be deemed its business opportunity and capacity, is the property of the corporation, but constitutes no part or element of its capital stock; while the same franchise does enter into and form part, and a very

Fire Ins. Co. v. Coleman, 107 N. Y. 541, 14 N. E. 431 (1887); L. 1857, c. 456, § 3. See now Tax L. § 12.

<sup>7</sup> People *ex rel.* Manhattan Ry. Co. v. Barker, 146 N. Y. 304, 40 N. E. 996 (1895); L. 1857, c. 456, § 3. See now Tax L. § 12.

<sup>8</sup> People *ex rel.* Delaware & Hud-

son Co. v. Feitner, 61 A. D. 129, 70 N. Y. Supp. 500 (1901); *aff'd* 171 N. Y. 641, 63 N. E. 786; Tax L. § 12 (L. 1896, c. 908).

<sup>9</sup> The People *ex rel.* The Delaware & Hudson Co. v. Feitner, 171 N. Y. 641, 63 N. E. 786 (1902).

essential part of the shareholder's capital stock. While the nominal or par value of the capital stock and of the share stock are the same, the actual value is often widely different. The capital stock of the company may be wholly in cash or in property, or both, which may be counted and valued. It may have in addition a surplus, consisting of some accumulated and reserved funds, or of undivided profits, or both, but that surplus is no part of the company's capital stock, and, therefore, is not itself capital stock. The capital cannot be divided and distributed; the surplus may be. But that surplus does enter into and form part of the share stock, for that represents and absorbs into its own value surplus as well as capital, and the franchise in addition. So that the property of every company may consist of three separate and distinct things, which are its capital stock, its surplus, its franchise; but these three things, several in the ownership of the company, are united in the ownership of the shareholders."<sup>10</sup> The "capital stock" of a corporation which is subjected by statute to taxation means "actual tangible property of the company, and not its share stock, which is to be assessed at its actual value."<sup>11</sup> "Capital stock, as that term is used in the Tax Law . . . , does not mean share stock; it is limited to the actual money or property paid in and possessed by the corporation as such."<sup>12</sup> "First, the subject of valuation and assessment is never the share stock, but always the company's capital and surplus. Second, such capital and surplus must be assessed at its own value, and when that is correctly known and ascertained, no other value can be substituted for it. Third, where its amount and value are undisclosed and unknown the assessors may consider the market value of the share stock and the general condition of the company as indicative of surplus or deficiency and of the probable amount of either. Fourth, they may further resort to such means of information when the amount of capital and surplus is disclosed, but the assessors have sufficient reason to disbelieve the statement and such reason is founded upon facts established by competent proof."<sup>13</sup> The manner of ascertaining

<sup>10</sup> *People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433, 12 L.R.A. 762, 27 N. E. 818 (1891); L. 1857, c. 456, § 3. See now Tax L. § 12.

<sup>11</sup> *People ex rel. Cornell S. Co. v. Dederick*, 161 N. Y. 195, 55 N. E. 927 (1900); Tax L. § 12.

<sup>12</sup> *People ex rel. Twenty-Third St. R. Co. v. Feitner*, 92 A. D. 518, 87

N. Y. Supp. 304 (1904); Tax L. § 12 (L. 1896, c. 908, § 12). It is erroneous to take the capital stock at par, add the premium at which share stock is selling on the market and the par value of bonds, though making various deductions from the total.

<sup>13</sup> *People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433, 12 L.R.A.

the value of the capital stock of a corporation for taxation purposes is not to take the value of its share stock but its capital and surplus at their actual value.<sup>14</sup>

§ 609. **Id.: At Actual Value, In General.**—"The term 'actual value' [in a statute requiring assessment of corporate capital stock at its actual value], is evidently used in distinction to the nominal value or amount. The direction to assess it at the actual value, therefore, required that it should be estimated above or below the par amount, according to the fact, and as the particular case might require. . . . There is doubtless, an incongruity in including the accumulated profits above ten per cent in the assessment, where the capital is assessed at its market value. It does not seem to have occurred to the law-makers that the existence of a surplus enters into the market value of the stock, and that this surplus is never the subject of an ownership or disposition distinct from the stock, and that their whole object was accomplished when they directed the stock to be assessed at its actual value. . . . in a case where a surplus exists, which must be included in the amount of the assessment, justice will be attained by deducting its amount from the sum at which the stock would be estimated if the surplus was considered as embraced in the valuation."<sup>15</sup> "It is the actual value of its capital stock and not the market value of its share stock that is to be assessed; in other words, it is its actual tangible personal property and not its franchises. Other statutes provide for the taxing of its real estate and franchises. . . . The value of property is determined by what it can be bought and sold for, and there can be no doubt but that these various expressions used in the statutes all are intended to mean the *actual value* of the property."<sup>16</sup>

§ 610. **Id.: Not Market Value of Shares of Stock.**—In assessing a corporation's capital stock for taxation it is not illegal

762, 27 N. E. 818 (1891); L. 1857, c. 456, § 3. See now Tax L. § 12.

<sup>14</sup> United States Trust Co. v. Mayor, 77 Hun, 182, 28 N. Y. Supp. 344 (1894); *aff'd* 144 N. Y. 488, 39 N. E. 383; L. 1857, c. 456, § 3. See now Tax L. § 12.

<sup>15</sup> Oswego Starch Factory v. Dolloway, 21 N. Y. 449 (1860); Gen. Mfg. Act, L. 1848, c. 40, as amend'd L. 1853, c. 654, and L. 1857, c. 456, § 3. See now Tax L. § 12.

<sup>16</sup> *People ex rel. Manhattan Ry. Co. v. Barker*, 146 N. Y. 304, 40 N. E. 996 (1895); L. 1857, c. 456, § 3, imposing tax on corporation's capital stock. See now Tax L. § 12.

Assessment of corporation at full value when valuations generally are less, see note in 60 L.R.A. 368.

On valuation of corporate franchise for purpose of taxation, see note in 57 L.R.A. 98.

to assess it at more than its market value.<sup>17</sup> "So the market value of the shares of capital stock [the value of which is to be assessed for taxation thereof] may sometimes be above and sometimes below the actual value. . . . But the market value of any stock which is listed at the stock exchange in New York, and largely dealt in from day to day for a series of months will usually furnish the best measure of value for all purposes. . . . But there is no law which compels assessors to resort to market value to find the actual value of capital stock."<sup>18</sup> "The value of the share stock, however, is not conclusive evidence of the value of the capital stock and surplus of a corporation. The selling price of the share stock is some and in many cases, where better evidence is not obtainable, may be satisfactory evidence of the value of the assets of a corporation, but it has never been held to be conclusive. . . ."<sup>19</sup> The capital and surplus of a corporation must be assessed at their own value in determining the tax on its capital stock; and the market value of the shares of capital stock is only to be considered by the assessors when either the value of the capital and surplus is not disclosed and cannot be ascertained, or, being disclosed, the assessors have reasons based upon facts established by competent proof to disbelieve the statement.<sup>20</sup> The proper basis for determining the amount of the capital of a corporation liable to taxation is not the market value of the shares in the hands of individual holders, but the corporate assets constituting the capital.<sup>1</sup>

**§ 611. Id.: Exceptions and Exemptions.**—The property exempt from the personal property tax has already been listed.<sup>2</sup> The words in the statute imposing a tax upon cor-

<sup>17</sup> *Knickerbocker Fire Ins. Co. v. Coleman*, 44 Hun, 410 (1887).

<sup>18</sup> *People ex rel. Knickerbocker Fire Ins. Co. v. Coleman*, 107 N. Y. 541, 14 N. E. 431 (1887); L. 1857, c. 456, § 3. See now Tax L. § 12.

<sup>19</sup> *People ex rel. Eden Musee Co. v. Feitner*, 60 A. D. 282, 70 N. Y. Supp. 120 (1901); Tax L. § 12. In assessing the capital stock of a corporation which owned a building on leased land and some personal property, it is proper for the commissioners to estimate the building at its actual value and to add the personal property and from this total to deduct the assessed value of the building.

<sup>20</sup> *United States Trust Co. of N. Y. v. The Mayor, etc., of New York*, 144 N. Y. 488, 39 N. E. 383 (1895); L. 1880, c. 269.

<sup>1</sup> *People ex rel. Bleecker St. R. Co. v. Barker*, 85 Hun, 210, 32 N. Y. Supp. 990 (1895).

<sup>2</sup> See § 605, *supra*; *People ex rel. Panama R. R. Co. v. Comrs. of Taxes*, 104 N. Y. 240, 10 N. E. 437 (1887); L. 1857, c. 456, § 3. See now Tax L. § 12. The exception in the statute imposing a tax upon corporate capital stock of such part thereof "as shall have been exempted by law," refers to the general exemption in § 4, tit. 1, c. 13, R. S.

porate capital stock, "except such part of as shall have been excepted in the assessment-roll" probably refer to stock of the corporation taxed, belonging to the State, or incorporated literary or charitable institutions.<sup>3</sup>

**§ 612. Id.: Surplus Profits or Reserve Funds.**—" . . . in the assessment of corporations they are entitled to no general deduction of ten per cent of their capital stock, but that percentage is only to be deducted from the surplus profits or reserve fund when such surplus is returned for taxation."<sup>4</sup>

**§ 613. Id.: Real Estate.**—"The theory of the statute [taxing the capital stock of corporations] is that real estate for the purpose of taxation shall be assessed at its full value. . . . the commissioners could legally disregard the assessed value of the capital. . . ."<sup>5</sup> The rule for ascertaining the taxable value of corporate capital stock is to add together the actual value of the corporation's real estate and personal property and deduct therefrom its indebtedness and the assessed value of its real estate.<sup>6</sup> "The statutory scheme prescribed by the legislature as construed by the courts directs that on one side of the account be placed the total property of the corporation; on the other side, among other things, the value of *its* real estate;" and this does not mean that if the realty is mortgaged the corporation shall return as *its* property only the value of the equity of redemption, while deducting from the total value of its property the whole assessed value of its realty as if unencumbered, but that if it return only the equity it deduct only the assessed value of the equity.<sup>7</sup> " . . . in determining the value of the capital stock of a domestic corporation for the purposes of taxation, it is lawful to include the actual value of its real estate and to deduct merely the assessed value thereof."<sup>8</sup> " . . . for the purpose of ascertaining the value of the capital of a cor-

<sup>3</sup> *People ex rel. Panama R. R. Co. v. Comrs. of Taxes*, 104 N. Y. 240, 10 N. E. 437 (1887); L. 1857, c. 456, § 3. See now Tax L. § 12. The quoted words are taken from § 10, tit. 4, c. 13, R. S.

<sup>4</sup> *People ex rel. Citizens' Illuminating Co. v. Neff*, 26 A. D. 542, 50 N. Y. Supp. 680 (1898); Tax L. §§ 12, 31 (L. 1896, c. 908).

<sup>5</sup> *People ex rel. Equitable Gas Light Co. v. Parker*, 144 N. Y. 94, 39 N. E. 13 (1894); L. 1857, c. 456. See now Tax L. § 12.

<sup>6</sup> *People ex rel. Cord Meyer Co.*

*v. Feitner*, 39 Misc. 467, 80 N. Y. Supp. 152 (1902).

<sup>7</sup> *People ex rel. Weber Piano Co. v. Wells*, 180 N. Y. 62, 72 N. E. 626 (1904); Tax L. § 12. "It may be that the proper way in which the relator should have been assessed was to treat it as holding the entire ownership of the realty and to deduct from its assets the whole assessed value."

<sup>8</sup> *People ex rel. Bankers' Safe Deposit Co. v. O'Donnel*, 54 Misc. 5, 105 N. Y. Supp. 457 (1907). Safe-deposit vaults were the realty.

poration it is competent for the commissioners to take the quantity or actual value of the real estate, together with the other property of the corporation, and after the value thereof is found, they are not required to deduct therefrom the actual value of the real estate which has been included in estimating the value of the capital, the exemption of the real estate being only to the extent that it has been assessed."<sup>9</sup> Commissioners assessing for taxation the capital stock of a corporation need not consider its real estate as worth only the amount for which it is assessed for taxation, but may estimate its actual value though in excess of its assessed value.<sup>10</sup> Commissioners of taxes cannot fix the value of the same real estate of a corporation at a different price to ascertain the amount for which the corporation is liable upon its capital stock and surplus from the price at which such realty was assessed for the purpose of taxation as real estate.<sup>11</sup> Commissioners, assessing for taxation the capital stock of a domestic corporation which they find has no other property going to make up its capital and surplus than what is invested in certain land and buildings, cannot place thereon for the purposes of taxation a larger figure than they are prepared to allow when they are required to deduct the value of the real estate for the purpose of seeing what portion of the capital and surplus is liable to taxation.<sup>12</sup> "It will not always be easy to determine the assessed value of the real estate to be deducted from the actual value of the capital stock. There can be no difficulty when the real estate is situated in the same ward or town where the capital stock is assessable, or even when it is situated in the same city or county. . . . But if the real estate should be in another State or country, or if, for any other reason, its assessed value cannot be obtained, then as the best and nearest substitute for it, the price paid, as the presumed value in the absence of proof or of any other standard, may be taken as the assessable value."<sup>13</sup> In determining the tax on the capital stock of a corporation which has

<sup>9</sup> *People ex rel. Equitable Gas-Light Co. v. Barker*, 66 Hun, 21, 20 N. Y. Supp. 797 (1892); *aff'd* 137 N. Y. 544, 33 N. E. 336.

<sup>10</sup> *People ex rel. Clearing House v. Barker*, 31 A. D. 315, 51 N. Y. Supp. 1102 (1898); *aff'd* 158 N. Y. 709, 53 N. E. 1130; *aff'd* 171 U. S. 276, and 179 U. S. 287; L. 1857, c. 456. See now Tax L. § 12.

<sup>11</sup> *People ex rel. Merchants' Real Estate Co. v. Wells*, 110 A. D. 194,

97 N. Y. Supp. 47 (1906); Tax L. § 21 (L. 1899, c. 712), and Tax L. § 12 (L. 1899, c. 712).

<sup>12</sup> *People ex rel. New York Real Estate Assn. v. Barker*, 29 A. D. 325, 51 N. Y. Supp. 567 (1898).

<sup>13</sup> *People ex rel. Twenty-Third St. R. R. Co. v. Commr's of Taxes*, 95 N. Y. 554 (1884); L. 1857, c. 456; L. 1853, c. 654. See now Tax L. § 12.

been entirely expended in real estate the assessors may properly estimate the stock at par and deduct only the assessed value of the realty (which is but one-half of its cost).<sup>14</sup> A corporation assessed upon its capital stock cannot deduct the value of vaults, admittedly an interest in real property, at their assessed value if in assessing the premises in which they are build for the real estate tax the assessors made the assessment on such premises in ignorance of the existence of the vaults and without, therefore, considering their value.<sup>15</sup> An interest acquired by a corporation in purchasing various vaults is an interest in real property and must be treated as such in determining its liability to tax upon its capital stock.<sup>16</sup> In determining the tax on the capital stock of a corporation owning real estate in a foreign State, the *assessed* value of such realty should be deducted as being its actual value in the absence of evidence of actual value deemed by the assessors more conclusive than the assessment thereof.<sup>17</sup> When a corporation liable to tax upon its capital stock has real estate outside the State, it is the actual value thereof which is to be deducted from its property liable to tax; and the price paid for the real estate, in the absence of other and better evidence, may be taken as representing such value.<sup>18</sup> Real property in other states as well as tangible property without the State should be deducted from the amount of the assets constituting the capital or surplus of a corporation in which they are included, in fixing the amount at which it should be assessed for purposes of taxation.<sup>19</sup>

<sup>14</sup> *People ex rel. Butchers' Hide & Melting Co. v. Astin*, 100 N. Y. 597, 3 N. E. 788 (1885); L. 1857, c. 456, § 3. See now Tax L. § 12.

<sup>15</sup> *People ex rel. Knickerbocker Safe Deposit Co. v. Wells*, 181 N. Y. 245, 73 N. E. 961 (1905); Tax L. § 12.

<sup>16</sup> *People ex rel. Knickerbocker Safe Deposit Co. v. Wells*, 181 N. Y. 245, 73 N. E. 961 (1905); Tax L. § 12.

<sup>17</sup> *People ex rel. Fairchild Chemical Co. v. Coleman*, 115 N. Y. 178, 21 N. E. 1056 (1889); L. 1857, c. 456, § 3. See now Tax L. § 12.

<sup>18</sup> *People ex rel. Panama R. R. Co. v. Comrs. of Taxes*, 104 N. Y. 240, 10 N. E. 437 (1887); L. 1857, c. 456. "In many cases it is a

reasonable assumption that real property is worth a capital sum equal to that represented by the capitalization of its ordinary net rental. So, also, the property of a railroad corporation may be worth a sum capitalized on the basis of its average income and earning capacity;" but a railroad's franchise to run over the road constituting its real property cannot be considered part of the actual value of the land.

<sup>19</sup> *People ex rel. Delaware & Hudson Canal Co. v. Barker*, 23 Misc. 188, 51 N. Y. Supp. 1105 (1897); L. 1857, c. 456. See now Tax L. § 12.

On constitutionality of statute which allows a deduction of only

§ 614. **Id.: Stock In Other Corporations.**—The statute requires taxation of the capital stock of a corporation after deduction, among other things, of “all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of New York.”<sup>20</sup>

§ 615. **Id.: Debts and Liabilities.**—Although nothing is said in the statute imposing a tax upon a corporation’s “capital stock” about the deduction of debts, yet nothing is said against doing so; and debts may be deducted because the value of the capital stock of necessity must largely depend upon the amount of the company’s indebtedness.<sup>1</sup> A corporation is “entitled to have its indebtedness deducted from the value of its corporate assets which constituted its capital stock, or capital, as distinguished from its actual share stock” in determining the tax upon its capital stock.<sup>2</sup> In determining the tax payable by a corporation on its capital stock, “while . . . [the] indebtedness [of the company] is a proper subject for consideration in estimating the value of the stock there is no authority for its deduction from the value of the stock after an estimate of the same has been made.”<sup>3</sup> “Debts are deductible in ascertaining the assessable value of the capital of a corporation;” but if its capital is unimpaired the commissioners are not bound to deduct debts, because they are presumably offset by assets above the capital which otherwise would be liable to taxation.<sup>4</sup> Assessors are not precluded from assessing for taxation the capital stock of a corporation according to their best judgment and information or bound to find it not subject to any tax because of an affidavit that its debts exceeded the value of all its personalty.<sup>5</sup> When the evidence before the commissioners of taxes and assessments of New York City is full and uncontradicted as to all necessary facts about its assets and liabilities, they cannot, because its capital is unimpaired, assume it to be possessed of undis-

the assessed value of the real estate in assessing the corporate stock of a corporation, see note in 30 L.R.A.(N.S.) 704.

<sup>20</sup> Tax L. § 12 (L. 1909, c. 62).

<sup>1</sup> *People ex rel. Cornell S. Co. v. Dederick*, 161 N. Y. 195, 55 N. E. 927 (1900); Tax L. § 12.

<sup>2</sup> *People ex rel. Second Ave. R. R. Co. v. Barker*, 141 N. Y. 196, 36 N. E. 184 (1894); L. 1857, c. 456, § 3. See now Tax L. § 12.

<sup>3</sup> *People ex rel. Butchers' Hide & Melting Co. v. Astin*, 100 N. Y. 597, 3 N. E. 788 (1885); L. 1857, c. 456, § 3. See now Tax L. § 12.

<sup>4</sup> *People ex rel. Equitable Gas Light Co. v. Parker*, 144 N. Y. 94, 39 N. E. 13 (1894); L. 1857, c. 456. See now Tax L. § 12.

<sup>5</sup> *People ex rel. Utica & Black River R. R. Co. v. Shields*, 6 Hun, 556 (1876).

closed assets sufficient to pay the disclosed indebtedness, and therefore refuse to deduct any of such indebtedness.<sup>6</sup> "When the assessors, in making an assessment of personal property, ascertain the amount of the owner's liabilities and make all the deductions on account thereof to which he is entitled, and assess him for the balance thus obtained, he cannot then again claim against the assessment thus made another deduction of his liabilities and thus entirely wipe out the assessment. Assessors may assess an owner for the whole amount of his personal property and then allow him deductions on account of his liabilities when he appears and claims it, or they may allow him the deductions when they make the assessment, and then he has no grievances to complain of."<sup>7</sup> In assessing the tax upon a corporation's capital stock no presumption can be indulged that its indebtedness represents property to the amount of such indebtedness in addition to that represented by its capital stock.<sup>8</sup> The capital stock of a corporation cannot be assessed as of any value for purposes of taxation when its entire assets are insufficient to pay bonds for which it is liable.<sup>9</sup> In determining the value of the capital stock and surplus of a domestic corporation for assessment purposes the commissioners may not consider as part thereof bonds of another corporation payment of the principal and interest of which has been guaranteed by the assessed corporation.<sup>10</sup> A guarantee and bonding company cannot deduct from the assessed value of its capital stock an amount called "unearned premiums held as reinsurance reserve, as required by law, being amount necessary to reinsure outstanding risks" when the only ground for the deduction is that before the next year should roll around it might be required to pay a considerable sum on account of contracts then outstanding for which it had received premiums.<sup>11</sup> A corporation assessed for taxation on its personal property which has given its notes for stock in another corporation and has been taxed on the money which is evidenced by such notes is entitled to deduct from

<sup>6</sup> *People ex rel. Seidenberg Co. v. Feitner*, 41 A. D. 571, 58 N. Y. Supp. 713 (1899).

<sup>7</sup> *People ex rel. Savings Bank of New London v. Coleman*, 135 N. Y. 231, 31 N. E. 1022 (1892).

<sup>8</sup> *People ex rel. Manhattan Ry. Co. v. Barker*, 146 N. Y. 304, 40 N. E. 996 (1895); L. 1857, c. 456, § 3. See now Tax L. § 12.

<sup>9</sup> *People ex rel. West Side &*

*Yonkers Ry. Co. v. Commsrs. of Taxes*, 31 Hun, 32 (1883); L. 1857, c. 456. See now Tax L. § 12.

<sup>10</sup> *People ex rel. Delaware & Hudson Co. v. Feitner*, 61 A. D. 129, 70 N. Y. Supp. 500 (1901); *aff'd* 171 N. Y. 641, 63 N. E. 786; Tax L. §§ 6, 12 (L. 1896, c. 908).

<sup>11</sup> *People ex rel. National Surety Co. v. Feitner*, 166 N. Y. 129, 59 N. E. 731 (1901).

its personalty taxed the debt evidenced by such notes.<sup>12</sup> Subscriptions prepaid for periodicals to be published by a solvent corporation are not debts to be deducted in determining the capital stock tax to be paid by it, except to the extent of the cost of furnishing the periodicals to the subscribers who have paid in advance for the unexpired terms of their subscriptions.<sup>13</sup> An amount received by a corporation for patterns from merchants to whom it sold them under agreement to repurchase them at a percentage of the price paid therefore by the merchants if not sold is not a debt to be deducted in ascertaining the capital stock tax to be paid by the corporation.<sup>14</sup>

§ 616. **Id.: Franchises.**—The value of the franchise of a corporation may not be assessed as being part of its personalty in taxing the latter locally.<sup>15</sup> Franchises cannot be valued or included in an assessment against a corporation's capital and surplus as they are taxed under another statute.<sup>16</sup> In assessing the tax upon a corporation's capital stock the value of the franchises possessed by it cannot properly be included.<sup>17</sup>

§ 617. **Id.: Patents.**—In determining the assets of a corporation for local taxation of its personal property an amount invested in United States patent rights should be deducted; interest accrued on its outstanding mortgage debts should be allowed as a debt; and an estimated amount for accrued annual taxes and depreciation in value of assets should not be allowed.<sup>18</sup>

<sup>12</sup> *People ex rel. Keppler v. Barker*, 22 A. D. 120, 47 N. Y. Supp. 958 (1897); *aff'd* 155 N. Y. 661.

<sup>13</sup> *People ex rel. Butterick Publishing Co. v. Purdy*, 153 A. D. 665, 138 N. Y. Supp. 707 (1912); *mod.* 207 N. Y. 771, 101 N. E. 1116; on dissenting opinion of Scott, J., below; *Tax L.* § 12.

<sup>14</sup> *People ex rel. Butterick Publishing Co. v. Purdy*, 153 A. D. 665, 138 N. Y. Supp. 725 (1912); *mod.* 207 N. Y. 771, 101 N. E. 1116; *Tax L.* § 12.

Deduction of corporate indebtedness as element in fixing value of capital stock for taxation see note in 58 L.R.A. 577.

Deduction in valuation of capital stock of corporation, see note in 58 L.R.A. 594.

<sup>15</sup> *People ex rel. Coney Island R. R. Co. v. Neff*, 15 A. D. 585, 44 N. Y. Supp. 810 (1897).

<sup>16</sup> *People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 417, 46 N. E. 875 (1897); *L.* 1857, c. 456. See now *Tax L.* § 12.

<sup>17</sup> *People ex rel. Manhattan Ry. Co. v. Barker*, 146 N. Y. 304, 40 N. E. 996 (1895); *L.* 1857, c. 456, § 3. See now *Tax L.* § 12; *People ex rel. Brooklyn R. R. Co. v. Neff*, 19 A. D. 590 (1897); *aff'd* 154 N. Y. 763, *L.* 1881, c. 361. See now *Tax L.* § 182.

<sup>18</sup> *People ex rel. New York & New Jersey Telephone Co. v. Neff*, 15 A. D. 8, 44 N. Y. Supp. 46 (1897); *aff'd* 156 N. Y. 701, 51 N. E. 1093.

**§ 618. Id.: Good-Will.**—"Good-will, like a franchise, is a privilege which the courts will protect as a right of value. As such it is property, though intangible. Under the Franchise Tax Law of corporations it is taxable with the franchises as forming a part of the value of the share stock (*citations*). But good-will, as such, is not taxable for general town, county or municipal purposes. It is not real estate, nor is it personal property as defined by the provisions of the Tax Law . . . . It consequently follows that good-will is not taxable property for town, county and municipal purposes, and that debts or liabilities contracted in the purchase of such property should not be deducted from the value of the taxable personal property."<sup>19</sup> "The good-will of a corporation, though of an intangible nature, is taxable with the franchise, as forming a part of the value of the share stock."<sup>20</sup> In determining whether or not the capital stock of a corporation is fully paid it is proper to permit a witness thoroughly conversant with the business, the good-will of which formed part of the consideration for the issue of the corporation's stock, and with its management, to give his opinion of the value of the good-will.<sup>1</sup> ". . . the value of good-will may be fairly arrived at by multiplying the average net profits by a number of years, such number being suitable and proper, having reference to the nature and character of the particular business under consideration, and the determination of such proper number of years should be submitted to and determined by the jury as a question of fact, dependent upon the evidence before them in each action."<sup>2</sup>

**§ 619. Id.: Dividends.**—A corporate dividend declared before but payable after the date on which the corporation's taxable status is by statute to be determined is not taxable as part of its capital stock.<sup>3</sup> It is proper to include among the assets of a corporation to be taxed dividends declared but left with the company and invested in its business.<sup>4</sup>

<sup>19</sup> *People ex rel. Cornell S. Co. v. Dederick*, 161 N. Y. 195, 55 N. E. 927 (1900); Tax L. § 6.

<sup>20</sup> *People ex rel. New York & Queens Gas Co. v. Feitner*, 58 A. D. 555, 69 N. Y. Supp. 27 (1901); Tax L. § 12 (L. 1896, c. 908).

<sup>1</sup> *White, Corbin & Co. v. Jones*, 79 A. D. 373, 79 N. Y. Supp. 583 (1903).

<sup>2</sup> *Von Au v. Magenheimer*, 115

A. D. 84, 100 N. Y. Supp. 659 (1906); *aff'd* 196 N. Y. 510, 89 N. E. 1114.

<sup>3</sup> *People ex rel. United States Trust Co. v. Barker*, 86 Hun, 131, 33 N. Y. Supp. 388 (1895); L. 1857, c. 456, § 3. See now Tax L. § 12.

<sup>4</sup> *People ex rel. Hawley Box Co. v. Barker*, 23 A. D. 532, 48 N. Y. Supp. 557 (1897). There were only four stockholders and with their

§ 620. **Id.: Place of Taxation.**—All the personal estate of every incorporated company liable to taxation on its capital must be assessed in the tax district where the principal office or place for transacting the financial concerns of the company shall be; or, if such company have no principal office, or place for transacting its financial concerns, then in the tax district where the operations of such company shall be carried on.<sup>5</sup> “The State of New York does not seek to impose a double taxation upon the same property, nor will it deprive one county of the State of the revenue to be afforded by taxation of the assessable property within that county because another county, which is a more important financial center, may have at an earlier date in the year made an assessment upon personal property rightfully assessable in the former county.”<sup>6</sup> “The general statute prescribing where corporations are to be taxed was framed to meet two classes of cases: first, those which had a principal office, fixed by their certificate, in accordance with the mandate of their charter, or the general law under which they were organized; and, second, those which had no such principal office fixed by their certificate of incorporation, because their charter did not require it. The former was to be taxed in the locality of their principal office. The latter in the ‘place for transacting the financial concerns of the company.’”<sup>7</sup> The principal office of a corporation for taxation purposes is where its by-laws put its principal place of business, if the special act incorporating it empowers it to fix its residence by its by-laws.<sup>8</sup> A statement in a certificate of incorporation of the city in which the corporation’s operations are to be carried on is conclusive upon it for purposes of personal property taxation.<sup>9</sup> Under statutes providing respectively that corporations be assessed in the town or ward where is their principal office, and that

consent the dividends declared never were called for. L. 1855, c. 37.

<sup>5</sup> Tax L. § 11 (L. 1909, c. 62).

<sup>6</sup> *People ex rel. General Electric Co. v. Barker*, 91 Hun, 590, 36 N. Y. Supp. 842 (1895); aff’d 149 N. Y. 589, 44 N. E. 1127.

<sup>7</sup> *Union Steamboat Co. v. City of Buffalo*, 82 N. Y. 351 (1880); 1 R. S. 289, § 6. That the statute says corporations “shall be assessed in the town or ward where the principal office . . . shall be” while the certificate of incor-

poration, pursuant to the law of incorporation, locates only the “principal office for managing the affairs of such company” is immaterial.

<sup>8</sup> *People ex rel. General Electric Co. v. Barker*, 91 Hun, 590, 36 N. Y. Supp. 842 (1895); aff’d 149 N. Y. 589, 44 N. E. 1127; R. S. pt. 1, c. 13, tit. 2, art. 1, § 6; 1 R. S. 389; Gen. Corp. Act (L. 1892, c. 687), § 3.

<sup>9</sup> *Chesebrough Mfg. Co. v. Coleman*, 44 Hun, 545 (1887); incorporated under L. 1848, c. 40.

certificates of incorporation state the name of the town and county in which corporations' operations are to be carried on, corporations must be assessed in the last mentioned place, irrespective of the relative proportion of the pecuniary business which is managed at various localities.<sup>10</sup> "In the case of a corporation which has a principal office or place for transacting its financial concerns, it is plain that the place where the office is located is the place of assessment of its personal estate, irrespective of its actual *situs*."<sup>11</sup> ". . . . in case a statute under which a corporation is organized requires that its principal place of business or its principal office shall be designated in its certificate of organization, the statement in the certificate in respect thereto is, as against the corporation, conclusive evidence of its residence, unless its residence has been changed pursuant to some statute," and a qualification in such certificate as to such residence is surplusage.<sup>12</sup> The statement, pursuant to statute, by a corporation in its certificate of incorporation, of its principal place of business, is conclusive against it for taxation purposes unless its residence has been changed pursuant to some statute.<sup>13</sup> "When a statute under which a corporation is organized requires that it be stated in the articles of incorporation in what place the principal office for the management of its affairs is to be situated, and the location of its principal office is stated in the articles, the statement is conclusive for the purposes of taxation . . . ;" but "when a statute under which a domestic corporation is organized does not fix its residence, or require that its place of business or of its principal office shall be stated in its articles of association, its residence or domicile is deemed to be where its principal place of business is situated (*citations*); and when

<sup>10</sup> *Oswego Starch Factory v. Dolloway*, 21 N. Y. 449 (1860); 1 R. S. 389, § 6, and Gen. Mfg. Act, L. 1848, c. 40; *Western Transportation Co. v. Scheu*, 19 N. Y. 408 (1859); 1 R. S. 389, § 6, and L. 1854, c. 232.

<sup>11</sup> *People ex rel. Bay State Shoe & Leather Co. v. McLean*, 80 N. Y. 254 (1880); 1 R. S. 414, § 6.

<sup>12</sup> *People ex rel. Edison Electric Co. v. Barker*, 91 Hun, 594, 36 N. Y. Supp. 844 (1895); L. 1848, c. 40 and L. 1892, c. 691, § 2.

<sup>13</sup> *People ex rel. Knickerbocker Press v. Barker*, 87 Hun, 341, 34

N. Y. Supp. 269 (1895); *aff'd* 147 N. Y. 715, 42 N. E. 725; Gen. Corp. L. § 3 (L. 1892, c. 687, § 3). ". . . should it appear that the location of its principal office was willfully misstated in the certificate, or in case the corporation should change its principal place of business, without effecting a legal change of residence, for the purpose of evading taxation, it might present a case under section 1798 of the Code of Civil Procedure for the attention of the Attorney-General."

the residence of such a corporation is not fixed pursuant to statute it may change its principal office or place of business from where it was first established to any place within the State wherein it is actually engaged in carrying on its business pursuant to authority conferred by its charter . . . ."<sup>14</sup>

**§ 621. Id.: Procedure of Assessing Real and Personal Property (Including Capital Stock) Taxes; Ascertainment of Property Exempt.**—By September first each year the boards of assessors of the several towns and the boards or officials charged with assessing property for taxation of the several cities must furnish the clerks of the boards of supervisors of their respective counties (or the city clerk of the city in the case of New York City) a full and complete list and statement of all property situated in their respective districts which is exempt or partially exempt from taxation under the laws of New York; and such clerks of the boards of supervisors (or city clerk in the case of New York City) must by October first transmit such completed lists or statements to the tax commission of the State, which, in turn must tabulate the statements and publish such tabulation in its annual report to the Legislature.<sup>15</sup>

**§ 622. Id.: Ascertainment of Property and Corporations Taxable.**—Between January first and July first the assessors in each tax district must ascertain by diligent inquiry all the property and the names of all the persons taxable therein.<sup>16</sup> Between June first and fifteenth the county clerks in every county, except those counties which contain a city of the second class or which are wholly situate within the corporate limits of a city, must give to each town clerk in his county a statement of the name and names and addresses of the directorate of every stock corporation, certificate of incorporation of which has been filed with him in the past year, which has its principal business office or chief place of business — according to its certificate of incorporation — in such town clerk's town, village or hamlet; and each such town clerk must then mail a notice that he has filed such statement in his office to each of the assessors of his town.<sup>17</sup>

<sup>14</sup> *Austen v. Hudson River Telephone Co.*, 73 Hun, 96, 25 N. Y. Supp. 916 (1893); L. 1848, c. 265, § 6.

<sup>15</sup> Tax L. § 15 (L. 1916, c. 323).

<sup>16</sup> Tax L. § 20 (L. 1916, c. 323).

<sup>17</sup> Tax L. § 29 (L. 1909, c. 62).

On practice and procedure of as-

sessors in taxing capital stock of corporation, see note in 58 L.R.A. 612.

For a discussion of different methods and procedure in taxation of corporations, see note in 60 L.R.A. 372.

**§ 623. Id.: Assessment on the Rolls.**—The State Tax Commission must adopt regulations and rules for the preparation and use of assessment-rolls and advise with and instruct boards of assessors and other officers as to their duties in respect thereto; and the assessors must prepare the assessment-rolls in form prescribed and approved by the Tax Commission.<sup>18</sup> Assessment-rolls must be sufficiently classified and arranged with respect to number of parts, and columns in each part, as to identify (1) each separately assessed parcel or portion of real estate, with the approximate quantity of the square feet, square rods or acres contained therein, or a statement of the linear dimensions thereof; (2) each special franchise; (3) the name of each corporation taxable on personal property; (4) the name of each corporation taxable on capital stock; and assessments of real property—other than special franchises—must be carried in a separate part of the roll from the assessments of personal property. In addition, the form of assessment-roll must indicate in appropriate columns the district in which is situated (1) each parcel or portion of real property, (2) each special franchise, (3) each corporation subject to taxation for personal property, and provide for the entry of assessments of real property, personal property and special franchises.<sup>19</sup> More particularly, the assessors must assess corporations liable to taxation in their respective districts upon their assessment-rolls in five columns: (1) In the first column (a) the name of each corporation; under the name (b) the amount of its capital stock paid in and secured to be paid in, (c) the amount paid by it for real property then owned by it wherever situated, (d) the amount of all surplus profits or reserve funds exceeding ten per centum of its capital after deducting therefrom the amount of such real property, and the amount of its stock if any belonging to the State and to incorporated literary and charitable institutions; (2) In the second column, the quantity of real estate (except special franchises) owned by such corporation and situated within their tax district; (3) In the third column, the actual value of such real property (except special franchises); (4) In the fourth column, the amount of the capital stock paid in and secured to be paid in and of all of such surplus profits or reserve funds as aforesaid, after deducting the sums paid out for all the real estate of the company then belonging to it, wherever such real estate may

<sup>18</sup> Tax L. § 21, subs. 1 and 7  
(L. 1916, c. 323).

<sup>19</sup> Tax L. § 21 (L. 1916, c. 323).

be situated, and the amount of stock if any belonging to the People of the State and to incorporated literary and charitable institutions; and (5) In the fifth column, the value of any special franchise owned by it as fixed by the State Board of Tax Commissioners.<sup>20</sup> The assessors of any tax district must either on their own motion or upon the application of any taxpayer therein enter in the assessment-roll of the current year any property shown to have been omitted from the assessment-roll of the preceding year, at the valuation of that year, or, if not then valued, at such valuation as the assessors may determine for the preceding year; but assessments of special franchises that were omitted must be entered at the valuation fixed and equalized by the tax commission.<sup>1</sup> On failure, through mistaken belief in its exemption, to assess a corporation's property for taxation one year, it may be assessed next year for the omitted year if notice is given of such assessment.<sup>2</sup> The assessment-roll directed by law to be made up by assessors of corporate capital stock may be made up substantially as follows: "In the first column insert the name of the corporation; in the second the quantity of real estate, in the town or ward; in the third column the assessed value of the real estate, and in the fourth column the value of the capital stock after making the exemptions and deductions required . . ."<sup>3</sup> "There is nothing in any of these provisions of the statute which requires that the roll, as originally completed for review, shall be made out in a single volume or upon sheets of paper attached together, or which forbids that it should be made out in parts or upon detached sheets, which when brought together constitute the roll, completed for purposes of review; least of all is there anything to forbid the re-engrossment of the roll after the corrections of the review-day."<sup>4</sup>

<sup>20</sup> Tax L. § 32 (L. 1909, c. 62).

<sup>1</sup> Tax L. § 34 (L. 1916, c. 323).

<sup>2</sup> *People ex rel. Brooklyn City R. R. Co. v. Board of Assessors of Brooklyn*, 92 N. Y. 430 (1883); L. 1865, c. 452; L. 1880, c. 542.

<sup>3</sup> *People ex rel. Twenty-third St. R. R. Co. v. Comm'rs of Taxes*, 95 N. Y. 554 (1884); L. 1857, c. 456; L. 1853, c. 654.

<sup>4</sup> *People ex rel. Delaware, Lackawanna & Western R. R. Co. v. Clapp*, 64 Hun, 547, 19 N. Y. Supp. 531 (1892); 1 R. S. 390, § 8 *et seq.* "Briefly, the facts on which the

objection is based are, that the roll was first made in three parts; that it was so on review day, when it was inspected by the relator, which was duly heard to complain that the valuation of its property was excessive, and a very substantial reduction was made in such valuation; and that afterwards the three parts of the roll were engrossed into a single roll, which was duly verified, as the completed roll, by the assessors and delivered to the supervisor of the town."

**§ 624. Id.: Statements and Reports By Corporations, Governing Statutes.**—On or before June first every moneyed or stock corporation deriving an income or profit from its capital or otherwise must make a written statement, through its president or other proper officer, in the form prescribed by the State Tax Commission, and deliver it to one of the assessors of the tax district in which the company is liable to be taxed; and such statement must be verified by an officer of the corporation making the report to the effect that it is in all respects just and true.<sup>5</sup> The statement must specify: (1) The real property, if any, owned by such company and (a) the tax district in which such realty is situated and (unless a railroad corporation) (b) the sums actually paid therefor; (2) the capital stock actually paid in and secured to be paid in, excepting therefrom (a) the sums paid for real property and (b) the amount of such capital stock held by the state and by any incorporated literary or charitable institution; and (3) the tax district in which the principal office of the company is situated, or, in case it has no principal office, the tax district in which its operations are carried on.<sup>6</sup> If such statement is not made within twenty days after the first day of June or is insufficient, evasive or defective, the assessors may compel the corporation by mandamus to make a proper statement.<sup>7</sup> A statute requiring every corporation within twenty days from the first day of January to make a report, which must be published and filed, requires that it must be *made* within twenty days *following* (and not preceding) the first of January, although it may be filed and published within a reasonable time thereafter.<sup>8</sup> In case of neglect to furnish such statements within thirty days after the time above provided the company so neglecting forfeits to the People of New York State for each statement so omitted to be furnished the sum of two hundred and fifty dollars, and it is the duty of the Attorney-General to prosecute for such penalty upon information which must be furnished him by the Tax Commission; but the Tax Commission may in its discretion discontinue such suit upon such statement being furnished and the costs of the suit being paid, if it is satisfied that such omission was not wilful.<sup>9</sup>

<sup>5</sup> Tax L. § 27 (L. 1916, c. 323).

<sup>6</sup> Tax L. § 27 (L. 1916, c. 323).

<sup>7</sup> Tax L. § 27 (L. 1916, c. 323).

<sup>8</sup> *Cincinnati Cooperage Co. v.*

*O'Keefe*, 44 Hun, 64 (1887); *aff'd*

120 N. Y. 603, 24 N. E. 993; L. 1848, c. 40, § 12.

<sup>9</sup> Tax L. § 28 (L. 1916, c. 323).

**§ 625. Id.: How Far Binding On Taxing Authorities.—**

“The reports of corporations should receive a reasonable interpretation and excessive nicety or exactness should not be exercised in bringing them to the test of the statutes.”<sup>10</sup>

“In defining the powers and duties of the department of taxes the Court of Appeals has established certain principles: (1) The action of the commissioners must be based upon facts and evidence before them, and must not be capricious, arbitrary or fanciful. (2) The commissioners must return the information and evidence upon which they acted. (3) Where nothing is returned beyond the statements filed by the relator, these statements must be regarded as the basis of their action and as containing the only facts upon which the assessment was made. (4) Statements which are not denied, or as to which the return is silent, must be regarded as true.”<sup>11</sup> The commissioners of taxes have the right to rely on a statement of assets of a corporation made by it.<sup>12</sup> The inquiry in taxing a corporation's capital and surplus is their actual value; and if the information asked is given the commissioners in reasonably plain and full form, is uncontradicted, not objected to as insufficient, and not subject to reasonable doubt, they cannot question it or assess in disbelief of it.<sup>13</sup> It is the value of a corporation's capital stock, and not its share stock, which assessors are to ascertain; and if the commissioners do not require an examination of the corporate officers and books they are bound by the statement of the value of the gross assets given them.<sup>14</sup> A sworn statement by a corporation to tax commissioners must be accepted as the basis for their assessment unless it be otherwise contradicted; and such contradiction does not follow from an assessment by them based on the market value of the stock or the dividends declared thereon.<sup>15</sup> The commissioners cannot

<sup>10</sup> *Whitney Arms Co. v. Barlow*, 63 N. Y. 62 (1875); *Gen. Mfg. Act*, L. 1848, c. 40, § 12, as amend'd L. 1853, c. 333.

<sup>11</sup> *People ex rel. Consolidated Telegraph, etc., Co. v. Barker*, 7 A. D. 27, 39 N. Y. Supp. 776 (1896); *aff'd* 151 N. Y. 639, 45 N. E. 1133.

<sup>12</sup> *People ex rel. German Looking Glass Plate Co. v. Barker*, 75 Hun 6, 26 N. Y. Supp. 971 (1894).

<sup>13</sup> *People ex rel. Edison Electric Illuminating Co. of N. Y. v. Barker*, 139 N. Y. 55, 34 N. E. 722 (1893).

<sup>14</sup> *People ex rel. Brooklyn Union Gas Co. v. Feitner*, 82 A. D. 368, 81 N. Y. Supp. 898; *Tax L.* § 12. Commissioners cannot infer that, because \$15,000,000 of bonds had been issued (no part of which had been used to buy non-taxable property), they had been applied to property of the corporation in addition to the paid-up capital.

<sup>15</sup> *People ex rel. Mutual Gas Light Co. v. Wells*, 42 Misc. 606, 87 N. Y. Supp. 595 (1904).

disregard a statement made for them under oath by a corporation's officer for taxation purposes, if they make no further inquiry; and the relator may cancel the tax they impose if they adopt a method of assessment erroneous on the statement's face.<sup>16</sup> When there is nothing before commissioners of assessment, on an application and hearing for correction of their assessment of a corporation, to contradict its statement and testimony, they are bound to consider them true; and if they reject them and their act is challenged by *certiorari* they must not only in the return set forth their conclusion but the evidence as well so that the court may review it.<sup>17</sup> Commissioners of taxes "are not bound by statements [by a corporation seeking correction of its tax assessment] which are contradicted and which they disbelieve where good reasons exist for such disbelief (*citation*), but where a statement is made, the truth of which is not disputed, a mere surmise that it may not be true does not justify assessing officers in rejecting such statement or acting otherwise than in accordance therewith."<sup>18</sup>

**§ 626. Id.: Examination of Assessments and Complaints.**—The assessors must complete the assessment-roll by August first and give notice they will review their assessments on the third Tuesday of August next following, up to which time it may be examined, and at which time they must hear and determine all complaints in relation to such assessments brought before them—for which purpose they may adjourn from time to time.<sup>19</sup> The complainant must file with them a statement under oath specifying the respect in which the assessment complained of is incorrect; and such statement must be made either by the party assessed, or where property is assessed, by some person authorized to make such statement, and who has knowledge of the facts stated therein.<sup>20</sup> "A taxing act, which requires a valuation of property as part of the procedure, is unconstitutional unless it provides a grievance day, or an adequate opportunity to be heard and any tax levied under such a statute is void. If, however, a grievance day is provided but notice thereof is not given,

<sup>16</sup> *People ex rel. Twenty-third St. R. Co. v. Feitner*, 92 A. D. 518, 87 N. Y. Supp. 304 (1904).

<sup>17</sup> *People ex rel. Consolidated Gas Co. v. Feitner*, 78 A. D. 313, 79 N. Y. Supp. 975 (1903); *Tax L. § 12* (L. 1896, c. 908). Before basing assessment on earnings, they must be established. In valuing

"share stock" the value of the franchise cannot be considered.

<sup>18</sup> *People ex rel. Bhungara Co. v. Wells*, 93 A. D. 212, 87 N. Y. Supp. 543 (1904); *aff'd* 179 N. Y. 529, 71 N. E. 1136.

<sup>19</sup> *Tax L. §§ 36 and 37* (L. 1916, c. 323).

<sup>20</sup> *Tax L. § 371* (L. 1916, c. 323).

while the statute is valid, the tax is voidable. The assessors have jurisdiction, but the failure to give notice is an irregularity (*citation*), and the assessment, if attacked in due form and in due time, will be set aside . . .”<sup>1</sup> “In case a corporation feels itself aggrieved on account of an assessment made upon its property, and desires to file a statement on ‘grievance day,’ pursuant to statute, with the board of assessors making the same, for the purpose of having such assessment reduced, or to enable it to review the same, the tax agent of such corporation will be presumed to have sufficient knowledge of the facts relating to the assessment of its property to make him competent, within the meaning of the statute, to verify such statement, and the sources of such knowledge need not be stated.”<sup>2</sup> A statement by a corporation filed with assessors to obtain a revision need not be verified by an officer or agent of the corporation having personal knowledge of the facts, but may be verified on information received from others, provided the sources of the information be stated.<sup>3</sup> A corporation assessed for real estate tax cannot apply to the tax board for reduction of the assessment through a corporation doing that kind of business which it never appointed its agent and which had no prior relation to or knowledge of the property.<sup>4</sup> “. . . in the city and county of New York the right to review an assessment for purposes of taxation is confined to the grounds of illegality and overvaluation. . . there is no requirement of law that any particular phrase or set form of words should be used by a taxpayer in objecting to an excessive assessment. If it is made distinctly to appear that overvaluation is the ground of his objection, it is immaterial in what language that objection is expressed.”<sup>5</sup> “. . . where a person assessed complains because his

<sup>1</sup> *People ex rel. Bridgeport Savings Bank v. Feitner*, 191 N. Y. 88, 83 N. E. 592 (1908); U. S. R. S. § 5219; Tax L. §§ 23, 24, 36; Greater N. Y. Charter, §§ 892, 895, 898, 899, 907, 914, 915, 916.

<sup>2</sup> *People ex rel. Erie R. R. Co. v. Webster*, 49 A. D. 556, 63 N. Y. Supp. 574 (1900); Tax L. § 36 (L. 1896, c. 908).

<sup>3</sup> *People ex rel. West Shore R. R. Co. v. Johnson*, 29 A. D. 75, 51 N. Y. Supp. 388 (1898); Tax L. § 36 (L. 1896, c. 908). The attorney verified the statement on information and belief and gave the

sources of information as statements furnished and letters written by the corporation’s tax agent.

<sup>4</sup> *People ex rel. Trojan Realty Corporation v. Purdy*, 174 A. D. 702, 162 N. Y. Supp. 56 (1916); Tax L. § 37 (L. 1909, c. 62).

<sup>5</sup> *People ex rel. Broadway Improvement Co. v. Barker*, 14 A. D. 412, 43 N. Y. Supp. 1015 (1897). “The notification is that the property was assessed at \$210,000 more than is in accordance with the marketable value thereof.” Held, sufficient.

property is assessed proportionately higher than other particular pieces of property upon the same roll, he should specify such pieces of property and state their value; but where the allegation is that the property of the person complaining is assessed proportionately higher than any of the other property in the town . . . , the valuation of all the different properties in the town need not be stated, or the particular instances of value given.”<sup>6</sup> A corporation taxed for its personal property is not barred from insisting upon a reduction because in its first statement for a reduction it did not include the later reduction sought as a debt, provided the commissioners accepted the later statement and it was submitted to them before the expiration of the time limited for the making of complaints.<sup>7</sup>

**§ 627. Id.: Hearing.**—The assessors may administer oaths, take testimony and hear proof in regard to any such complaint and the assessment to which it relates, and, if not satisfied that such assessment is erroneous, may require the party assessed or his agent or representative, or any other person, to appear before them and be examined concerning such complaint and to produce any papers relating to such assessment with respect to his property or his residence for the purpose of taxation; and, after such examination, must fix the value of the property of the complainant and for that purpose may increase or diminish the assessment thereof; and if any person wilfully neglects or refuses to attend and be so examined, or to answer any material question put to him, such person is not entitled to any reduction of his assessment; and minutes of the examination of every person examined by the assessors upon the hearing of any such complaint must be taken and filed in the office of the town or city clerk.<sup>8</sup> “It is a familiar principle that a party may waive an objection founded upon want of jurisdiction of the person . . . . The proceedings

<sup>6</sup> *People ex rel. Erie R. R. Co. v. Webster*, 49 A. D. 556, 63 N. Y. Supp. 574 (1900); Tax L. § 36 (L. 1896, c. 908). The statement, held sufficient, alleged: “That the assessment . . . is illegal, incorrect and erroneous, for the reason that the valuation placed on said property is excessive and greater than the full value of said property. 4. That the assessment . . . is illegal, incorrect and erroneous, for the reason that the

valuation placed on said property is unequal and not in proportion to the valuations placed upon the other property set forth in said roll, but is in excess thereof, and is assessed at a higher proportionate valuation than other properties on the same roll.”

<sup>7</sup> *People ex rel. Keppler v. Barker*, 22 A. D. 120, 47 N. Y. Supp. 958 (1897); *aff’d* 155 N. Y. 661, 49 N. E. 1102.

<sup>8</sup> Tax L. § 37 (L. 1916, c. 323).

for the assessment of property are of a judicial character, and the assessors in making an assessment act judicially, and the law provides for the appearance before them of parties deeming themselves aggrieved by their proposed action, and the submission of proofs to support the complaint made, and a final determination by the assessors thereon; and the rule referred to is applicable to such a proceeding, and precludes a party, who appears before them and asks to have his assessment reduced and obtains a reduction and makes no other objection, from subsequently claiming that they had no jurisdiction to tax him at all."<sup>9</sup> Assessors act in a judicial capacity, must be governed by the evidence before them, and when they have no ground in such evidence to dispute it are bound to act in accordance with it.<sup>10</sup> The Commissioners of Taxes and Assessments of New York City cannot tax a corporation on the basis of a statement of one of its officers at the end of an examination before them that he considered its stock worth par and that its capital was unimpaired, if uncontradicted testimony of the witnesses at the examination gives the actual amount of the company's property and liabilities; but they must base their assessment on such actual amount.<sup>11</sup>

**§ 628. Id.: Equalization and Cancellation of Assessment and Levy and Collection of Tax.**—The text of the statute governing the equalization of assessment and the levy and collection of taxes is given hereinafter.<sup>12</sup> “. . . the determination of an assessing or taxing officer that an assessment made for one

<sup>9</sup> Matter of McLean, 138 N. Y. 158, 20 L.R.A. 389, 33 N. E. 821 (1893). A domestic corporation did most of its business in Suffolk county but had an office in New York city where it was assessed and took the proceedings mentioned in the text.

<sup>10</sup> People *ex rel.* Glen Telephone Co. v. Hall, 130 A. D. 360, 114 N. Y. Supp. 511 (1909).

<sup>11</sup> People *ex rel.* Brokaw Bros. v. Feitner, 44 A. D. 278, 60 N. Y. Supp. 687 (1899).

<sup>12</sup> Tax L. §§ 50-95; Tax L. § 302 (as amend'd L. 1918, c. 530), enacts that “if a personal tax, levied against a . . . corporation, on the property of a . . . corporation, is void for want of jurisdiction of such . . . corporation and has been returned by the proper collector un-

collectible for want of personal property out of which to collect the same, the . . . corporation against whom or against whose property the said tax was levied may then apply to the Supreme Court or County Court in the county in which is located the tax district where said tax was levied, for an order cancelling the said tax, and upon notice to the president of the village, county treasurer, supervisor of the town or, in the case of a city, upon notice to its attorney or to the corporation counsel, and upon satisfactory proof by affidavit, the court shall make an order directing the cancellation of said tax from the assessment-roll by the county treasurer, comptroller, or other officer in whose custody and control the said roll may be.”

particular year should be canceled for the reason that the property was not subject to assessment, is [not] conclusive upon succeeding officers against assessments for subsequent years upon the same property or franchise."<sup>13</sup> A statute permitting application by a corporation for "correction" of the local assessment against its personal property does not permit an increase thereof by the assessors on its application for correction.<sup>14</sup> In determining the question of inequality of assessment under the Tax Law, as distinguished from the charter of New York City, comparison must be made with property in the borough or county, as distinguished from property in the same ward or section or other part of the city; and with personal as well as with real property.<sup>15</sup> Substantial performance only of the provisions of the tax laws is to be required; and, therefore, when a warrant is made to a tax collector to collect a tax which requires him to collect six instead of five per cent additional, it will not be defective, especially if the corporation taxed objected not on that ground but only on the ground that the tax was excessive, and this after its time to raise this objection had passed.<sup>16</sup> An application to have an action by the city to collect a personal tax from a company dismissed on the statutory ground that the assessment under which the tax was levied was erroneous because the company's just indebtedness was greater than the value of its personal property is improper, as review of the acts of the tax commissioners can be had, in the absence of fraud, only as provided by statute, viz. application to them during the grievance days from January to April for correction of the erroneous assessment, and failing in that, review of their action by writ of *certiorari*; and the reasons which, under the statute, make it appear to the court just that the tax imposed within the jurisdiction of the taxing officers should not be paid must be reasons other than those which may be considered in *certiorari*.<sup>17</sup>

**§ 629. Id.: Miscellaneous Statutory Provisions.**—Provision for the oath by the assessors to their roll; its filing by Septem-

<sup>13</sup> *People ex rel. New England Dressed Meat & W. Co.*, 155 N. Y. 408, 41 L.R.A. 228, 50 N. E. 53 (1898).

<sup>14</sup> *People ex rel. New York & New Jersey Telephone Co. v. Neff*, 15 A. D. 8, 44 N. Y. Supp. 46 (1897); *aff'd* 156 N. Y. 701, 51 N. E. 1093; L. 1888, c. 583, tit. 10, § 8.

<sup>15</sup> *People ex rel. Queens Borough*

*Gas & Electric Co. v. Woodbury*, 67 Misc. 481, 123 N. Y. Supp. 592 (1910).

<sup>16</sup> *Matter of Adler & Co.*, 174 N. Y. 287, 66 N. E. 929 (1903); Tax L. § 259.

<sup>17</sup> *City of New York v. Chase, Talbot & Co.*, 206 N. Y. 1, 99 N. E. 143 (1912); Tax L. § 301.

ber first, subject to inspection for fifteen days; the giving of notice of completion, filing and openness to inspection of the roll; delivery and filing of the roll with the proper authorities; apportionment of the valuation of railroad, telegraph, telephone, pipe-line, water or gas companies and of special franchises among school and special districts; and neglect or omission of duty by assessors, is contained in the statute hereinafter quoted.<sup>18</sup> An application by a county treasurer for institution of proceedings to collect a tax against a corporation cannot be made to or allowed by a special county judge, or anyone save the court.<sup>19</sup>

**§ 630. Id.: Special Franchise Tax, In General.**—In the assessment-roll prepared by the assessors each special franchise must be distinguished, with the amount of tax assessed against it, and its value as fixed by the State Board of Tax Commissioners.<sup>20</sup> “The charter of a corporation is the law which gives it existence as such. That is its general franchise, which can be repealed at the will of the Legislature. A special franchise is the right, granted by the public, to use public property for a public use, but with private profit, such as the right to build and operate a railroad in the streets of a city. Such a franchise, when acted upon, becomes property and cannot be repealed, unless power to do so is reserved in the grant, although it may be condemned upon making compensation.”<sup>1</sup> The special franchise tax act is constitutional.<sup>2</sup> The act conferring on the State Tax Commissioners the power to assess, for the purpose of taxation, the value of “Special Franchises” is constitutional.<sup>3</sup> “The object of an assessment is not necessarily to produce a tax upon the intangible rights but is to determine what the special franchise is

<sup>18</sup> Tax L. §§ 39 (L. 1918, c. 279), 40, 41 (L. 1916, c. 323).

<sup>19</sup> Matter of Wright, Peters & Co., 73 A. D. 75, 76 N. Y. Supp. 775 (1902); Tax L. § 259 (L. 1896, c. 908).

For authorities on the question of constitutional equality in the United States in relation to taxation of corporate property, see comprehensive note in 60 L.R.A. 321.

On power to compel production of corporate book to aid in assessing holder of stock or his estate, see note in 8 L.R.A. (N.S.) 788.

<sup>20</sup> Tax L. § 21 (L. 1916, c. 323), and § 32 (L. 1909, c. 62).

<sup>1</sup> Lord v. Equitable Life Assurance Soc., 194 N. Y. 212, 22 L.R.A. (N.S.) 420, 87 N. E. 443 (1909).

<sup>2</sup> People *ex rel.* Metropolitan St. Ry. Co. v. Tax Commrs., 174 N. Y. 417, 63 L.R.A. 884, 67 N. E. 69 (1903). It violates neither the home rule nor the contract clauses of the Constitution, being § 2 of art. 10 of the State and § 10 of art. 1 of the Federal Constitutions.

<sup>3</sup> Buffalo Gas Co. v. Volz; 31 Misc. 160, 64 N. Y. Supp. 534 (1900); L. 1899, c. 712; N. Y. Const. art. 10, § 2.

worth, and, if the basis of computation is right, it is quite immaterial for the purpose of fairness whether a tax on the intangible part of the franchise results or not.”<sup>4</sup>

**§ 631. Id.: What Is Taxable as Special Franchise.**—What is known, for the purpose of taxation, as a special franchise includes the value of: (1) The right to collect wharfage, crannage or dockage on wharves and piers; (2) the franchise, right or permission to construct, maintain or operate surface, under-ground or elevated railroads, in, under, above, on or through streets, highways or public places; (3) the franchise, right, authority or permission to construct, maintain or operate, in, under, above, upon or through any streets, highways or public places, any mains, pipes, tanks, conduits or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil or other substance, or electricity for telegraphic, telephonic, or other purposes; and (4) the tangible property of a corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise, and the tangible property as included must be taxed as a part of the special franchise.<sup>5</sup> The term “Special Franchise” is not — except as to elevated railroads — deemed to include the crossing of a street, highway or public place outside the limits of a city or incorporated village where such crossing is less than two hundred and fifty feet in length, unless such crossing be the continuation of an occupancy of another street, highway or public place.<sup>6</sup> A grant from owners of the soil to a corporation through which the latter’s property runs is not a “Special Franchise” taxable by the State.<sup>7</sup> An exclusive right in the nature of an easement vested in a railroad “to use and occupy the thirty-foot strip [on a street] forever for the purpose of railroad tracks and turnouts and running locomotives and cars thereon without interruption or molestation” is not such a right as to be subject to a franchise tax.<sup>8</sup>

<sup>4</sup> *People ex rel. Brooklyn Heights R. R. Co. v. Tax Commissioners*, 146 A. D. 372, 131 N. Y. Supp. 49 (1911); *aff’d* 204 N. Y. 648, 97 N. E. 1113.

For authorities on the question of taxability of local franchises, see note in 57 L.R.A. 40.

<sup>5</sup> Tax L. § 2, subd. 6 (L. 1916, c. 323).

<sup>6</sup> Tax L. § 2, subd. 7 (L. 1916, c. 323).

<sup>7</sup> *People ex rel. Retsof Mining Co. v. Priest*, 75 A. D. 131, 77 N. Y. Supp. 382 (1902); *aff’d* 175 N. Y. 511, 67 N. E. 1088; Tax L. § 2, subd. 3 (L. 1899, c. 712).

<sup>8</sup> *People ex rel. Long Island R. R. Co. v. Tax Commissioners*, 148 A. D. 751, 133 N. Y. Supp. 348 (1912); *aff’d* 207 N. Y. 683, 101 N. E. 1117; Tax L. § 2, subd. 3, as amend’d L. 1899, c. 712.

"A special franchise involves a grant from competent public authority, and there can be no franchise if an act is done within the boundaries of a street 'by virtue of the ownership of the soil or of some interest therein;' " so that an assessment for taxation on property occupied in the latter way is unjustified." "A street crossing franchise consists of the right to lay tracks across a street and use them, when but for a grant of the right to do so from competent public authority it would be a trespass."<sup>10</sup> "A special franchise granted to a railroad corporation is a right granted to it to maintain its road where, without such authority to do so, it would be unlawful."<sup>11</sup> "When a right of way over a public street is granted to such [a] corporation, with leave to construct and operate a street railroad thereon, the privilege is known as a special franchise, or the right to do something in the public highway, which, except for the grant, would be a trespass."<sup>12</sup> While an avenue at the time of incorporation of a railroad company may not actually be in public use as a street, yet if legislation by the legislature and resolutions by the city be passed on the assumption of and with reference to rights of the city in streets then laid out as public highways on maps of which the avenue in question is part, and were treated by several private owners as public highways, and the public authorities' consent was always necessary to occupation of such avenue by the railroad company, then the right to travel upon it is a special franchise, taxable as such.<sup>13</sup> ". . . the statutes authorizing the taxation of special franchises apply to steam surface railroads."<sup>14</sup> The test of whether or not certain property shall be considered in determining the special franchise tax of a street railroad corporation is: Does it belong to the structure of the railroad and is it necessary for its operation? If yea, the value of the property may be

<sup>9</sup> *People ex rel. New York Central & Hudson River R. R. Co. v. Woodbury*, 167 A. D. 428, 153 N. Y. Supp. 537 (1915); *aff'd* without opinion 218 N. Y. 635, 112 N. E. 1070.

<sup>10</sup> *People ex rel. New York Central R. R. Co. v. Woodbury*, 203 N. Y. 167, 96 N. E. 431 (1911); Tax L. §§ 1, 2, subd. 3.

<sup>11</sup> *People ex rel. New York Central & Hudson River R. R. Co. v. Priest*, 206 N. Y. 274, 99 N. E. 547 (1912).

<sup>12</sup> *People ex rel. H. R. & P. R. R. Co. v. Tax Commissioners*, 215 N. Y. 507, L.R.A.1916B, 1222, 109 N. E. 569 (1915); Tax L. § 2, subd. 3.

<sup>13</sup> *People ex rel. New York Central & Hudson River R. R. Co. v. Priest*, 206 N. Y. 274, 99 N. E. 547 (1912).

<sup>14</sup> *People ex rel. New York Central & Hudson River R. R. Co. v. Priest*, 206 N. Y. 274, 99 N. E. 547 (1912); *People ex rel. New York Central & H. R. R. R. Co. v. Woodbury*, 203 N. Y. 167, 96 N. E. 431.

considered; if nay, it may not.<sup>15</sup> A State grant to a corporation to use the public streets is taxable as a special franchise though the United States later give it license to use such streets without State interference.<sup>16</sup> The crossing of a railroad over canal lands, which are to be deemed "public places" under the statute, is a special franchise and taxable as such.<sup>17</sup> "The object of the Special Franchise Tax Act is to tax railroad corporations for privileges granted them in the streets which they occupy on their lines of railway, and if, after they have their rights of way secured over private land, a public highway is laid across the tracks, while there is a crossing, it is not a crossing made by the railroad or through public favor so far as the railroad is concerned;" and it is not a special franchise taxable within the meaning of the statute.<sup>18</sup> Crossings made by constructing steam surface railroads across streets already in existence are included in the statute imposing the franchise tax, *i. e.*, the statute authorizing the taxation of special franchises applies to steam surface railroads, as their crossings are land according to its provisions.<sup>19</sup> A railroad corporation proceeding to act as if it acquiesced in the contention of municipal authorities that land within the lines of some streets over which it ran its tracks had been dedicated to public use is estopped from claiming that such streets are not public in a proceeding to enforce against it a franchise tax unless it admits it is a trespasser thereon, because its operation over such streets must then be by permission or franchise which is therefore taxable.<sup>20</sup> A corporation contracting with a municipality to construct, maintain and operate a railroad and paying a municipality a fixed sum for the use of the property over which the railway runs and holding the balance of the fares for performing the public service is not subject to a special franchise tax for its

<sup>15</sup> The two cases of *People ex rel. Buffalo & L. E. Traction Co. v. Tax Commissioners*, in 209 N. Y. 496, 502, 103 N. E. 776, 778, respectively.

<sup>16</sup> *People ex rel. Postal Telegraph-Cable Co. v. State Board of Tax Commissioners*, — Misc. — (1918), N. Y. L. J. Feb. 25; App. Div. 1st Dept.

<sup>17</sup> *People ex rel. New York Central & Hudson River R. R. Co. v. Woodbury*, 167 A. D. 535, 153 N. Y. Supp. 541 (1915); *aff'd* without opinion 216 N. Y. 651, 110 N. E. 1047; Tax L. § 2, subd. 3.

<sup>18</sup> *People ex rel. New York Central R. R. Co. v. Woodbury*, 203 N. Y. 167, 96 N. E. 431 (1911); Tax L. §§ 1, 2, subd. 3.

<sup>19</sup> *People ex rel. New York Central R. R. Co. v. Woodbury*, 203 N. Y. 167, 96 N. E. 431 (1911); Tax L. §§ 1, 2, subd. 3.

<sup>20</sup> *People ex rel. East River T. R. R. v. Board of Tax Commissioners*, 160 A. D. 771, 146 N. Y. Supp. 112 (1914); Tax L. § 2, subd. 3.

rights under the contract.<sup>1</sup> A grant by the city to a railroad company pursuant to statute of the right to use for the term of its corporate existence certain subsurface property, not in fee but with reservation to the city of the right to use any part of the soil under the company's tracks and structures, etc., is a special franchise, properly included in an assessment therefor.<sup>2</sup> A right granted by the State to a corporation to construct its railroad over water-courses and build bridges for the purpose is a special franchise; and bridges and trestles so erected are assessable as and for special franchises, even though the corporation own the fee on each side of the water-courses on which the bridges' abutments rest.<sup>3</sup> A bridge over a river built on abutments built on lands owned in fee by a railroad company, not immediately connected with any special franchise, while tangible property, is not within the statutory words "tangible property . . . situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise;" and its value should not be considered in determining the amount of the assessment.<sup>4</sup> The right of a corporation to run its cars over a bridge under a contract with a municipal corporation does not give it a franchise to operate its cars within the meaning of the phrase "special franchise" so as to be taxable as such.<sup>5</sup> In determining a franchise tax assessment a viaduct constructed by the corporation by agreement with a town, its highway commissioner, part of the expense of which the town pays, and over which the corporation's track ran, is properly treated as tangible property of the corporation in the streets, but not the pavement between the rails and for two feet outside.<sup>6</sup> The fact that a bridge not properly the subject of a franchise tax is included with other intangible and tangible property does not vitiate the whole assessment when

<sup>1</sup> *People ex rel. Interborough Rapid Transit Co. v. Tax Commissioners*, 126 A. D. 610, 110 N. Y. Supp. 577 (1908); *aff'd* 195 N. Y. 618.

<sup>2</sup> *People ex rel. New York Central, etc., R. R. Co. v. Woodbury*, 206 N. Y. 304, 99 N. E. 545 (1912).

<sup>3</sup> *People ex rel. H. R. & P. C. R. R. Co. v. Tax Commissioners*, 215 N. Y. 507, L.R.A.1916B, 1222, 109 N. E. 569 (1915); Tax L. § 2, subd. 3.

<sup>4</sup> *People ex rel. New York Cen-*

*tral R. R. Co. v. Woodbury*, 206 N. Y. 304, 99 N. E. 545 (1912).

<sup>5</sup> *Matter of New York Railways Co.*, 172 A. D. 128, 158 N. Y. Supp. 237 (1916); Tax L. § 2, subd. 3; *Greater New York Charter*, §§ 73, 74 (L. 1901, c. 466, as amend'd L. 1905, cc. 629, 630).

<sup>6</sup> *People ex rel. Buffalo & Lake Erie Traction Company v. Tax Commissioners*, 156 A. D. 466, 142 N. Y. Supp. 116 (1913); *aff'd* 209 N. Y. 502, 103 N. E. 778; *Railroad L. § 98*.

it is a small and definite part of the property assessed.<sup>7</sup> Tangible property of a corporation under public waters used in connection with its special franchise is assessable and taxable by the State Board of Tax Commissioners as tangible property.<sup>8</sup> A viaduct (and its approaches) built by a street railroad company under a contract with a municipality by which each was to expend money and the company to keep it in repair for the term of its franchise, although the contract declares it is to be a public highway, is properly treated by the State Board of Tax Commissioners as tangible property of the railroad in assessing its special franchise tax, because it is essential to the operation of the railroad.<sup>9</sup> In assessing the value of a street railroad's special franchise for the purpose of tax, the pavement which it is by law obliged to construct and maintain between and near its tracks is not to be treated by the State Board of Tax Commissioners as constituting any part of the railroad's tangible property; although the price which the railroad company is willing to pay to lay down and maintain the statutory pavement, being some evidence of the value of the intangible right to operate the railroad in the street, may properly be considered in ascertaining the value of its special franchise.<sup>10</sup> Under a statute providing that a special franchise shall not include the crossing of a street, highway or public place where such crossing is not at the intersection of another street or highway unless at other than right angles for two hundred and fifty feet or more, the crossing of two highways or of a highway and a public place is not a special franchise; and an authorized crossing by a railroad-lessee of a canal, and a contiguous crossing of a public highway lying next to the canal, at an oblique angle, on a continuous bridge, not at the intersection of another street or highway, 242 and 62 feet over the canal and highway respectively, are not a special franchise for the purpose of assessment and taxation as such.<sup>11</sup>

<sup>7</sup> *People ex rel. New York Central R. R. Co. v. Woodbury*, 206 N. Y. 304, 99 N. E. 545 (1912).

<sup>8</sup> *People ex rel. Edison Co. v. Commissioners of Taxes*, 58 Misc. 249, 110 N. Y. Supp. 833 (1908); Tax L. § 47, subd. 3.

<sup>9</sup> *People ex rel. Buffalo & L. E. Traction Co. v. Tax Commissioners*, 209 N. Y. 502, 103 N. E. 778 (1913).

<sup>10</sup> *People ex rel. Buffalo & L. E.*

*Traction Co. v. Tax Commissioners*, 209 N. Y. 496, 103 N. E. 776 (1913); Tax L. § 2; R. R. L. § 178.

<sup>11</sup> *People ex rel. New York Central & Hudson River R. R. Co. v. Woodbury*, 208 N. Y. 421, 102 N. E. 565, 566 (1913); Tax L. § 2, subd. 4 (in 1907), and subd. 6.

Tax on franchise of interstate telegraph and telephone companies, see note in 24 L.R.A. 162.

**§ 632. Id.: Place of Taxation.**—Assessors must assess corporations liable to taxation on their special franchises in their respective tax districts.<sup>12</sup>

**§ 633. Id.: Reports By Corporations, On Acquisition of Special Franchise.**—Every corporation subject to taxation on a special franchise must within thirty days after such special franchise is acquired make a written report to the Tax Commission containing (1) a full description of every special franchise possessed or enjoyed by it, (2) a copy of (a) the special law, grant, ordinance or contract under which it is held, or (b) if possessed or enjoyed under a general law, a reference to such law, (3) a statement of any condition, obligation or burden (a) imposed upon such special franchise or (b) under which it is enjoyed, together with (4) any other information relating to the value of such special franchise required by the Tax Commission.<sup>13</sup>

**§ 634. Id.: Subsequent and Annual Reports.**—The Tax Commission may require an annual report and from time to time a further or supplemental report from any such corporation containing information and data upon such matters as it may specify.<sup>14</sup>

**§ 635. Id.: Form and Verification.**—The Tax Commission may prepare blanks to be used in making the reports; and every report required by law must have annexed to it the affidavit of the president, vice-president, secretary or treasurer of the corporation to the effect that the statements contained therein are true.<sup>15</sup>

**§ 636. Id.: Penalty for Failure to Make or for Disclosing.**—Every corporation failing to make the report or failing to make any special report required by the Tax Commission within a reasonable time specified by it *forfeits* to the People of the State the sum of one hundred dollars for every such failure and the additional sum of ten dollars for each day that such failure continues; and is not entitled to review the assessment by certiorari as provided by the statute; and acknowledgment of receipt of blank reports which contain the penalty provisions of the statute is deemed sufficient notice of such penalties.<sup>16</sup> The courts will not enjoin the State Board of Tax Commissioners from disclosing franchise tax reports made to it, but, as the law says nothing either about such reports being kept private or about their being made public, will leave it

<sup>12</sup> Tax L. § 32 (L. 1909, c. 62).

<sup>13</sup> Tax L. § 44 (L. 1916, c. 334).

<sup>14</sup> Tax L. § 44 (L. 1916, c. 334).

<sup>15</sup> Tax L. § 44 (L. 1916, c. 334).

<sup>16</sup> Tax L. § 44 (L. 1916, c. 334).

to the Commissioners' wise discretion either to withhold or to permit their inspection, depending upon whether they can be convinced the inspection or disclosure is for legitimate or illegitimate purposes.<sup>17</sup>

**§ 637. Id.: Valuation and Equalization of Special Franchise, Preliminarily by Tax Commission.**—The Tax Commission must annually fix and determine the full and actual valuation of each special franchise subject to assessment in each city, town or village; must inquire into and ascertain as near as may be the percentage of the full and actual value at which other real property in the city, town or village for which such full valuation has been made is being assessed; and by the rate of equalization so established must fix and determine the equalized valuation of each special franchise subject to assessment.<sup>18</sup> The tangible property of a corporation brought into the system of special franchise taxation as an incidental part thereof, though previously assessed by local authority is "an inseparable part of the special franchises mentioned in the statute, constituting with them a new entity, which as a going concern can neither be assessed nor sold to advantage, except as one thing, single and entire."<sup>19</sup> "The scheme of the statute for the taxation of special franchises (incorporated in the Tax Law) is that they are assessed at their value without any diminution for any local public charges thereon, and that such charges are to be deducted from the tax when levied."<sup>20</sup> The State Board of Tax Commissioners properly fixes and determines in one amount the value of the special franchise of a corporation distributing gas and wires to occupy streets and public places in a city even though its continuous and unbroken lines of pipes and wires extend through and into several wards of the city.<sup>1</sup> Although the statute may not make a village one of the territorial units for a special franchise assessment by the State authorities, yet *each* franchise in a village must be separately assessed by the State board; and the village assessors are without power to fix values in villages — their duty is merely clerical; and the assessment, *i. e.*, the ascertained value of a

<sup>17</sup> American District Telegraph Co. v. Woodbury, 127 A. D. 455, 112 N. Y. Supp. 165 (1908); Tax L. § 43.

<sup>18</sup> Tax L. § 45 (L. 1916, c. 334).

<sup>19</sup> People *ex rel.* Metropolitan St. Ry. Co. v. Tax Commrs., 174 N. Y. 417, 63 L.R.A. 884, 67 N. E. 69 (1903).

<sup>20</sup> People *ex rel.* Nassau Electric Railroad Co. v. Grout, 119 A. D. 130, 103 N. Y. Supp. 975 (1907); *aff'd* 189 N. Y. 510, 81 N. E. 1173; Tax L. § 46.

<sup>1</sup> People *ex rel.* Troy Gas Co. v. Hall, 203 N. Y. 312, 96 N. E. 933 (1911); Tax L. §§ 40, 43.

special franchise, wholly within a village, can be made only by the State board.<sup>2</sup> The State board should fix the value of each special franchise instead of placing it on a whole town in bulk so that the local assessors may know the amount to be apportioned each village for taxation purposes, as they are without power themselves to make the apportionment.<sup>3</sup>

**§ 638. Id.: Notice of Hearing of Complaints.**—On determining the full and actual valuation of a special franchise and the rate of equalization thereof, the Tax Commission must immediately give notice in writing to the corporation affected and to each city, town or village in which such special franchise is subject to assessment, stating in substance that such determinations have been made, and the total full and actual valuation, and the rate of equalization thereof, in each city, town and village; and that the Commission will meet at its office in the City of Albany on a day specified in such notice to hear and determine any complaint concerning such full valuation and the rate of equalization.<sup>4</sup> In a town the statement must specify the total amount of the assessment of such special franchise and the amount thereof in any village or villages therein.<sup>5</sup> Such notice must be served at least ten days before the day fixed for the hearing by mailing a copy thereof to the corporation at its principal office or place of business.<sup>6</sup>

**§ 639. Id.: Hearing.**—The Tax Commission must meet at the time and place specified in its notice and hear and determine all complaints in relation to their assessments brought before them, and for that purpose may adjourn from time to time.<sup>7</sup> The procedure as regards the assessed corporation's statement containing its complaint; the administering of oaths; the taking of testimony and proof, etc., are the same in general as the procedure before the assessors when they review real and personal property tax assessments; and reference is made to the treatment heretofore given of such procedure.<sup>8</sup>

**§ 640. Id.: Final Valuation by Tax Commission on Basis of Net Earnings or Otherwise.**—After hearing complaints as to such valuation and rate of equalization of the special franchise the Tax Commission must fix and determine the final full value of each special franchise and ascertain the final rate

<sup>2</sup> People *ex rel.* N. Y. C. & H. R. R. R. Co. v. Keno, 61 Misc. 345, 114 N. Y. Supp. 1094 (1908).

<sup>3</sup> People *ex rel.* N. Y. C. & H. R. R. R. Co. v. Keno, 61 Misc. 345, 114 N. Y. Supp. 1094 (1908).

<sup>4</sup> Tax L. § 45a (L. 1916, c. 334).

<sup>5</sup> Tax L. § 45a (L. 1916, c. 334).

<sup>6</sup> Tax L. § 45a (L. 1916, c. 334).

<sup>7</sup> Tax L. § 45a (L. 1916, c. 334) and § 37 (L. 1916, c. 323).

<sup>8</sup> See § 626, *et seq.*, *supra*; Tax L. § 45-a (L. 1916, c. 334); § 37 (L. 1916, c. 323).

of equalization and equalize the final full value of each special franchise to such an amount as in its judgment will place the special franchise on the same basis as the assessment of other real property in the city, town or village in which the special franchise is located.<sup>9</sup> In ascertaining the basis of assessment of other real property or determining the final full and actual valuation of a special franchise, the Tax Commission may in its discretion take testimony and hear proof under oath or otherwise, and may avail itself of all information on the subject appearing of record in its office, and all information which it may acquire in the discharge of its duties, and may employ its experts, agents or other persons in procuring any information it may require for such purpose.<sup>10</sup> The usual rules as to value should apply in the valuation of the tangible property included in a special franchise, and it should accordingly be valued at the cost of reproduction less depreciation.<sup>11</sup> In valuing tangible property of a company to determine the special franchise tax, its land should be taken at its then present value and not at its original cost value.<sup>12</sup> In determining the taxable value of a street railway's franchise it is proper to include as part of the value of its structure in the streets a certain sum for the value of the paving within the railroad area, if a statute imposes a duty on the corporation to keep such area in repair.<sup>13</sup> A tunnel under public waters constructed pursuant to a grant to a corporation to build it is properly taken into consideration in assessing the special franchise tax due from the corporation.<sup>14</sup> "Any comparison of track or passenger mileage necessarily spreads the earnings over the mileage, without taking into account the value of a franchise at a particular place to increase the earnings of the system of road with which it is connected. A particular franchise is frequently of important value in connection with a railroad system as a means of obtaining and retaining business. Where a special franchise relates simply to a point or portion of a railroad system its value to the system must be

<sup>9</sup> Tax L. § 45b (L. 1916, c. 334).

<sup>10</sup> Tax L. § 45b (L. 1916, c. 334).

<sup>11</sup> *People ex rel. New York Central & Hudson River R. R. Co. v. Woodbury*, 167 A. D. 428, 153 N. Y. Supp. 537 (1915); *aff'd* without opinion, 218 N. Y. 635, 112 N. E. 1070.

<sup>12</sup> *People ex rel. Jamaica W. S. Co. v. Tax Commissioners*, 196 N. Y. 39, 89 N. E. 581 (1909).

<sup>13</sup> *People ex rel. Metropolitan Street Railway Co. v. State Tax Commissioners*, 159 A. D. 136, 144 N. Y. Supp. 74 (1913); *aff'd* 212 N. Y. 606, 607, 106 N. E. 1040; R. L. § 178.

<sup>14</sup> *People ex rel. Bryan v. State Board of Tax Commissioners*, 142 A. D. 796, 127 N. Y. Supp. 858 (1911); Tax L. § 2, subd. 3.

considered in connection with all the surroundings and facts which aid in the determination of such value.”<sup>15</sup> All of the special privileges enjoyed by a corporation within a tax district, i. e., a town, and constituting parts of a single system, must be regarded as a “special franchise” upon which a valuation must be fixed by the State Board of Tax Commissioners; and where parts of such special franchise are in two or more villages, all within the same town, the assessors of such villages must ascertain and determine what is a fair and just portion of such total valuation, to be placed upon the village tax roll.<sup>16</sup> In determining the value, for franchise taxation, of the right of a railroad to cross a highway, there may be taken into consideration the population of the municipality where the crossing is located, the character of the crossing itself (whether at grade, overhead or underground), the relative importance of the street with reference to its use by the public at the place of crossing, the amount of traffic over it by the railroad and the resulting interference with its use by the public, the character of the trackage (whether by through train service or for switching purposes), the land values of the locality in which the crossing is, the general financial condition of the railroad bearing on its being a paying road, and general information of the members of the assessing board as to prices paid to municipalities for the privilege of generally similar occupancies.<sup>17</sup> “. . . a public service corporation, with reference to its property which will become worthless by use and must be replaced, is entitled to set aside each year from its earnings a reasonable sum to provide for its replacement. This is outside of the ordinary annual expenses for maintenance, renewals and repairs.”<sup>18</sup>

“The manner of computing the value of a special franchise is dependent upon the facts and circumstances in each case. Where the net earnings of a special franchise can be computed with reasonable certainty . . . an assessment

<sup>15</sup> *People ex rel. New York Central & Hudson River R. R. Co. v. Priest*, 206 N. Y. 274, 99 N. E. 547 (1912).

<sup>16</sup> *People ex rel. New York Central & Hudson River R. R. Co. v. Gourley*, 64 Misc. 605, 118 N. Y. Supp. (1909); Tax L. §§ 43, 45. The claim was made that each highway crossing or other special privilege should have a separate valuation fixed upon it by the Tax Board.

<sup>17</sup> *People ex rel. New York & Rockaway Beach Ry. Co. v. Tax Commissioners*, 157 A. D. 496, 140 N. Y. Supp. 691 (1913); *aff'd* 209 N. Y. 599, 103 N. E. 1130.

<sup>18</sup> *People ex rel. Third Ave. R. R. Co. v. Tax Commissioners*, 136 A. D. 155, 120 N. Y. Supp. 528 (1909); *aff'd* 198 N. Y. 608, 92 N. E. 1098.

thereof based upon a computation therefrom is approved by the courts. No hard and fast rule by which the board of tax commissioners must be controlled in valuing a special franchise for the purpose of taxation has been adopted by the legislature or laid down by the courts,"<sup>19</sup> " . . . it is beyond the province of the courts to lay down an exclusive rule of franchise valuation applicable to all cases. . . . When a particular assessment comes up for review . . . the duty of the appellate courts is discharged when they inquire whether the rule whereby the value of this special franchise was ascertained was reasonably adapted to that end, and if so, whether it was consistently and correctly applied to the facts."<sup>20</sup> Although a certain rule for valuing franchises for taxation is binding on a trial court when the case is before it yet if evidence sufficient and pertinent to entitle the relator to the rule declared by the courts by the time he appeals was introduced, he is entitled to have the later rule applied.<sup>1</sup> In determining the taxable value of special franchises the net earnings rule should be adopted in preference to expert opinion, when possible.<sup>2</sup> The net earnings rule is not necessarily conclusive in determining the value of a special franchise.<sup>3</sup> "The application of the net earnings rule is a method to that end [of ascertaining the full and actual value of special franchises for taxation purposes] . . . It rests upon the fact that the net income from the use of the franchise to the owner and operator of it is a test and arbiter of its actual value . . . Manifestly, the term 'net earnings', as used in the rule, means what is left of the gross earnings produced by the property after the legitimate costs, expenses and deductions connected with and arising from its use are paid."<sup>4</sup> "The net earnings rule . . . is based upon the practical and commonly recognized principle that the earning capacity or power of an industrial property indicates its value. The

<sup>19</sup> *People ex rel. New York Central & Hudson River R. R. Co. v. Priest*, 206 N. Y. 274, 99 N. E. 547 (1912).

<sup>20</sup> *People ex rel. Jamaica W. S. Co. v. Tax Commissioners*, 196 N. Y. 39, 89 N. E. 581 (1909).

<sup>1</sup> *People ex rel. Metropolitan Street Railway Co. v. State Tax Commissioners*, 159 A. D. 136, 144 N. Y. Supp. 74 (1913); *aff'd* 212 N. Y. 606, 607, 106 N. E. 1040.

<sup>2</sup> *People ex rel. Metropolitan*

*Street Railway Co. v. State Tax Commissioners*, 159 A. D. 136, 144 N. Y. Supp. 74 (1913); *aff'd* 212 N. Y. 606, 607, 106 N. E. 1040.

<sup>3</sup> *People ex rel. Queens County Water Co. v. Woodbury*, 67 Misc. 490, 123 N. Y. Supp. 599 (1910); *aff'd* 143 A. D. 618, 128 N. Y. Supp. 522.

<sup>4</sup> *People ex rel. Third Ave. R. R. Co. v. Tax Commissioners*, 212 N. Y. 472, 106 N. E. 325 (1914).

sum of the earnings or income indicates, however, the value of the property only which produces it. In the application of the net earnings rule, the value of the tangible property used in producing those earnings upon which a fair and reasonable return is allowed should be the full and actual value of all the property essential to the operation of the enterprise or plant. But what that property is and its value are questions of fact.”<sup>5</sup> “ While no statute prescribes it, yet in ordinary cases the net earnings rule is the proper method by which to compute the value of a special franchise in order to determine the tax assessable upon it by the State Board of Tax Commissioners. This rule consists in ascertaining the sum of the gross earnings or income, and deducting from it the sum of operating expenses and other expenses necessarily paid, such as taxes and rentals, leaving a figure representing the sum of the final net income from both tangible and intangible property. If from this final sum is deducted an amount equal to six per cent of the value of the tangible property as the reasonable earnings or income therefrom and from the remainder is deducted a sum designated “ depreciation allowance,” what is left is deemed to represent the net earnings attributable to the intangible parts of the special franchises and is capitalized at six per cent to produce the sum of their assessable value for the purpose of taxation. Adding the value of the company’s tangible property, there is produced the taxable value of the special franchise.”<sup>6</sup> “ The net earnings rule contemplates a valuation upon the basis of the net earnings of the corporation which are attributable to its enjoyment of the special franchise. The method is thus applied:

- (1) Ascertain the gross earnings.
- (2) Deduct the operating expenses.
- (3) Deduct a fair and reasonable return on that portion of the capital of the corporation which is invested in tangible property.

The resulting balance gives the earnings attributable to the special franchise. If this balance be capitalized at a fair rate we have the value of the special franchise.”<sup>7</sup> “ The net earnings rule is a method of determining the value of a special franchise by ascertaining its earning capacity. It is

<sup>5</sup> *People ex rel. Third Ave. R. R. Co. v. Tax Commissioners*, 212 N. Y. 472, 106 N. E. 325 (1914).

<sup>6</sup> *People ex rel. Third Ave. R. R. Co. v. Tax Commissioners*, 212 N. Y. 472, 106 N. E. 325 (1914).

<sup>7</sup> *People ex rel. Jamaica W. S. Co. v. Tax Commissioners*, 196 N. Y. 39, 89 N. E. 581 (1909).

assumed to be worth that sum which, placed at interest at a determined rate, usually six or seven per cent, will produce the amount which the franchise earns. If the gross earnings of the company, the operating expenses, other proper charges against earnings, and the value of the tangible property be given, the value of the special franchise is the result of a purely mathematical computation."<sup>8</sup> Taking the value of a company's tangible property, computing interest thereon at 6%, deducting the resulting amount from the total net earnings, makes a balance, after allowing for return on the investment in tangible property, which results from the ownership and use of the special franchise owned by the company and is the amount of net earnings attributable to enjoyment of the special franchise and taxable as part thereof.<sup>9</sup> In ascertaining the taxable value of franchises of several street railways comprising a general street railway system it is proper to adopt the net earnings rule and in applying it to treat the system as a whole and ascertain its value, including the tangible property in the streets and the intangible right to operate, and then to divide the aggregate amount among the various companies in proportion to the tangible property in the streets owned by each.<sup>10</sup> "In cases where the net earnings rule is an appropriate method for valuing a special franchise the first step is to ascertain the gross earnings of the corporation and the second step is to deduct the operating expenses. Among the operating expenses are to be included all the taxes which have accrued against and have been paid by the corporation during the period in which the net earnings are taken as the basis of the valuation. These taxes include any special franchise tax which has been assessed against the corporation for that or in that period and which the corporation has actually paid. A special franchise tax, however, which has not actually been paid is not to be deemed a part of the operating expenses and cannot properly be included in the deduction made on account of such expense."<sup>11</sup> The net earnings rule should be adopted in determining the value of a railroad company's special franchise for taxation purposes,

<sup>8</sup> *People ex rel. Queens County Water Co. v. Woodbury*, 67 Misc. 490, 123 N. Y. Supp. 599 (1910); *aff'd* 143 A. D. 618, 128 N. Y. Supp. 522.

<sup>9</sup> *People ex rel. Jamaica W. S. Co. v. Tax Commissioners*, 196 N. Y. 39, 89 N. E. 581 (1909).

<sup>10</sup> *People ex rel. Metropolitan*

*Street Railway Co. v. State Tax Commissioners*, 159 A. D. 136, 144 N. Y. Supp. 74 (1913); *aff'd* 212 N. Y. 606, 607, 106 N. E. 1040.

<sup>11</sup> *People ex rel. Jamaica Water Supply Co. v. State Board of Tax Commissioners*, 197 N. Y. 33, 90 N. E. 112 (1909).

*i. e.*, the gross earnings should be ascertained, the operating expenses should be deducted, with the annual taxes paid, and from the remainder should be taken a fair and reasonable return on that portion of the capital invested in tangible property, the result becoming the net earnings attributable to the special franchise, which, when capitalized at one per cent higher than the rate (6%) of income allowed, becomes the value of the intangible property of the special franchise.<sup>12</sup>

“The rate of return upon the value of a corporation’s tangible property must be allowed in determining its special franchise tax; and the rate upon the value of the property used constituting a fair return is inherently a question of fact to be decided upon the circumstances, conditions, facts and opinions disclosed by the evidence. The nature of the business, whether it be established or experimental, the risks natural or proven attending it, are some of the many varying circumstances which may enter into the determination of a rate of return which must as a rule be left to the good judgment of the tribunals which review the facts as proven.”<sup>13</sup> In getting at the value of a special franchise of a public service corporation by using the net earnings rule it is proper to give the corporation a return of six per cent on its property in the absence of satisfactory evidence to the contrary, as the question is what return should be allowed on the investment represented by the company’s property, tangible and intangible.<sup>14</sup> “In ascertaining a franchise tax, necessitating the preliminary determination of the value of the company’s tangible property (upon which a return of 6% should be allowed) the value of its interest in subservice or subway conduits through which its power and light cables pass should be included, even though owned by another corporation, if the corporation in question had invested therein and such investment was essential to the operation of its road. In its tangible property

<sup>12</sup> *People ex rel. Manhattan Ry. Co. v. Woodbury*, 203 N. Y. 231, 96 N. E. 420 (1911).

<sup>13</sup> *People ex rel. Third Ave. R. R. Co. v. Tax Commissioners*, 212 N. Y. 472, 106 N. E. 325 (1914).

<sup>14</sup> *People ex rel. Third Ave. R. R. Co. v. Tax Commissioners*, 136 A. D. 155, 120 N. Y. Supp. 528 (1909); *aff’d* 198 N. Y. 608, 92 N. E. 1098. “We are, therefore, to allow a fair return upon the value of the entire property, considering the risks and

all the circumstances surrounding the business, we are then to deduct from the net earnings an amount which the tangible property earns, based upon a per cent which is deemed a fair return upon an investment in such a street railway enterprise, and then are to capitalize the remaining net earnings at the same rate in order to determine the actual value of the remainder of the property, that is, the intangible part of the special franchise.”

should also be included cash on hand and the cost of easements.”<sup>15</sup> In determining the special franchise tax of a corporation it is proper to allow for annual depreciation, which should be computed by dividing the values of the various kinds of tangible property by the number of years of their respective estimated lives, or periods of time through which the various kinds of tangible property will respectively, with ordinary and adequate annual renewals and repairs, continue efficient in and commercially adaptable to their respective processes and functions.<sup>16</sup> “So long as depreciation of property is a proper factor to take into account in determining the net earnings, . . . the rate should . . . be applied as well to functional as to physical depreciation.”<sup>17</sup> The provision for the ultimate replacement of property deteriorating so that ordinary repairs do not make it good should be allowed out of the gross earnings to ascertain the true earning capacity in determining the franchise tax.<sup>18</sup> In applying the net earnings rule to the determination of the value of a special franchise it is proper to consider the reconstruction cost of practically indestructible property as its value.<sup>19</sup> When the net earnings rule is adopted to determine the taxable value of a corporate special franchise, taxes should be deducted from the gross earnings in order to determine the net earnings of the taxpayer.<sup>20</sup> In determining the value of a special franchise pursuant to the net earnings rule it is not improper to deduct the franchise tax from earnings in getting at the net earnings.<sup>1</sup> Payments by a company operating a railroad for claims against it for injuries and damages not made on account of its employing defective machinery or incompetent servants or of other wrongful or negligent acts, are properly deducting from earnings in the determination of the value of the corporation’s special franchise by applying the net earn-

<sup>15</sup> *People ex rel. Manhattan Ry. Co. v. Woodbury*, 203 N. Y. 231, 96 N. E. 420 (1911).

<sup>16</sup> *People ex rel. Third Ave. R. R. Co. v. Tax Commissioners*, 212 N. Y. 472, 106 N. E. 325 (1914).

<sup>17</sup> *People ex rel. Queens County Water Co. v. Woodbury*, 67 Misc. 490, 123 N. Y. Supp. 599 (1910); *aff’d* 143 A. D. 618, 128 N. Y. Supp. 522.

<sup>18</sup> *People ex rel. Jamaica W. S. Co. v. Tax Commissioners*, 196 N. Y. 39, 89 N. E. 581 (1909).

<sup>19</sup> *People ex rel. Third Ave. R. R. Co. v. Tax Commissioners*, 136 A. D. 155, 120 N. Y. Supp. 528 (1909); *aff’d* 198 N. Y. 608, 92 N. E. 1098.

<sup>20</sup> *People ex rel. Jamaica W. S. Co. v. Tax Commissioners*, 196 N. Y. 39, 89 N. E. 581 (1909).

<sup>1</sup> *People ex rel. Third Ave. R. R. Co. v. Tax Commissioners*, 136 A. D. 155, 120 N. Y. Supp. 528 (1909); *aff’d* 198 N. Y. 608, 92 N. E. 1098.

ings rule.<sup>2</sup> Payments by a corporation for percentages of gross earnings and for car license fees should be included in operating expenses in determining the corporation's special franchise tax because the percentages and license fees are costs or charges connected with the use of the property.<sup>3</sup> Rental received by a corporation from certain of its cars rented to subsidiaries should be excluded from the income or earnings of the corporation under the net earnings rule, in determining the value of its special franchise for taxation.<sup>4</sup>

**§ 641. Id.: Filing; Entry, Notice of; Basis of all Taxation on Franchise; Information as To.**—The statute requires the Tax Commission to file with the proper clerk or department of each political subdivision a statement of its valuation of the special franchises assessed therein; and the clerk or department to deliver a copy to the taxing authorities; and the latter to enter such valuations in their assessment-rolls.<sup>5</sup> The time for filing a certificate (by assessors, of a corporation's franchise tax) provided by statute is directory and may be filed *nunc pro tunc*.<sup>6</sup> The statute further requires the Tax Commission to give the corporation notice of its valuation of its franchise.<sup>7</sup> The final equalized valuation of every special franchise as fixed and determined by the Tax Commission is the assessed valuation on which all taxes, based on such special franchise for state, county, city, town, village, school, highway or other district purposes are levied for the ensuing year.<sup>8</sup> The taxing authorities in any city, town, village or district must on demand furnish to the Tax Commission any information required by it to value special franchises.<sup>9</sup>

**§ 642. Id.: How Far Taxation On Special Franchise Relieves From Other Taxes.**—If the corporation assessed in any locality for a special franchise has paid such locality a tax on a percentage of gross earnings or other income, or a license fee, or on account of such special franchise, such payment is to be deducted from the special franchise assessment.<sup>10</sup> The imposition of the special franchise tax on a corporation does not relieve it from payment of any organization, franchise or

<sup>2</sup> People *ex rel.* Third Ave. R. R. Co. v. Tax Commissioners, 136 A. D. 155, 120 N. Y. Supp. 528 (1909); *aff'd* 198 N. Y. 608, 92 N. E. 1098.

<sup>3</sup> People *ex rel.* Third Ave. R. R. Co. v. Tax Commissioners, 212 N. Y. 472, 106 N. E. 325 (1914).

<sup>4</sup> People *ex rel.* Third Ave. R. R. Co. v. Tax Commissioners, 212 N. Y. 472, 106 N. E. 325 (1914).

<sup>5</sup> Tax L. § 45c (L. 1916, c. 334).

<sup>6</sup> People *ex rel.* Troy Gas Co. v. Hall, 143 A. D. 756, 128 N. Y. Supp. 361; *aff'd* 203 N. Y. 312, 96 N. E. 933 (1911); Tax L. §§ 40, 43.

<sup>7</sup> Tax L. § 45d (L. 1916, c. 334).

<sup>8</sup> Tax L. § 45e (L. 1916, c. 334).

<sup>9</sup> Tax L. § 45f (L. 1916, c. 334).

<sup>10</sup> Tax L. § 48 (L. 1916, c. 581).

other tax; but tangible property situated in, upon, under or above any street, highway, public place or public waters, subject to tax as special franchise as described in the statute cannot be taxed except upon an assessment as a special franchise made by the Tax Commission.<sup>11</sup> By the forty-eighth section of the Tax Law "it was intended that corporations which were by some other statute required to pay taxes in the nature of a special franchise tax for the same period of time provided by the special franchise act should be given credit therefor upon the tax so imposed by that act and thus prevent a duplication of special franchise taxes. . . . Franchise taxes relating to or affecting entirely different periods of time do not overlap and cannot constitute a duplication."<sup>12</sup> A corporation organized for private gain cannot because it contracts for a compensation to furnish water to a village escape taxation as employing its property as a means of village government.<sup>13</sup> In ascertaining the tax value of franchises, payments made thereunder to a municipality of percentages of gross earnings, rents for use of streets and fees for car licenses should be viewed as in the nature of taxes and allowed as deductions.<sup>14</sup> Payments made by a street railroad corporation to a municipality under an ordinance for the right to build and operate tracks on its streets should be credited against a tax levied upon the corporation's special franchise; and the fact that in the ordinance are listed crossings not used by the corporation and therefore not subjected to the franchise tax does not deprive the company of the right to have deducted from its franchise tax on the other crossings the amount paid under the ordinance for the whole crossings therein listed.<sup>15</sup> A railway corporation is not entitled to compel a municipal corporation to credit against its special franchise taxes bridge tolls paid by it to the municipality under a contract for the operation of its cars over a municipal bridge; "nor does the fact that the city has credited what it has received from other corporations for the right to operate cars over the bridge against their special franchise taxes estop the

<sup>11</sup> Tax L. § 49 (L. 1916, c. 334).

<sup>12</sup> *New York Railways Co. v. City of New York*, 218 N. Y. 483, 113 N. E. 501 (1916); Tax L. § 48 (L. 1909, c. 60).

<sup>13</sup> *People ex rel. Mills Water-Works Co. v. Forrest*, 97 N. Y. 97 (1884); L. 1873, c. 737; L. 1876, c. 415; L. 1877, c. 171.

<sup>14</sup> *People ex rel. Metropolitan*

*Street Railway Co. v. State Tax Commissioners*, 159 A. D. 136, 144 N. Y. Supp. 74 (1913); *aff'd* 212 N. Y. 606, 607, 106 N. E. 1040.

<sup>15</sup> *People ex rel. New York, Westchester & Boston Ry. Co. v. Hyde*, 143 A. D. 321, 128 N. Y. Supp. 115 (1911); *aff'd* 204 N. Y. 666, 97 N. E. 1114; Tax L. § 48.

city from denying the right of . . . [a particular corporation] to have what it paid credited towards its special franchise taxes.”<sup>16</sup> In determining the tax on a franchise to a corporation to cross highways, assessments on crossings the *locus in quo* of which was occupied by the railroad prior to occupation thereof by the highways, are illegal.<sup>17</sup> A statute providing that when a corporation assessed by a municipality for a franchise tax has paid the latter any sum based on a percentage of gross earnings, any other income, any license fee or any sum of money, such sum shall be deducted from the tax assessed, has in view “a deduction in four cases: (1) Where the corporation has paid any sum based on a percentage of gross earnings; (2) or any other income; (3) or any license fee; (4) or any sum of money on account of such special franchise, which payment was in the nature of a tax,” and “applies only to payments made in cash;” so that a railroad company compelled to furnish a city space in its subways free cannot deduct the rental value of the space from its franchise assessment.<sup>18</sup> Under the statute requiring that all amounts paid by a corporation to a municipality (under any agreement or statute) based on a percentage of gross earnings, other income, license fee or on account of any special franchise, shall be deducted from the corporation’s franchise tax assessment, not only sums paid as taxes may be deducted but a payment of toll by a railway to a city for crossing a bridge may be deducted.<sup>19</sup>

**§ 643. Id.: Review By Certiorari.**—Review by certiorari of special franchise taxation is considered in the sections of this work beginning with the next one.

**§ 644. Id.: Review By Certiorari; Procedure in General both in Real and Personal Property (Including Capital Stock) and Special Franchise Certiorari, and In Income Tax and Franchise Tax Certiorari.**—The right to review taxation is limited by the statutes.<sup>20</sup> The Tax Law specifically prescribes the

<sup>16</sup> Matter of New York Railways Co., 172 A. D. 128, 158 N. Y. Supp. 237 (1916); Tax L. § 48.

<sup>17</sup> People *ex rel.* New York & Rockaway Beach Ry. Co. v. Tax Commissioners, 157 A. D. 496, 140 N. Y. Supp. 691 (1913); *aff’d* 209 N. Y. 599.

<sup>18</sup> Matter of Consolidated Telegraph & Electrical Subway Co., 119 A. D. 835, 104 N. Y. Supp. 922 (1907); *aff’d* 189 N. Y. 549, 82

N. E. 1125; Tax L. § 46 (L. 1899, c. 712).

<sup>19</sup> People *ex rel.* Nassau Electric Railroad Co. v. Grout, 119 A. D. 130, 103 N. Y. Supp. 975 (1907); *aff’d* 189 N. Y. 510, 81 N. E. 1173; Tax L. § 46.

<sup>20</sup> Matter of Lehigh Valley R. R. Co. v. Sohmer, 174 A. D. 732, 161 N. Y. Supp. 557 (1916); *aff’d* 220 N. Y. 689, 115 N. E. 1057; Tax L. §§ 182, 200.

procedure which any person aggrieved by assessment of property *on any assessment-roll* must follow to have the assessment reviewed; and the Charter of New York City supplements this regulation of the Tax Law; so that these statutes govern certiorari proceedings to review assessments of taxation against a corporation's real and personal property (including capital stock) and special franchise.<sup>1</sup> But the Tax Law does not specifically provide the procedure for reviewing by certiorari corporate state-income and franchise taxes, referring to the Code of Civil Procedure for that procedure.<sup>2</sup> "The common-law writ [of certiorari] brings up the record for inquiry into jurisdiction and regularity, and in criminal or quasi-criminal cases, the evidence also, 'to see whether, as a matter of law, there was any proof which could warrant a conviction of the relator' (*citations*). The general statutory writ brings up both record and proceedings for examination, not only as to jurisdiction and method of procedure, but also to see whether there was a violation of any rule of law, or any competent proof of all the essential facts, or a preponderance of proof against the existence of any of those facts (*citations*). The special statutory writ now before us [L. 1880, C. 269] differs from its predecessors in one remarkable respect, in

<sup>1</sup> Tax L. § 290; N. Y. Charter, § 906; Tax L. § 46 says "an assessment of a special franchise by the state board of tax commissioners may be reviewed in the manner prescribed by article thirteen of this chapter," which is the article beginning with section 290.

<sup>2</sup> As to State income tax certiorari, see Tax L. § 219 (L. 1917, c. 726), §§ 199, 200 (L. 1909, c. 61). As to State franchise tax certiorari, see Tax L. §§ 199, 200 (L. 1909, c. 61). The provisions of the Code of Civil Procedure regulating certiorari are found in § 2120 *et seq.* "The Code does not provide a new remedy of certiorari, but regulates the writ and the practice therein in cases where it is expressly authorized by statute, or where the right to it existed at common law and has not been taken away by statute. The provisions of the Code apply to every statutory or common-law writ except in cases where the statute has made provisions superseding them.

The Tax Law, sections 290-296, both inclusive, as amended, permits a review of assessments by certiorari, and gives certain rules governing such procedure. And so far as it regulates the practice and the use of the writ in tax cases, the provisions are exclusive and override the Code provisions (*citations*). Where the statute is silent, the provisions of the Code are effective. . . . The provision of the Tax Law as to how the writ is to be directed, relates only to the issuing of the writ and the making of the return, but is silent upon the question as to whether the court in its discretion may allow an interested party to intervene and take a part in the proceedings. It follows that the court, in its discretion, has the power in a tax case, as in other cases of certiorari, to bring in a new party." *People ex rel. New York Central R. R. Co. v. Block*, 178 A. D. 251 (1917); Tax L. § 290 *et seq.*; C. C. P. § 2137.

that it permits a redetermination of all questions of fact upon evidence, taken in part at least, by the Special Term, or under its direction."<sup>3</sup> The special statutory writ of certiorari "embraces all that is contained in the common law and Code writs of certiorari . . . and in addition thereto authorizes a rehearing of the question at issue and the introduction of additional proofs bearing thereon;" it is still a writ of review.<sup>4</sup> *Certiorari* is the proper remedy if assessors err in judgment; but if they are without jurisdiction *certiorari* (if it be a mode of redress) is not the only remedy, and an action may be maintained to recover the amount of the assessment.<sup>5</sup> When a corporation of which assessors had jurisdiction did not avail itself of its right by certiorari to review an assessment made by them against it, it cannot later sue to recover back the taxes it paid on an erroneous basis for their imposition adopted by the assessors, as such taxes are not illegal but merely erroneous.<sup>6</sup> Certiorari lies to review a void assessment.<sup>7</sup> ". . . the act of 1880 (Chap. 269), which provided for the allowance of writs of certiorari, furnished an adequate remedy for the dissatisfied taxpayer and confined him to its adoption, in all cases where the illegality of the proceedings of the taxing officers consisted, not in a lack of jurisdiction on their part to act, but in the commission of errors which vitiated the assessment and laid it open to cancellation or reversal."<sup>8</sup> A writ returnable at Special Term under the Tax Law is a statutory one; while a writ to the court for hearing at the Appellate Division under the Code of Civil Procedure is a common-law one.<sup>9</sup> ". . . a party assessed in the city of New York may resort, as a matter of right, to either the statutory writ or to the common-law writ as regulated by sections twenty-one hundred and twenty to twenty-one hundred and forty-four."<sup>10</sup> A writ of certiorari provided for by a statute "for the review and correction of illegal,

<sup>3</sup> *People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 417, 46 N. E. 875 (1897).

<sup>4</sup> *People ex rel. Twenty-third St. R. Co. v. Feitner*, 92 A. D. 518, 87 N. Y. Supp. 304 (1904).

<sup>5</sup> *Union Steamboat Co. v. City of Buffalo*, 82 N. Y. 351 (1880).

<sup>6</sup> *United States Trust Co. v. Mayor*, 77 Hun, 182, 28 N. Y. Supp. 342 (1894); *aff'd* 144 N. Y. 488, 39 N. E. 383; L. 1857, c. 456, § 3.

<sup>7</sup> *People ex rel. American Thread*

*Co. v. Feitner*, 30 Misc. 641, 64 N. Y. Supp. 321 (1900).

<sup>8</sup> *United States Trust Co. of N. Y. v. The Mayor, etc., of New York*, 144 N. Y. 488, 39 N. E. 383 (1895); L. 1880, c. 269.

<sup>9</sup> *People ex rel. American Thread Co. v. Feitner*, 30 Misc. 641, 64 N. Y. Supp. 321 (1900).

<sup>10</sup> *People ex rel. American Thread Co. v. Feitner*, 30 Misc. 641, 64 N. Y. Supp. 321 (1900).

erroneous or unequal assessments " may be granted *ex parte*, if it do not stay the action of the assessors; need not make the supervisor a party; need not be served ten days before the return day; and permits the court itself to correct the wrong done, if any.<sup>11</sup> The statutory remedy by certiorari from a tax assessment does not avail a corporation which complains, not that the assessment against it is illegal, but that the assessment of its stockholders whom it represents is unequal, as compared with that levied against real estate owners; and equity will not aid because the grievance assigned does not relate to any question of fraud or illegal discrimination or classification.<sup>12</sup> The statutory prohibition against certiorari when the determination disputed is reviewable by appeal to a court or some other body or officer does not apply to a case in which the officers of a corporation take the stand that it is not liable to a capital stock tax because exempted as a manufacturing company, and refuse, therefore, to make a report; but rather to a case in which the report is made by the corporate officers and the comptroller is dissatisfied with the report, proceeds to make a valuation of his own, and settles an account thereon against the company from which it appeals to the proper board.<sup>13</sup>

**§ 645. Id.: Certiorari to Review Real and Personal Property (Including Capital Stock) and Special Franchise Taxes, Petition, Who May Make.**—Any person assessed upon any assessment-roll, claiming to be aggrieved by any assessment for property therein, may present a petition; and two or more persons assessed upon the same roll who are affected in the same manner by the alleged illegality, error or inequality, may unite in the same petition.<sup>14</sup> The petition in a certiorari proceeding to review a New York City tax must be that of the party aggrieved.<sup>15</sup> If a corporation assessed for real estate taxes and claiming reduction or exemption wilfully refuses to appear when summoned by the tax board to testify it can-

<sup>11</sup> *People ex rel. Ulster & Delaware R. R. Co. v. Smith*, 24 Hun, 66 (1881); *dism'd* 85 N. Y. 628; L. 1880, c. 269; C. C. P. §§ 2128, 2355, 2132, 2138.

<sup>12</sup> *Mercantile Nat. Bank v. Mayor, etc.*, of N. Y., 172 N. Y. 35, 64 N. E. 756 (1906). The complaint was that realty was assessed and taxed at not more than 60 per cent. of its actual value while the plaintiff's shares of

stock were assessed and taxed at their full value.

<sup>13</sup> *People ex rel. Brush Electric Mfg. Co. v. Wemple*, 129 N. Y. 543, 14 L.R.A. 708, 29 N. E. 808 (1892); L. 1880, c. 542, as amend'd L. 1881, c. 361.

<sup>14</sup> Tax L. § 290 (L. 1916, c. 323, § 76).

<sup>15</sup> *Greater N. Y. Charter*, § 906 (L. 1911, c. 455).

not obtain review by certiorari.<sup>16</sup> Certiorari proceedings to review real estate taxation will apparently not be entertained though instituted on refusal of the tax board to reduce its assessment on request by a corporation engaged in the business of reducing tax assessments to so reduce; because such request is not made by one entitled by statute to make it.<sup>17</sup>

**§ 646. Id.: Where and When Made.**—The petition must be presented to the Supreme Court.<sup>18</sup> The petition must be presented to a Justice of the Supreme Court or at a Special Term of the Supreme Court in the judicial district in which the assessment complained of was made.<sup>19</sup> A certiorari to review or correct on the merits any final determination of the Board of Taxes and Assessments of New York City must be allowed by the Supreme Court or any Justice thereof.<sup>20</sup> The petition must be presented within fifteen days after the completion and filing of the assessment-roll and the first posting or publication of the notice thereof as required by the Tax Law.<sup>1</sup> If no notice of completion and filing of an assessment-roll is given, though required by statute, the period of limitation prescribed by it for making application for a writ of certiorari to review the tax assessment does not bind, although if there has been long delay in applying for the writ it may be that the court could dismiss it on account of laches.<sup>2</sup> A writ of certiorari to review an assessment against a corporation in the City of New York need be applied for only within four months and not within fifteen days.<sup>3</sup> The Supreme Court will not entertain applications to correct assessments unless application has first been made to the commissioners, assuming that they have jurisdiction to assess; but if they had not, and their assessment is void, application may be made directly to

<sup>16</sup> *People ex rel. Trojan Realty Corporation v. Purdy*, 174 A. D. 702, 162 N. Y. Supp. 56 (1916); Tax L. § 37 (L. 1909, c. 62).

<sup>17</sup> *People ex rel. Floersheimer v. Purdy*, 174 A. D. 694, 162 N. Y. Supp. 70, rev'd 221 N. Y. 481, 483, 116 N. E. 390 (1916); Tax L. § 37 (L. 1909, c. 62); *Greater N. Y. Charter*, §§ 895, 898, 906 (L. 1913, c. 324); *Bus. Corp. L. § 2a* (L. 1909, c. 484); *Penal L. § 280* (L. 199, c. 317).

<sup>18</sup> Tax L. § 290 (L. 1916, c. 323, § 76).

<sup>19</sup> Tax L. § 291 (L. 1906, c. 61).

<sup>20</sup> *Greater N. Y. Charter*, § 906 (L. 1911, c. 455).

<sup>1</sup> Tax L. § 291 (L. 1906, c. 61).

<sup>2</sup> *People ex rel. American Exchange National Bank v. Purdy*, 196 N. Y. 270, 89 N. E. 838 (1909); Tax L. § 251, now § 291.

<sup>3</sup> *People ex rel. Langdon v. Feitner*, 30 Misc. 646, 64 N. Y. Supp. 269 (1900); C. C. P. § 2125; *Gen. Tax L. § 251* (L. 1896, c. 908); see now Tax L. § 290 *et seq.*; *Greater N. Y. Charter*, §§ 892–895, 907, 909.

the Supreme Court by certiorari.<sup>4</sup> The statutory remedy of certiorari to review and correct an illegal, excessive or unequal assessment is not available to a corporation which has omitted to file a report of its capital stock and has neglected, after it has been assessed, to apply within the statutory limitation of time to the tax commissioners for a correction of the assessment.<sup>5</sup>

**§ 647. Id.: Form, Contents and Grounds.**—The petition must (1) be duly verified; and set forth (2) that the assessment is illegal, specifying (a) the grounds of the alleged illegality, or (b) if erroneous by reason of overvaluation, stating the extent of such overvaluation, or (c) if unequal in that the assessment has been made at a higher proportionate valuation than the assessment of other property on the same roll by the same officers, specifying the instances in which such inequality exists, and the extent thereof; (3) that the petitioner is or will be injured thereby; and (4) that the application has been made in due time to the proper officers to correct such assessment.<sup>6</sup> In certiorari proceedings for assessment by New York City, the petition must (1) be verified, (2) specify the grounds therefor, viz., (a) that the assessment is illegal, giving the particulars of the alleged illegality, or (b) that it is erroneous by reason of overvaluation, or (c) in the case of real estate that it is erroneous by reason of inequality in that the assessment has been made at a higher proportionate valuation than the assessment of other real estate of like character in the same ward or section or other real estate on the tax rolls of the city for the same year, specifying the instances in which such inequality exists, and the extent thereof, (3) state that the petitioner is or will be injured thereby.<sup>7</sup> “Section two hundred and ninety *et seq* of the Tax Law . . . as well as section nine hundred and six of the Greater New York Charter . . . provide that any person claiming to be aggrieved by any assessment may seek relief through a writ of certiorari upon either one of three grounds: *First* for illegality, in which case the grounds of the alleged illegality must be stated; *second*, for overvaluation, in which case the extent of the overvaluation must be

<sup>4</sup> *People ex rel. New York Edison Co. v. Feitner*, 39 Misc. 474, 80 N. Y. Supp. 138 (1902); Gen. Tax L. § 250, see now Tax L. § 290 *et seq.*; N. Y. City Charter, § 895.

<sup>5</sup> *People ex rel. Mutual Union Telegraph Co. v. Commrs. of Taxes*,

99 N. Y. 254, 1 N. E. 773 (1885); L. 1859, c. 302, § 8; L. 1880, c. 269.

<sup>6</sup> Tax L. § 290 (L. 1916, c. 323, § 76).

<sup>7</sup> Greater N. Y. Charter, § 906 (L. 1911, c. 455).

stated; *third*, for inequality, in which case facts showing the inequality must be stated. The judgment to be awarded if the petitioner establishes his claim, is in case the assessment is found to be 'illegal,' that it shall be stricken from the roll, in which case the property would remain unassessed for any sum and in case it is 'erroneous' for overvaluation or inequality that a reassessment be made or the roll be corrected, in which case the property will remain assessed at the proper valuation."<sup>8</sup> A case of "an assessment of a parcel of real estate which the tax commissioners had jurisdiction to assess, but as to which they unlawfully included an element of value, to wit, an uncompleted building which while it constituted a part of the real estate, was expressly exempted from taxation," is a case not of an "illegal" assessment but of one erroneous for overvaluation, which cannot be attacked for "illegality" or on a petition alleging only "illegality."<sup>9</sup> Certiorari to review a franchise tax assessment on the claim of lack of jurisdiction to make it, as distinguished from a claim of overvaluation, lies though the relator filed no written, verified objection.<sup>10</sup> ". . . a corporation taxed upon its special franchise is entitled to assail the assessment on the ground of inequality."<sup>11</sup> The inequality of taxation which is the subject of review in certiorari proceedings "has reference to a case where the assessors have departed from the general rule, or ratio, of assessment in a particular case, to the taxpayer's injury, and where there have resulted unequal valuations of the same class of property, so that the complainant's property has been valued higher in proportion than other similar property on the same assessment roll."<sup>12</sup> The absence in a petition for a writ of certiorari to review a franchise tax assessment of statements of the extent of the overvaluation must be taken advantage of by motion to quash the writ; and if return be made thereto as though the petition sufficed and the questions involved be submitted to the court

<sup>8</sup> *People ex rel. Soeurbee, Inc. v. Purdy*, 179 A. D. 748, 167 N. Y. Supp. 91 (1917); Tax L. § 290 *et seq.* (L. 1916, c. 323); Greater N. Y. Charter, § 906 (L. 1911, c. 455); Tax L. § 293 (L. 1916, c. 323).

<sup>9</sup> *People ex rel. Soeurbee, Inc. v. Purdy*, 179 A. D. 748, 167 N. Y. Supp. 91 (1917); Tax L. § 290 *et seq.* (L. 1916, c. 323); Greater N. Y. Charter, § 906 (L. 1911, c. 455).

<sup>10</sup> *People ex rel. N. Y. C. & H. R. R. R. Co. v. Kenos*, 61 Misc. 345, 114 N. Y. Supp. 1094 (1908); Tax L. § 36, now § 37.

<sup>11</sup> *People ex rel. Jamaica W. S. Co. v. Tax Commissioners*, 196 N. Y. 39, 89 N. E. 581 (1909).

<sup>12</sup> *Mercantile Nat. Bank v. Mayor, etc.*, of N. Y., 172 N. Y. 35, 64 N. E. 756 (1902); L. 1880, c. 269.

upon the merits, the defect is waived.<sup>13</sup> The statutory statement in a petition for a writ to review an assessment, that "application has been made in due time to the proper officers to correct such assessment," should be inserted in the petition only in cases where the assessment is sought to be reviewed on some other ground than that it is "illegal," as that word is used in the statute, and a writ granted on a petition omitting such statement will not be quashed.<sup>14</sup> All that is necessary to permit an application by a corporation for a writ of certiorari to review an assessment of its real property in New York City for a given year is that there be a completed assessment book or roll; that the commissioners of taxes should have acted definitely in fixing the amount of the assessment upon its property, and should have taken final action which could not be revised or altered and which constituted an adjudication that could be reviewed.<sup>15</sup> A petition by a corporation to review an assessment on its real estate is sufficient to warrant the grant of a writ of certiorari if it allege that other assessments on the roll were made at a lower proportionate valuation than the assessment of the relator's property, and that its assessment is not only largely in excess of the real value of the property, but is not in proportion to the basis of the valuation adopted in making other assessments.<sup>16</sup> The court may, on a motion to strike from a petition for certiorari to review an assessment an allegation that other real and personal property was assessed at a less proportionate value than that of the petitioner, on the ground that it failed to specify the instances and extent of the inequality, permit an amendment to the petition and subsequent proceedings to cover the defect.<sup>17</sup> A ground, alleged for reduction by certiorari of a capital stock assessment, that the commissioners have illegally included in their valuation of the corporation's personalty the then market-value of the capital stock, to wit, one hundred and twelve per cent upon the whole of it, fairly apprises them of the objection that the method on

<sup>13</sup> *People ex rel. New York & Rockaway Beach Ry. Co. v. Tax Commissioners*, 157 A. D. 496, 140 N. Y. Supp. 691 (1913); *aff'd* 209 N. Y. 599, 103 N. E. 1130; *Tax L.* § 290.

<sup>14</sup> *People ex rel. American Thread Co. v. Feitner*, 30 Misc. 641, 64 N. Y. Supp. 321 (1900).

<sup>15</sup> *People ex rel. Bronx Gas Co. v. Barker*, 22 A. D. 161, 47 N. Y.

Supp. 1020 (1897), 155 N. Y. 308, 49 N. E. 775.

<sup>16</sup> *People ex rel. Bronx Gas Co. v. Feitner*, 43 A. D. 198, 59 N. Y. Supp. 327 (1899); *Greater N. Y. City Charter*, § 906 (L. 1897, c. 378).

<sup>17</sup> *People ex rel. Brooklyn Elevated R. R. Co. v. Assessors*, 10 A. D. 393, 41 N. Y. Supp. 769 (1896); L. 1896, c. 908, §§ 250, 251; C. C. P. § 723.

which the assessment proceeded was illegal, and is not simply an objection of overvaluation to the extent of twelve per cent.<sup>18</sup>

**§ 648. Id.: The Writ of Certiorari, When Allowed, and Effect.**—Upon the presentation of the petition the justice or court may allow a writ of certiorari.<sup>19</sup> The allowance of the writ does not stay the proceedings of the assessors or other persons to whom it is directed or to whom the assessment is delivered, to be acted upon according to law.<sup>20</sup> The writ of certiorari to review an assessment of a special franchise cannot be used by the court or judge issuing it to bring before the court a municipal corporation as a party defendant.<sup>1</sup>

**§ 649. Id.: Against Whom Issued.**—The writ of certiorari is allowed against or to the officers making the assessment, to review such assessment.<sup>2</sup> A certiorari to review or correct on the merits any final determination of the Board of Taxes and Assessments in New York City must be directed to the Commissioner of Taxes and Assessments.<sup>3</sup>

**§ 650. Id.: Form and Contents.**—The writ of certiorari must (a) be to the officers making the assessment, (b) be to review the assessment, (c) prescribe the time within which a return thereto must be made.<sup>4</sup>

**§ 651. Id.: Service of.**—In the six hundred and sixty-ninth section of this work will be found a discussion of service of a writ of certiorari.

**§ 652. Id.: The Return to the Writ, When and Where Returnable.**—The time within which the return to the writ of certiorari must be made is that prescribed in the writ, but it must not be less than ten days and may be extended by the court or a justice thereof. The return of the writ must be made to a Special Term of the Supreme Court of the judicial district in which the assessment complained of was made.<sup>5</sup> In all proceedings, brought under the two hundred and fifty-first [now two hundred and ninety-first] section of the Tax Law, in which it is sought to review the final determination of the board of taxes and assessments, as a board, the writ of certiorari must be returnable in the first judicial district.<sup>6</sup>

<sup>18</sup> *People ex rel. Equitable Gas-Light Co. v. Barker*, 66 Hun, 21, 20 N. Y. Supp. 797 (1892); *aff'd* 137 N. Y. 544, 33 N. E. 336.

<sup>19</sup> Tax L. § 291 (L. 1906, c. 61).

<sup>20</sup> Tax L. § 291 (L. 1909, c. 61).

<sup>1</sup> *People ex rel. Rochester Telephone Co. v. Priest*, 95 A. D. 44, 88 N. Y. Supp. 11 (1904); Tax L.

§ 251, art. 11, see now § 291; Tax L. § 45 (L. 1900, c. 254).

<sup>2</sup> Tax L. § 291 (L. 1906, c. 61).

<sup>3</sup> Greater N. Y. Charter, § 906 (L. 1911, c. 455).

<sup>4</sup> Tax L. § 291 (L. 1906, c. 61).

<sup>5</sup> Tax L. § 291 (L. 1906, c. 61).

<sup>6</sup> *People ex rel. Long Island R. R. Co. v. Feitner*, 53 A. D. 181, 65

§ 653. **Id.: Form and Contents of Return.**—The officers making a return to the writ need not return the original assessment-roll or other original papers acted upon by them, but it is sufficient to return certified or sworn copies of such roll or papers, or of such portions thereof as may be called for by such writ; and the return must concisely set forth such other facts as may be pertinent and material to show the value of the property assessed on the roll and the grounds for the valuation made by the assessing officers.<sup>7</sup> The return must be verified.<sup>8</sup> The officers making a return under the certiorari provided in the Tax Law, as distinguished from the certiorari at common-law or under the Code of Civil Procedure, cannot file an “answer” admitting the making of the assessment-roll and alleging the property was assessed at its true market value, but must make “certified or sworn copies of such roll or papers, or of such portions thereof as may be called for by such writ,” without reference to fees or compensation.<sup>9</sup> The statutory provision that a return by commissioners assessing a corporate franchise tax must set forth the grounds for the valuation made by the assessing officers requires “that the assessing officers should tell the court *how they got* at the valuation; in other words, that they should disclose the *modus operandi* leading to the result which they reached.”<sup>10</sup> The statutory mandate that the return of the officials taxing a corporate special franchise “must concisely set forth such other facts as may be pertinent and material to show the value of the property assessed on the rolls and the grounds for the valuation made by the assessing officers” requires that the return tell the court how such officers got at the valuation, *i. e.*, not merely a statement from which the grounds may be guessed at; and an order for a further return to a writ of certiorari to review such an assessment will be granted if such grounds are not set forth.<sup>11</sup> A return by the State Board of Tax Commissioners on a special franchise should contain not merely the conclusion of the Board as to the franchise’s value but the evidence on

N. Y. Supp. 935 (1900); Tax L. § 251 (L. 1896, c. 908, now § 291); Greater N. Y. Charter, §§ 906, 908.

<sup>7</sup> Tax L. § 292 (L. 1906, c. 61).

<sup>8</sup> Tax L. § 292 (L. 1906, c. 61).

<sup>9</sup> *People ex rel. Long Island R. R. Co. v. Wolf*, 152 A. D. 173, 136 N. Y. Supp. 465 (1912); Tax L. §§ 290–292.

<sup>10</sup> *People ex rel. Jamaica W. S. Co. v. Tax Commissioners*, 196 N. Y. 39, 89 N. E. 581 (1909).

<sup>11</sup> *People ex rel. Buffalo Gas Co. v. Tax Commissioners*, 199 N. Y. 162, 92 N. E. 215 (1910); Tax L. § 292. See also *People ex rel. The Lehigh Valley R. Co. v. Woodbury*, 199 N. Y. 167, 92 N. E. 217 (1910).

which the conclusion is based and the grounds for the valuation made.<sup>12</sup> A requirement in a writ of certiorari to assessors of the special franchise of a corporation that they return "the manner of making the same [the assessment], the method pursued by you in making and fixing a valuation . . . , with the basis adopted by you for such valuation thereof," will be stricken out as surplusage, because the statute requires of them to return the facts "pertinent and material to show the value of the property" and "the grounds for the valuation" and no writ can require of them to do either more or less.<sup>13</sup> If a return by commissioners of taxes and assessments in New York City to a writ of certiorari sued out by a corporation to review their assessment of its capital and surplus traverses an averment in its petition that it was denied opportunity to inspect the tax books and instead alleges that full notice, after the assessment, was given that the books were open for inspection, the return is conclusive; and if, in fact, the averments of the return are untrue in this respect, the relator's remedy is by action for a false return.<sup>14</sup>

**§ 654. Id.: Filing of.**—The return must be filed in the office where the writ is returnable, according to the command thereof.<sup>14a</sup>

**§ 655. Id.: Hearing, Reference, Striking Out or Correcting Assessment, or Re-assessment, In General.**—Upon the return to the writ the court may (1) order the assessment stricken from the roll, if it appears that it is illegal; or (2) order (a) a reassessment of the property of the petitioner, or (b) the correction of the assessment upon the roll in whole or in part in such manner as shall be in accordance with law or as shall make it conform to the valuations and assessments of other property upon the same roll and secure equality of assessment, if it appears that the assessment is erroneous or unequal; or (3) take evidence, if, upon the hearing it appears

<sup>12</sup> People *ex rel.* New York, Ontario and Western Ry. Co. v. Tax Commissioners, 132 A. D. 604, 117 N. Y. Supp. 81 (1909); Tax L. § 45 (L. 1900, c. 254), now § 46.

<sup>13</sup> People *ex rel.* Buffalo Gas Co. v. Commissioners, 55 A. D. 186, 67 N. Y. Supp. 51 (1900); Tax L. § 252 (L. 1896, c. 908), now § 292.

<sup>14</sup> People *ex rel.* Rochester Lamp Co. v. Feitner, 65 A. D. 224, 72 N. Y. Supp. 641; Greater N. Y. City Charter, § 898 (1901). "The petition

does not aver that the relator ever appeared before the board of tax commissioners and offered to be sworn, or to present testimony showing that the statement as filed by them was erroneous in any respect or that the tax which was levied was excessive. . . . the person or corporation must present himself, its agents or officers . . ." A letter applying for revision is insufficient.

<sup>14a</sup> C. C. P. § 2134.

to the court that testimony is necessary for the proper disposition of the matter, or (4) appoint a referee to take such evidence as it may direct and report it to the court with his findings of fact and conclusions of law, if upon the hearing it appears to the court that testimony is necessary for the proper disposition of the matter.<sup>15</sup> If a reference is ordered, the evidence taken by the referee together with his report and findings of fact and conclusions of law constitute a part of the proceedings upon which the determination of the court must be made.<sup>16</sup> Upon a hearing on the return of a writ, the parties to the proceeding may mutually agree upon the number of pieces of property to be valued and the number of witnesses to be sworn on the subject of the value of such properties; but in case the parties fail to so agree, then upon application of either party the court must determine the number of witnesses to be sworn and the number of pieces of property to be valued, and must limit the same to such number as the court deems reasonable.<sup>17</sup> " Ordinarily, the writ of certiorari whereby the court reviews the judicial or quasi-judicial determination of a board or body of officers brings up for consideration only the evidence on which such board or body of officers acted and the court is called upon to decide whether any error of law or fact was committed in dealing with such evidence. When the action of assessing officers, however, is questioned by a writ of certiorari under the Tax Law, the court is authorized by the statute to take further and additional proof as to the true value of the assessed property, and upon such proof, in addition to the evidence before the assessing officers, it must endeavor to reach a correct conclusion as to what is a proper valuation. A certiorari proceeding under the Tax Law, therefore, is very much like a revaluation of the property which is the subject of assessment."<sup>18</sup> The remedy given by the nine hundred and sixth section of the Charter of Greater New York to review a determination of the Tax Board by certiorari is to bring about a new hearing by the court in which it may review the whole subject and is not bound by the strict rules of the common law, in the admission of evidence or otherwise.<sup>19</sup> " . . . a hearing on the return, to

<sup>15</sup> Tax L. § 293 (L. 1916, c. 323, § 77).

<sup>16</sup> Tax L. § 293 (L. 1916, c. 323, § 77).

<sup>17</sup> Tax L. § 293 (L. 1916, c. 323, § 77).

<sup>18</sup> People *ex rel.* Jamaica W. S.

Co. v. Tax Commissioners, 196 N. Y. 39, 89 N. E. 581 (1909).

<sup>19</sup> People *ex rel.* Brooklyn Development Co. v. Purdy, 96 Misc. 10, 159 N. Y. Supp. 778 (1916); *aff'd*, without opinion, 177 A. D. 936, 164 N. Y. Supp. 1107 (App. Div. 2d

the certiorari [to correct a tax assessment] is in substance a new trial; . . . new evidence may be taken which, by the command of the statute, the court is bound to consider in making its determination.”<sup>20</sup> A corporation cannot have evidence taken in certiorari proceedings to cancel or reduce an assessment of its capital stock unless its application for reduction tenders a question of fact and contains a statement of facts which if true would require a cancellation or reduction.<sup>1</sup> An assessment of a corporation for taxation will be stricken from the rolls on certiorari only if illegal: if simply erroneous because a wrong basis of assessment was adopted a reassessment will be ordered.<sup>2</sup> It is incumbent on the relator appealing in certiorari from a tax assessment to affirmatively show that the assessment imposed was excessive.<sup>3</sup> Facts deemed sufficient to present a *prima facie* case of erroneous assessment of a corporation's real estate by reason of overvaluation and inequality are given in the note case.<sup>4</sup> The entire proof must be considered to determine if a personal property assessment against a domestic corporation is proper; and if it show that its debts exceed its taxable assets an assessment must be vacated.<sup>5</sup> The General Tax Law must be read in connection with the Greater New York Charter and controls in the absence of conflicting charter provisions; so that only the total assessment against both improved and unimproved land can be reviewed by the court, and not the value of the land exclusive of the buildings thereon.<sup>6</sup> Special

Dept.); Greater N. Y. Charter, § 906. “ . . . the burden of proof is upon the party assailing the assessment to establish affirmatively its alleged inequality or excessiveness. . . . In the absence of proof to the contrary, the assessors are presumed to have properly performed their duties . . . ”

<sup>20</sup> People *ex rel.* Bibb Mfg. Co. v. Wells, 84 A. D. 330, 82 N. Y. Supp. 564 (1903).

<sup>1</sup> People *ex rel.* Cord Meyer Co. v. Feitner, 39 Misc. 467, 80 N. Y. Supp. 152 (1902); Tax L. § 253 (L. 1896, c. 908), now § 293. The application for reduction said the corporation's realty was not all in New York City and it had many parcels therein assessed at over \$400,000.

<sup>2</sup> People *ex rel.* Consolidated Gas

Co. v. Feitner, 78 A. D. 313, 79 N. Y. Supp. 975 (1903); Tax L. § 12 (L. 1896, c. 908).

<sup>3</sup> People *ex rel.* Niagara Falls, etc., Co. v. Tax Commissioners, 202 N. Y. 426, 95 N. E. 754 (1911).

<sup>4</sup> People *ex rel.* Broadway Realty Co. v. Feitner, 61 A. D. 156, 70 N. Y. Supp. 452 (1901); *aff'd* 168 N. Y. 661, 61 N. E. 1132.

<sup>5</sup> People *ex rel.* Sicilian Asphalt Co. v. Feitner, 30 Misc. 665, 64 N. Y. Supp. 298 (1900).

<sup>6</sup> People *ex rel.* Morse Dry Dock & Repair Co. v. Purdy, 100 Misc. 580, 167 N. Y. Supp. 69 (1917); Tax L. § 21-a. A writ of certiorari to review an assessment of real property and a building thereon on the ground that the building was not assessable because in New York City and in the course of construction will not

Term has discretion to permit an amendment to a writ of certiorari made returnable through error at the county clerk's office instead of Special Term, even though the objection is taken on special appearance.<sup>7</sup> The municipal representatives of a city of the second class may be allowed by the court to appear in proceedings to reduce the assessments of property of corporations in such city in order to equalize it with that of the realty in the city even though notice of such proceedings had been given by the Attorney-General to the corporation counsel of the city and he had done nothing.<sup>8</sup> The statute providing for the taking of testimony by the court or a referee on a hearing on a writ of certiorari to review an assessment for taxation on a corporation's real estate, while permissive in form, is nevertheless, mandatory; and the court cannot dismiss the proceeding if the relator request that testimony be taken and its papers are sufficient, as the only option the court has is to determine whether it will take the testimony or appoint a referee to do so.<sup>9</sup> The fact that on a special statutory certiorari proceeding the court decides in the first instance that testimony is necessary to be given to make a proper disposition of the proceeding does not conclude it on a motion to confirm the report of the referee it appointed to take the testimony from determining that upon the face of the return it appears that the tax is illegal and void.<sup>10</sup>

**§ 656. Id.: In Special Franchise Certioraris.**—When the writ is obtained to review a special franchise assessment made pursuant to the provisions of the second article of the Tax Law, the court, upon the filing of the return to the writ may (1) take such evidence as it may deem necessary, or (2) appoint a referee to take evidence and to hear, try and determine all questions raised by the petition and the return thereto, and to make his findings and determinations therein, or (3) on motion of either party direct the place of trial

be quashed because the relator charged illegality when relator should have charged overvaluation if the sufficiency of the petition was not challenged and no motion to quash the writ was made on that ground. *People ex rel. Gleason v. Purdy*, 223 N. Y. 88 (1918); *Greater N. Y. Charter*, § 889-a.

<sup>7</sup> *People ex rel. New York Central & Hudson River R. R. Co. v. Cook*, 62 Hun, 303, 17 N. Y. Supp. 546 (1891); L. 1880, c. 269, § 2.

<sup>8</sup> *People ex rel. Rochester R. R. Co. v. Priest*, 41 Misc. 545, 85 N. Y. Supp. 235 (1903).

<sup>9</sup> *People ex rel. Bronx Gas Co. v. Feitner*, 43 A. D. 198, 59 N. Y. Supp. 327 (1899); Tax L. § 253 (L. 1896, c. 908), now § 293; *Greater N. Y. City Charter*, § 906 (L. 1897, c. 378).

<sup>10</sup> *People ex rel. Twenty-third St. R. Co. v. Feitner*, 92 A. D. 518, 87 N. Y. Supp. 304 (1904).

changed to the county in which the special franchise under review is situated.<sup>11</sup> On due entry of an order granting a motion to change the place of trial, the place of trial is deemed changed to the county designated, and the papers and proceedings must be certified to that county in the manner provided by law in the case of a change in the place of trial of an action, and all subsequent proceedings must be had in the county so designated, as if the special proceedings had been originally instituted in that county; and the court, upon the application of the Attorney-General upon cause shown, may vacate any reference made in any proceeding instituted prior to April twenty-sixth, nineteen hundred sixteen to review a special franchise assessment, made pursuant to the provisions of the second article of the Tax Law.<sup>12</sup> The Governor upon application of the Attorney-General upon cause shown may appoint extraordinary terms of the Supreme Court to be held in any judicial district and to try such special franchise cases and designate a justice to preside thereat; and such extraordinary term has jurisdiction over all special franchise cases arising in any tax district within the judicial district for which the term is appointed, without regard to the county in which the term is being held, and either party to a proceeding to review a special franchise assessment may at any time bring the proceeding on for a hearing or trial before such extraordinary term by serving upon the other party sixteen days' notice thereof by mail or fourteen days' notice personally.<sup>13</sup> A new assessment or a correction of an assessment made by order of the court has the same force and effect as if it had been so made by the proper officers within the time prescribed by law for making such assessment.<sup>14</sup> “. . . for purposes of review upon certiorari the valuation of a special franchise shall be treated as though it had been fixed by the same officers as those who made the other assessments upon the roll.”<sup>15</sup> The presumption is that an assessment for franchise taxation made by assessors is correct and it will not be overthrown without evidence that their conclusion is wrong.<sup>16</sup> A relator certioraring the tax board for assessing

<sup>11</sup> Tax L. § 293-a (L. 1916, c. 323).

<sup>12</sup> Tax L. § 293-a (L. 1916, c. 323, § 78).

<sup>13</sup> Tax L. § 293-a (L. 1916, c. 323, § 78).

<sup>14</sup> Tax L. § 293-a (L. 1916, c. 323, § 78).

<sup>15</sup> *People ex rel. Jamaica W. S.*

*Co. v. Tax Commissioners*, 196 N. Y. 39, 89 N. E. 581 (1909); Tax L. §§ 42, now § 43, and 250, now § 290.

<sup>16</sup> *People ex rel. New York & Rockaway Beach Ry. Co. v. Tax Commissioners*, 157 A. D. 496, 140 N. Y. Supp. 691 (1913); *aff'd* 209 N. Y. 599, 103 N. E. 1130.

an excessive franchise tax against it must affirmatively show that the assessment is excessive and that it is entitled to have it reduced.<sup>17</sup> " . . . the assessment of a special franchise may be reduced so as to equalize it with other assessments in the same locality."<sup>18</sup> The review contemplated by the forty-sixth (formerly forty-fifth) section of the Tax Law, so far as inequality of assessment is concerned, relates to assessments or valuations of different franchises alone, and not their comparison with the assessments of any other kinds of property.<sup>19</sup> The court will not compel the State Board of Tax Commissioners to change its assessment or valuation of a special franchise so as to make it correspond with that of the local assessors wherein the corporation taxed operates.<sup>20</sup>

**§ 657. Id.: Costs.**—The statute governing costs in certiorari proceedings to review assessments on real and personal property and on special franchises is given in full hereinafter.<sup>1</sup> A relator which has come into court and has succeeded in reducing an assessment by an amount greater than half the reduction claimed before the assessing officers may have costs and disbursements against the tax district, represented by the tax commissioners.<sup>2</sup> A relator obtaining a reduction by certiorari of more than one-half the assessment claimed before the assessing officers for its special franchises is entitled to costs and disbursements.<sup>3</sup>

**§ 658. Id.: Appeals.**—An appeal may be taken by either party from an order, judgment or determination under certiorari proceedings as from an order, and the appeal must be heard and determined in like manner as appeals in the Supreme Court from orders, and all issues and appeals in any such proceeding have preference over all other civil actions and proceedings in all courts.<sup>4</sup> " . . . the proceeding by *certiorari* against assessors, given by chapter 269 of the Laws

<sup>17</sup> *People ex rel. Buffalo & Lake Erie Traction Company v. Tax Commissioners*, 156 A. D. 466, 142 N. Y. Supp. 116 (1913); *aff'd* 209 N. Y. 502, 103 N. E. 778.

<sup>18</sup> *People ex rel. Delaware, Lackawanna & Western R. R. Co. v. Tax Commissioners*, 134 A. D. 765, 119 N. Y. Supp. 260 (1909).

<sup>19</sup> *People ex rel. New England Telegraph Co. v. Woodbury*, 63 Misc. 1, 116 N. Y. Supp. 209 (1909).

<sup>20</sup> *People ex rel. New England Telegraph Co. v. Woodbury*, 63 Misc. 1, 116 N. Y. Supp. 209 (1909).

<sup>1</sup> Tax L. § 294 (L. 1909, c. 61).

<sup>2</sup> *People ex rel. Consolidated Water Co. v. Woodbury*, 67 Misc. 503, 122 N. Y. Supp. 904 (1910); Tax L. § 294 (Consol. L. c. 60).

<sup>3</sup> *People ex rel. New York Mail and Newspaper Transportation Co. v. Tax Commissioners*, 157 A. D. 686, 142 N. Y. Supp. 758; *aff'd* 210 N. Y. 623, 104 N. E. 1138; Tax L. § 294.

<sup>4</sup> Tax L. § 295 (L. 1909, c. 61).

of 1880, is peculiar and exceptional among special proceedings; . . . it is governed in all respects by the act by which it is provided; . . . appeals therein are to be had and treated in all respects as appeals from orders,—and . . . costs on such appeals, when allowed in the discretion of the court, are to be taxed as motion costs, and not as the costs of an appeal from a judgment.”<sup>5</sup> The appellate court on a review by certiorari under the Tax Law is bound to assume at the outset that the valuation of a special franchise fixed by the State Board of Tax Commissioners is correct; and one assailing its validity must make it conclusively appear that the method by which the assessors arrived at the result complained of was incorrect, and that the assessment does not represent the fair value of the property assessed.<sup>6</sup>

**§ 659. Id.: Refund; Apportionment of Mixed Assessments; Collection After Removal from County; Collection by Supp. Pro.; Contempt, Fines, Imprisonment; Dismissal of Proceedings; Cancellation for Lack of Jurisdiction or of Personalty; Failure of Collector to Pay Over; Sequestration of Corporation Not Paying; Recovery of Surplus from Sale.**—The statute makes provision for refund of taxes found by certiorari proceedings not to be due;<sup>7</sup> for apportionment when premises of one person have been wrongfully taxed in with premises of another;<sup>8</sup> for collection of a tax from one who has removed after taxation to another county;<sup>9</sup> for proceedings supplementary to execution to collect a tax of over ten dollars;<sup>10</sup> for contempt, fines and imprisonment for non-payment of tax;<sup>11</sup> for dismissal of the proceeding to collect a tax when the court deems just;<sup>12</sup> for cancellation of a personal tax void for want of jurisdiction or uncollectible for want of personalty;<sup>13</sup> for failure of the collector to pay over moneys collected;<sup>14</sup> for sequestration of the property of a corporation failing to pay taxes;<sup>15</sup> and for recovery of a surplus from the sale of any property for unpaid taxes.<sup>16</sup> When the State becomes liable by statute to refund a tax paid, which was illegal and void, the right to interest follows without any

<sup>5</sup> *People ex rel. Oak Hill Cemetery Assn. v. Pratt*, 66 Hun, 578, 21 N. Y. Supp. 653 (1893); *aff'd* 138 N. Y. 655, 34 N. E. 513.

<sup>6</sup> *People ex rel. Jamaica W. S. Co. v. Tax Commissioners*, 196 N. Y. 39 89 N. E. 581 (1909).

<sup>7</sup> Tax L. § 296 (L. 1916, c. 323, § 79).

<sup>8</sup> Id. § 297 (L. 1909, c. 61).

<sup>9</sup> Id. § 298 (L. 1916, c. 323, § 80).

<sup>10</sup> Id. § 299 (L. 1909, c. 61).

<sup>11</sup> Id. § 300 (L. 1909, c. 61).

<sup>12</sup> Id. § 301 (L. 1909, c. 374).

<sup>13</sup> Id. § 302 (L. 1916, c. 323, § 81).

<sup>14</sup> Id. §§ 303–305 (L. 1909, c. 61).

<sup>15</sup> Id. § 306 (L. 1916, c. 323, § 82).

<sup>16</sup> Id. § 307 (L. 1909, c. 61).

express provision of law on the subject.<sup>17</sup> When a railroad corporation supinely waits three years after rejection by a board of tax supervisors of its claim for a refund of taxes in excess of what it should have paid and accepted the amount determined as due from it for taxes, it cannot reverse or set aside the action of the board unless it shows their lack of good faith.<sup>18</sup> The "jurisdiction of the court to issue the order for the examination [of a corporation in proceedings supplementary to execution under the Tax Law] does not rest on the appearance of the corporation before the tax department, but upon the fact that the tax has been returned by the proper collector, uncollected for want of personal property out of which to collect the same."<sup>19</sup>

**§ 660. Id.: Certiorari to Review State Income and Franchise Taxes, In General.**—The determination of the Tax Commission upon any application made to it by any corporation for revision and resettlement of any account stating its annual income tax for the privilege of exercising its franchise in New York State may be reviewed in the manner prescribed by and subject to the provisions of section one hundred and ninety-nine of the Tax Law.<sup>20</sup> The determination of the Comptroller upon any application made to him by any corporation for a revision and resettlement of any account for franchise tax may be reviewed both upon the law and the facts.<sup>1</sup>

**§ 661. Id.: Petition or Affidavit, Who May Make.**—The determination of the Comptroller on an application for revision and resettlement of a corporation's franchise tax may be reviewed upon certiorari by the Supreme Court at the instance of any person or corporation affected thereby, and in the name and on behalf of the People of the State.<sup>2</sup> The same rule governs certiorari to review a corporation's State-income-franchise tax as determined by the Tax Commission.<sup>3</sup>

**§ 662. Id.: Where and When Made.**—The determination of the Comptroller on an application for revision and resettlement of an account settling a corporation's franchise tax may be reviewed by the Supreme Court.<sup>4</sup> The same holds true of

<sup>17</sup> *People ex rel. Knickerbocker Trust Co. v. Kelsey*, 114 A. D. 319, 99 N. Y. Supp. 852 (1906).

<sup>18</sup> *People ex rel. Erie R. R. Co. v. Supervisors*, 193 N. Y. 127, 86 N. E. 348 (1908); Tax L. § 256, now § 296.

<sup>19</sup> *Corcoran v. Kellogg Structural*

*Co.*, 179 A. D. 396, 166 N. Y. Supp. 269 (1917); Tax L. § 299 (L. 1909, c. 62).

<sup>20</sup> Tax L. § 219 (L. 1918, c. 417).

<sup>1</sup> Tax L. § 199 (L. 1909, c. 62).

<sup>2</sup> Tax L. § 199 (L. 1909, c. 62).

<sup>3</sup> Id. § 219 (L. 1918, c. 417).

<sup>4</sup> Tax L. § 199 (L. 1909, c. 62).

review by certiorari of a corporation's state-income-franchise tax as determined by the Tax Commission.<sup>5</sup> Apparently such a petition must be presented to a term of the Appellate Division of the Supreme Court or at Special Term; because those terms only can grant the writ.<sup>6</sup> No certiorari to review any audit and statement of an account or any determination by the Comptroller under the statute imposing a franchise tax upon corporations can be granted unless notice of application therefor is made within thirty days after the service of the notice of such determination.<sup>7</sup> The same holds true of review by certiorari of a corporation's State-income-franchise tax as determined by the Tax Commission.<sup>8</sup>

**§ 663. Id.: Form, Contents and Grounds.**—The petition or affidavit to review by certiorari the account of a franchise tax of a corporation stated by the Comptroller on an application to him for revision and resettlement thereof must be in the name and on behalf of the People of New York State.<sup>9</sup> The same holds true of review by certiorari of a corporation's State-income-franchise tax as determined by the Tax Commission.<sup>10</sup> If by petition, it must be verified; and whether by petition or affidavit, it may be accompanied by other written proof and must show a proper case for the issuing of the writ.<sup>11</sup>

**§ 664. Id.: Notice.**—Eight days' notice must be given the Comptroller of an application for a writ of certiorari on his determination of a corporation's franchise tax.<sup>12</sup> The same holds true of an application to review the Tax Commission's determination of a corporation's franchise tax.<sup>12</sup> The same save that the notice must be to the Tax Commission.<sup>13</sup>

**§ 665. Id.: Deposit of Tax and Filing of Undertaking.**—Before making an application to the Supreme Court for a writ of certiorari to review the Comptroller's determination of a corporation's franchise tax there must be<sup>14</sup> (1) deposited with the State Treasurer the full amount of the taxes, percentage, interest, and other charges audited and stated in his account of such tax, and (2) filed with the Comptroller an undertaking in such amount and with such sureties as a Justice of the Supreme Court shall approve to the effect that if such writ is dismissed or the determination of the Comp-

<sup>5</sup> Id. § 219 (L. 1918, c. 417).

<sup>6</sup> C. C. P. § 2127.

<sup>7</sup> Tax L. § 200 (L. 1909, c. 62).

<sup>8</sup> Id. § 219 (L. 1918, c. 417).

<sup>9</sup> Tax L. § 199 (L. 1909, c. 62);  
C. C. P. § 2127.

<sup>10</sup> Id. § 219 (L. 1918, c. 417).

<sup>11</sup> C. C. P. § 2127.

<sup>12</sup> Tax L. § 200 (L. 1909, c. 62).

<sup>13</sup> Id. § 219 (L. 1918, c. 417).

<sup>14</sup> Tax L. § 200 (L. 1909, c. 62).

troller affirmed, the applicant for the writ will pay all costs and charges which may accrue against him or it in the prosecution of the writ, including costs of all appeals. The same holds true on certiorari to review a State-income-franchise tax, except that the undertaking should be filed with the Tax Commission.<sup>15</sup> A corporation seeking a writ of certiorari to review a franchise tax assessment must deposit with the State Treasurer the tax sought to be reviewed as a condition precedent to obtaining the writ, even though its petition alleges that taxes assessed and paid by two other corporations leased to it were illegal and void.<sup>16</sup>

**§ 666. Id.: The Writ of Certiorari, When Allowed and Effect.**—The granting or refusal of the writ of certiorari to review a corporation's franchise or State-income-franchise tax is discretionary with the court.<sup>17</sup> A writ of certiorari to review a franchise or State-income-franchise tax does not stay the execution of the determination to be reviewed or affect the power of the body or officer to which or to whom it is addressed.<sup>18</sup>

**§ 667. Id.: Against Whom Directed.**—The writ must be directed to the body or officer whose determination is to be reviewed, or to any other person having the custody of the record or other papers to be certified, or to both, if necessary; and it must be directed to the board or body by the name, if any, in which an action would lie against it; otherwise to the members thereof by their names.<sup>19</sup> When the incumbent of the office of State Comptroller changes between the time of making an assessment against a corporation for taxation and that of suing out a writ of certiorari to review it, the writ is properly directed to the Comptroller as such, without naming him or making the ousted incumbent a party; and the Comptroller in office can answer the writ.<sup>20</sup>

**§ 668. Id.: Form and Contents.**—The writ of certiorari to review a franchise or a State-income-franchise corporate tax must be in the name of the People of New York State.<sup>1</sup>

<sup>15</sup> Id. § 219 (L. 1918, c. 417).

<sup>16</sup> *People ex rel. Lehigh Valley R. Co. v. Sohmer*, 84 Misc. 518, 147 N. Y. Supp. 636 (1914); *aff'd* 169 A. D. 430, 154 N. Y. Supp. 1053; Tax L. §§ 199, 200.

<sup>17</sup> Tax L. § 199 (L. 1909, c. 61); Id. § 219 (L. 1918, c. 417); C. C. P. § 2127.

<sup>18</sup> C. C. P. § 2131.

<sup>19</sup> C. C. P. § 2129; Tax L. § 199 (L. 1909, c. 61); Id. § 219 (L. 1918, c. 417).

<sup>20</sup> *Matter of the Tax against Tiffany & Co.*, 80 Hun, 486, 30 N. Y. Supp. 494 (1894); C. C. P. §§ 2136, 2129.

<sup>1</sup> Tax L. § 199 (L. 1909, c. 61); Id. § 219 (L. 1918, c. 417).

**§ 669. Id.: Service Of.**—Except when different directions respecting the mode of service thereof are given by the court granting it, a writ of certiorari directed to a person or persons by name or his or their official title or titles must be served upon each officer or other person to whom it is so directed in the same manner as a summons in an action brought in the Supreme Court; and a writ of certiorari directed to a board or body or the members thereof must be served by showing the original writ and delivering a copy thereof to a majority of the members of such board or body; unless the board or body is created by law and has a chairman or other presiding officer appointed pursuant to law, when service on him is sufficient; or unless one or more of the persons upon whom service should be made cannot after due diligence be found, when the exhibition of the original writ is dispensed with and service may be made as prescribed by law for the service of a summons issued out of the Supreme Court.<sup>2</sup> A writ of certiorari must be served, except when the court granting it differently directs, upon each officer or other person to whom it is directed if directed to them by name or official title, or upon the corporation, in the same manner as a summons in an action brought in the Supreme Court, unless directed to a court or the judges thereof having a clerk appointed pursuant to law when it may be served by filing the writ with the clerk.<sup>3</sup>

**§ 670. Id.: The Return to the Writ, When and Where Returnable.**—A writ of certiorari must be made returnable within twenty days after the service thereof at the office of the clerk of the county designated therein wherein the determination to be reviewed was made, if issued from the Supreme Court; and if the county designated in the writ is not the proper county the court upon motion may amend the writ accordingly; and thereupon all papers on file must be transferred to the clerk of the county where the writ is made returnable by the amendment.<sup>4</sup> After a writ of certiorari has been issued, the time to make a return thereto may be enlarged as a similar proceeding may be taken in an action brought in the same court and triable in the county where the writ is returnable.<sup>5</sup>

**§ 671. Id.: Form and Contents of Return.**—The Comptroller, for the purpose of review by certiorari of his revision or resettlement of an account stating a corporation's franchise

<sup>2</sup> C. C. P. § 2071; Tax L. § 199 (L. 1909, § 62); Id. § 219 (L. 1918, c. 417).

<sup>3</sup> C. C. P. § 2130.

<sup>4</sup> C. C. P. § 2132.

<sup>5</sup> C. C. P. § 2133.

tax, must return on the certiorari the accounts and all the evidence before him on the application for such revision or resettlement, and all the papers and proofs upon the original statement of such account and all proceedings thereon.<sup>6</sup> The same holds true of the Tax Commission on review by certiorari of its determination of the State-income-franchise tax of the corporation.<sup>7</sup> The return must be annexed to the writ, or copy thereof served, with a transcript annexed, certified by the person served, of the record or proceedings, and a statement of the other matters specified in and required by the writ.<sup>8</sup> A return by the Comptroller is not conclusive as to the facts on certiorari to review taxes on a corporation's capital stock if it be not a definite denial of the relator's statement in a petition; *e. g.*, that it is a manufacturing corporation.<sup>9</sup> The Comptroller is required to return to a certiorari to review his tax assessment of a domestic corporation's capital stock the accounts and all the evidence submitted to him; but his decision will not be disturbed unless the relator produces the evidence showing his error.<sup>10</sup> The Comptroller need not return the *grounds* of his refusal to revise or readjust a franchise tax.<sup>11</sup>

**§ 672. Id.: Filing of.**—The return must be filed in the office where the writ is returnable, according to the command thereof.<sup>12</sup>

**§ 673. Id.: Hearing.**—Either party may notice the cause for hearing at any time after the return is complete.<sup>13</sup> The cause must be heard at a term of the Appellate Division of the Supreme Court held within the judicial department embracing the county where the writ was returnable.<sup>14</sup> If, on certiorari from the Comptroller's determination on an application for revision and resettlement of a corporation's franchise tax, the original or resettled accounts are found erroneous or illegal, either in point of law or of fact, by the Supreme Court, the accounts reviewed must then be corrected and restated.<sup>15</sup> The same holds true on review by certiorari

<sup>6</sup> Tax L. § 199 (L. 1909, c. 62).

<sup>7</sup> Id. § 219 (L. 1918, c. 417).

<sup>8</sup> C. C. P. § 2134.

<sup>9</sup> *People ex rel. Edison Co. v. Campbell*, No. 1, 88 Hun, 527, 34 N. Y. Supp. 711 (1895); L. 1889, c. 463.

<sup>10</sup> *People ex rel. Postal Telegraph Cable Co. v. Campbell*, 70 Hun, 507, 24 N. Y. Supp. 208 (1893); L. 1889, c. 463, § 20.

<sup>11</sup> *People ex rel. New York Realty Corporation v. Miller*, 92 A. D. 116, 87 N. Y. Supp. 341 (1904); Tax L. § 196 (L. 1896, c. 908, § 196). See now Tax L. § 199.

<sup>12</sup> C. C. P. § 2134.

<sup>13</sup> C. C. P. § 2138.

<sup>14</sup> C. C. P. § 2138.

<sup>15</sup> Tax L. § 199 (L. 1909, c. 62).

of the Tax Commission's determination of a corporation's State-income-franchise tax.<sup>16</sup> When notice is given, the person served may produce affidavits or other written proofs, upon the merits, in opposition to the application.<sup>17</sup> The court in its discretion may permit either party to produce affidavits or other written proofs relating to any alleged error of fact or any other question of fact which is essential to the jurisdiction of the body or officer to make the determination to be reviewed, where the facts in relation thereto are not sufficiently stated in the return and the court is satisfied they cannot be made to appear by means of an order for a further return.<sup>18</sup> The questions involving the merits to be determined by the court upon the hearing are the following only: (1) Whether the body or officer had jurisdiction of the subject-matter of the determination under review; (2) whether the authority conferred upon the body or officer in relation to that subject-matter has been pursued in the mode required by law, in order to authorize it or him to make the determination; (3) whether in making the determination any rule of law, affecting the rights of the parties thereto has been violated, to the prejudice of the relator; (4) whether there was any competent proof of all the facts necessary to be proved in order to authorize the making of the determination; and (5) if there was such proof, whether there was upon all the evidence such a preponderance of proof against the existence of any of those facts that the verdict of a jury affirming the existence thereof, rendered in an action in the Supreme Court triable by a jury, would be set aside by the court as against the weight of evidence.<sup>19</sup> On a tax certiorari a new trial of the relator's assessability may be had, but on the issues joined by the pleadings (viz., the petition and return) only; so that when the relator simply asserts that it has earned a stated surplus, without alleging what are its capital stock and assets, it cannot on certiorari show by its books or otherwise that its own statement of its assets and liabilities was false or erroneous.<sup>20</sup> The burden is on a relator to show any error of the State Comptroller in imposing a tax on it.<sup>1</sup> A return on review of a franchise tax assessment which is not traversed

<sup>16</sup> Id. § 219 (L. 1918, c. 417).

<sup>17</sup> C. C. P. § 2128; Tax L. § 199 (L. 1909, c. 61); Id. § 219 (L. 1918, c. 417).

<sup>18</sup> C. C. P. § 2139.

<sup>19</sup> C. C. P. § 2140.

<sup>20</sup> *People ex rel. McClure Publications, Inc., v. Purdy*, 161 A. D. 541,

146 N. Y. Supp. 646 (1914); *aff'd* 213 N. Y. 658, 107 N. E. 1084. Franchise tax.

<sup>1</sup> *People ex rel. Western Electric Co. v. Campbell*, 80 Hun, 466, 30 N. Y. Supp. 472 (1894); *aff'd* 145 N. Y. 587, 40 N. E. 239; L. 1889, chs. 353, 463.

must be assumed to be true so far as it states relevant facts but not legal conclusions.<sup>2</sup>

§ 674. **Id.: Final Order.**—The court, upon the hearing, may make a final order annulling or confirming, wholly or partly, or modifying, the determination reviewed, as to any or all of the parties; and if the determination reviewed is annulled or modified, the court may order and enforce restitution in like manner, with like effect, and subject to the same conditions as when a judgment is reversed upon appeal.<sup>3</sup> The final order of the court upon the certiorari must be entered in the office of the clerk where the writ was returnable; but before it can be enforced an enrollment thereof must be filed, and for that purpose the clerk must attach together and file in his office the papers upon which the cause was heard, a certified copy of the final order, and a certified copy of each order which in any way involves the merits or necessarily affects the final order; and such filing is a sufficient authority for any proceeding by or before the body which or the officer who made the determination reviewed which the final order of the court directs or permits.<sup>4</sup>

§ 675. **Id.: Costs.**—Costs not exceeding fifty dollars and disbursements may be awarded by the final order in favor of or against either party; in the discretion of the court.<sup>5</sup>

§ 676. **Id.: Appeals.**—From any determination of the Supreme Court upon any review upon certiorari by it of the determination of the Comptroller on an application for revision and resettlement by him of an account stated by him of a corporation's franchise tax, an appeal to the Court of Appeals may be taken by either party.<sup>6</sup> The same holds true of appeals from the determination of a corporation's state-income-franchise tax by the Tax Commission.<sup>7</sup> When the execution of the final order in certiorari proceedings of the Supreme Court is stayed by an appeal to the Court of Appeals, the proceedings below are stayed in like manner.<sup>8</sup> A difference between the State Comptroller and the Appellate Division, not as to the amount of a corporation's property held within the State, and taxable for franchise tax purposes, but as to the character of part of it, is a legal conclusion reviewable by the Court of Appeals.<sup>9</sup>

<sup>2</sup> *People ex rel. N. Y. C. & H. R. R. Co. v. Keno*, 61 Misc. 345, 114 N. Y. Supp. 1094 (1908).

<sup>3</sup> C. C. P. §§ 2141, 2142.

<sup>4</sup> C. C. P. §§ 2144-2145.

<sup>5</sup> C. C. P. § 2143.

<sup>6</sup> Tax L. § 199 (L. 1909, c. 62).

<sup>7</sup> *Id.* § 219 (L. 1918, c. 417).

<sup>8</sup> C. C. P. § 2145.

<sup>9</sup> *People ex rel. Commercial Cable Co. v. Morgan*, 178 N. Y. 433 (1904).

**§ 677. Id.: Defective or Omitted Returns; When One Certioraried Out of Office, Dead; etc.; Bringing in Interested Parties; Substitution of Mandamus for Certiorari.**—The statute provides for procedure on defective or omitted returns;<sup>10</sup> for procedure when the officer certioraried has rounded out his term of office;<sup>11</sup> for bringing in parties interested;<sup>12</sup> for cases in which the officer or other person whose duty it is to make the return has died, absconded, removed from the State or become insane;<sup>13</sup> and for substitution by amendment of the remedy by mandamus for that by certiorari.<sup>14</sup>

**§ 678. Stock Transfer Tax, In General.**—If stock brokers affix stamps which they purchased to stocks they sell under an act of the legislature later held unconstitutional and are never reimbursed therefor they may recover the value thereof of the State. It seems that even if the brokers' acts in erroneously affixing the stamps be assumed to be the acts of their customers, the suing brokers may be treated as trustees suing for the benefit of their customers and their liability to such customers after recovery can be enforced against them as trustees.<sup>15</sup> The nature of a statute imposing a tax upon all agreements or instruments for the transfer of shares of corporate stock is that of an excise tax on the transfer.<sup>16</sup> Although classification of stock for the purpose of imposing thereon a transfer tax into stock having a hundred dollars or any fraction thereof of face value is constitutional, yet classification of such stock into shares of stock having one hundred dollars or fraction thereof of face value is unconstitutional, as affording no proper basis of taxation.<sup>17</sup> The fact that a tax on the transfer of corporate stock taxes the transfer of certificates of stock in a foreign corporation when made by a non-resident in this State does not make it violative of the commerce clause of the Federal Constitution.<sup>18</sup> A tax on the transfer of stock based on its face value "is an excise tax

<sup>10</sup> C. C. P. § 2135.

<sup>11</sup> Id. § 2136.

<sup>12</sup> Id. § 2137.

<sup>13</sup> Id. § 2139.

<sup>14</sup> Id. § 2148-a.

<sup>15</sup> *Van Antwerp v. State of New York*, 218 N. Y. 422, 113 N. E. 497 (1916); L. 1906, c. 414, amending L. 1905, c. 241, § 315, held unconstitutional (Tax L. § 270); and L. 1910, c. 186 (Tax L. § 280), giving right of recovery against State.

<sup>16</sup> *U. S. Radiator Co. v. State of New York*, 208 N. Y. 144, 46 L.R.A.

(N.S.) 585, 101 N. E. 783 (1913); Tax L. § 270.

<sup>17</sup> *People ex rel. Farrington v. Mensching*, 187 N. Y. 8, 10 L.R.A. (N.S.) 625, 79 N. E. 884 (1907); L. 1906, c. 414, § 315, amend'd Tax L. § 241, by imposing a tax "on each share of one hundred dollars of face value or fraction thereof" instead of on "each hundred dollars of face value or fraction thereof."

<sup>18</sup> *People ex rel. Hatch v. Rear-don*, 184 N. Y. 431, 8 L.R.A. (N.S.) 314, 77 N. E. 970 (1906); U. S.

which need not depend upon any principle of valuation or on any notice to the taxpayer. . . . Neither notice nor grievance day is required, for no valuation is made except by the statute itself, and there is no provision in either [the State or Federal] Constitution requiring such a tax to be laid on an *ad valorem* basis.”<sup>19</sup> A law imposing a tax “on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock. . . . on each hundred dollars of face value or fraction thereof” is valid and constitutional.<sup>20</sup> The statute imposing a tax on transfers of corporate stock is not unconstitutional because it precludes one from recovering on his contract to sell stock when he pays the tax which he has failed to pay through inadvertence, as its effect is not to forfeit property but to deny the offender the right to enforce through the courts of this State a contract which he has himself made unenforceable.<sup>1</sup> A statute is unconstitutional which authorizes an investigation to be conducted by a state official the purpose of which is the detection of violations of a statute imposing a tax on the transfer of corporate stock, and the procedure of which is to compel a party to produce his private books as evidence against himself, and the sequel of which is penalties and criminal prosecution.<sup>2</sup> Provision is made in the statute (hereinafter quoted) for the preparation and sale by the State Comptroller of stock transfer tax stamps; for new designs of stamps; for penalties for using old designs and for surrender thereof to the State Comptroller; and for sale of such stamps to the public by banks and authorized agents of the State Comptroller.<sup>3</sup> The law gives the State Comptroller power to procure dies for the stamp, clerical assistance, etc.<sup>4</sup> The statute requires registration with the State Comptroller of parties negotiating in shares or certificates of stock, and stock brokerage businesses and corporations having transfer offices or agencies in New York State.<sup>5</sup> It also requires such

Const. art. 1, § 8, par 3; Tax L. § —.

<sup>19</sup> *People ex rel. Hatch v. Rear- don*, 184 N. Y. 431, 8 L.R.A.(N.S.) 314, 77 N. E. 970 (1906).

<sup>20</sup> *People ex rel. Hatch v. Rear- don*, 184 N. Y. 431, 8 L.R.A.(N.S.) 314, 77 N. E. 970 (1906); U. S. Const. art. 1, § 8, par. 3; N. Y. Const. art. 3, § 15.

<sup>1</sup> *Sheridan v. Tucker*, 145 A. D. 145, 129 N. Y. Supp. 18 (1911);

L. 1905, c. 241, as amend'd L. 1906, c. 414.

<sup>2</sup> *People ex rel. Ferguson v. Rear- don*, 197 N. Y. 236, 27 L.R.A.(N.S.) 141, 90 N. E. 829 (1910); Tax L. § 12.

<sup>3</sup> Tax L. §§ 271, 271-a (L. 1913, c. 811, and L. 1916, c. 552, respectively).

<sup>4</sup> Tax L. § 274 (L. 1909, c. 61).

<sup>5</sup> Tax L. § 275-a (L. 1913, c. 779).

parties, stock brokerage businesses and corporations to keep in form prescribed by the State Comptroller a book of account of the particulars of every sale, agreement to sell, delivery or transfer of shares or certificates of stock and the stamps used in connection therewith, as well as a stock-certificate account-transfer-ledger, book or register recording various details and particularly the evidence of payment of the stock transfer tax.<sup>6</sup> These books and the stock certificates and memoranda recorded therein must be kept two years, and must be open at certain periods to the State Comptroller's inspection, who may have mandamus to procure such inspection.<sup>7</sup> He may also sue to recover statutory penalties for failure to pay the tax.<sup>8</sup> A party failing to keep such books, memoranda or certificates, or altering or destroying them, or making false entries therein, or refusing inspection thereof, or otherwise violating the statute is guilty of a misdemeanor and on conviction must pay from five hundred to five thousand dollars' fine or be imprisoned for from three months to two years, or both.<sup>9</sup> A blanket civil penalty of a forfeiture of five hundred dollars to the People of the State is provided for each and every violation of these provisions of the law imposing a tax on the transfer of stock for which a penalty is not otherwise specifically provided.<sup>10</sup> The State Comptroller must bring an action in his name as such in any court of competent jurisdiction for the recovery of any civil penalty, and any moneys collected by him must be paid into the State Treasury; and in an action against a corporation or its transfer agent to recover a penalty because of its transfer of stock upon the books or records of the corporation without requiring the payment of the stock transfer tax, the failure of the corporation or its transfer agent, on the demand of the comptroller or his duly authorized representative, to produce the surrendered certificate or memoranda of sale with the required stamps attached, constitutes *prima facie* proof of the non-payment of the tax imposed by the two hundred and seventieth section of the Tax Law.<sup>11</sup> The taxes imposed by the stock transfer tax law and their revenues must be paid by the State Comptroller into the State Treasury and must be applicable to the general fund and to the payment of all claims and demands which are a lawful charge thereon.<sup>12</sup> No transfer of stock made after June first, nineteen hundred and five, on

<sup>6</sup> Tax L. § 276 (L. 1913, c. 779).

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Tax L. § 277 (L. 1912, c. 292).

<sup>11</sup> Tax L. § 277 (L. 1912, c. 292).

<sup>12</sup> Tax L. § 279 (L. 1909, c. 61).

which a stock transfer tax is imposed by law, can be made the basis of any action or legal proceedings, if the tax is not paid at the time of the transfer; nor can proof thereof be offered or received in evidence in any court in New York State.<sup>13</sup>

**§ 679. Id.: On What Imposed.**—The stock transfer tax is a tax imposed with respect to the stock of any domestic or foreign corporation on all (a) sales of such stock, (b) agreements to sell such stock, (c) memoranda of sale of such stock, (d) deliveries of shares or certificates of such stock and (e) transfers of shares or certificates of such stock, which may be made after June first, nineteen hundred and five.<sup>14</sup> It is immaterial to the imposition of the tax whether such sale, agreement, memoranda, delivery or transfer be made (a) upon or shown by the books of the corporation, or (b) by any assignment in blank, or (c) by any delivery, or (d) by any paper, or (e) by any agreement, or (f) by any memorandum, or (g) by any other evidence of sale or transfer; it is immaterial whether it be intermediate or final; and it is immaterial whether it invest the holder with the beneficial interest in or legal title to such stock, or merely with the possession or use thereof for any purpose, or to secure the future payment of money, or the future transfer of any stock.<sup>15</sup> The tax is not imposed upon an agreement evidencing the deposit of stock certificates as collateral security for money loaned thereon if such stock certificates are not actually sold; nor upon the stock certificates so deposited; nor upon mere loans of stock or the return thereof.<sup>16</sup> The transfer of an intermediate certificate of a corporation issued on increase of its capital stock to its stockholders entitling them to buy the increased stock according to their holdings and to interest on the portion paid in, together with the right of making the final payments and receiving the final certificate, is a transfer of stock subject to tax.<sup>17</sup> A transfer of a certificate of stock, though it be not a transfer of the stock and invest the transferee solely with the legal title as distinguished from the beneficial interest, is taxable; the phrase "legal title" in the statute refers to a naked appearance of title or a limited

<sup>13</sup> Tax L. § 279 (L. 1909, c. 61).

As to what constitutes a transfer of stock within the statute taxing stock transfers, see note in 46 L.R.A. (N.S.) 585.

On validity of statute imposing special tax on transfer of corporate stock, see note in 8 L.R.A. (N.S.) 314.

<sup>14</sup> Tax L. § 270 (L. 1913, c. 779).

<sup>15</sup> Tax L. § 270 (L. 1913, c. 779).

<sup>16</sup> Tax L. § 270 (L. 1913, c. 779).

<sup>17</sup> *Sohmer v. Hebden*, 165 A. D. 853, 856, 151 N. Y. Supp. 346 (1915), dissenting opinion of Woodward, J., on which Court of Appeals reversed, 216 N. Y. 728; Tax L. § 270.

title appearing complete on its face.<sup>18</sup> The original issuance of stock is not a transfer or sale thereof necessitating the affixation of stamps.<sup>19</sup> When one corporation purchases certain assets of each of four corporations under contracts entitling each of these last four corporations to a designated number of shares of stock of the one corporation as a consideration for the sale, but the certificates were issued to a trust company as trustee of a voting trust, and the trust company, at each of the four corporations' request, issues to each stockholder therein a certificate for the number of shares proportionate to the number of the shares of its stock owned by him, the certificates so issued by the trust company are taxable as evidencing a transfer of stock, as the four corporations became owners of such stock on their creation and, being a separate entity distinct from its stockholders, its request to, and acquiescence therein by the trust company to issue certificates to their respective stockholders, was a corporate act constituting a taxable transfer.<sup>20</sup> A transfer of corporate stock by agreement (1) for the adjustment of a debt (2) which legally, upon the conditions being performed, transferred the title of the certificates for such stock from a trust company, acting as depository under the agreement to managers acting under the agreement to adjust the debt, and (3) which legally transfers the title of the stock itself from such managers to a new set of voting trustees, constitutes a double "transfer" of stock taxable as two transfers, in spite of the fact that for convenience (or for the purpose of evading payment of the tax) the voting trustee who acquired the title from the trust company directed the latter as agent to deliver the stock to the new trustees.<sup>1</sup> A delivery of stock to syndicate managers to enable them under an agreement to pledge the stock as security for their note with the proceeds of which unissued stock should be bought which should be delivered to the stockholders delivering the stock to the managers in proportion to their existing holdings on payment of their

<sup>18</sup> *Bonbright & Co. v. State of New York*, 165 A. D. 640, 151 N. Y. Supp. 35 (1915); Tax L. § 270, as amend'd L. 1911, c. 352. *U. S. Radiator Corp. v. State of N. Y.*, 208 N. Y. 144, 46 L.R.A.(N.S.) 585, 101 N. E. 783, held not determinative since amendment. "A transfer of the certificate itself, the mere 'scrap of paper,' to use a recent famous expression, is made taxable now as well as a transfer of the share of stock."

<sup>19</sup> *People v. Duffy-McInnerney Co.*, 122 A. D. 336, 106 N. Y. Supp. 878 (1907); *aff'd* 193 N. Y. 636, 86 N. E. 1129; Tax L. § 315 *et seq.* (L. 1905, c. 241).

<sup>20</sup> *United States Radiator Co. v. State of New York*, 208 N. Y. 144, 46 L.R.A.(N.S.) 585, 101 N. E. 783 (1913); Tax L. § 270.

<sup>1</sup> *Hudson & Manhattan R. R. Co. v. State of New York*, 180 A. D. 81, 167 N. Y. Supp. 515 (1917); Tax L. § 270 (L. 1912, c. 292).

*pro rata* share of the amount paid therefor is a transfer requiring a tax.<sup>2</sup> The "transfer" of stock requiring stock transfer stamps does not mean the "vesting of title in the vendee merely by the election of the vendor" but contemplates "something more than a theoretical change of title. They contemplate some physical act; the delivery of a certificate; the execution and delivery of a bill of sale; and entry upon the books of the corporation."<sup>3</sup> "Stock transfer taxes accrue upon the cancellation and surrender of a stock certificate standing in the name of an accommodation holder and the making out of a new stock certificate in the place thereof in the name of another accommodation holder, and the indorsement of the new certificate in blank by him, the actual ownership of the stock remaining at all times in the defendant."<sup>3a</sup>

**§ 680. Id.: Amount and Computation of Tax.**—The stock transfer tax is two cents on each one hundred dollars of face value of the stock, or fraction thereof; and, if the shares or certificates of stock are issued without designated monetary value, the tax is at the rate of two cents for each and every share of such stock.<sup>4</sup>

**§ 681. Id.: Stamps and Payment.**—It is the duty of the person or persons making or effectuating the sale or transfer to procure, affix and cancel the stamps and pay the tax imposed.<sup>5</sup> The payment of such tax must be denoted by an adhesive stamp or stamps affixed as follows: (1) To the books of the corporation if the sale or transfer is evidenced only by such books;<sup>6</sup> (2) To the surrendered certificate if the transaction is effected by the delivery or transfer of a certificate;<sup>7</sup> (3) To a bill or memorandum of sale to be made and delivered by the seller to the buyer if the case be one of an agreement to sell or of a sale effected by delivery of the cer-

<sup>2</sup> *Wing v. Smith*, 173 A. D. 57, 159 N. Y. Supp. 454 (1916); Tax L. § 270 (L. 1913, c. 779); Tax L. § 315 (L. 1906, c. 414).

<sup>3</sup> *Phelps-Stokes Estates, Inc. v. Nixon*, 222 N. Y. 93, 118 N. E. 241 (1917); Tax L. §§ 270, 278. Defendant offered to purchase of plaintiff certain stock deposited by a third party if last-named did not take it up before a certain date—which he did not. Held, no "transfer" needing stamps.

<sup>3a</sup> *Travis v. Ann Arbor Co.*, 180 A. D. 799 (1917); Tax L. § 270. It was held there were two taxable transfers.

On the question of liability to pay transfer or inheritance tax in respect of stock in domestic corporation belonging to the estate of a nonresident, see notes in 19 L.R.A. (N.S.) 887; 25 L.R.A. (N.S.) 384.

For authorities discussing the question as to validity of statute imposing special tax on transfer of corporate stock, see note in 8 L.R.A. (N.S.) 314.

<sup>4</sup> Tax L. § 270 (L. 1913, c. 779).

<sup>5</sup> Tax L. § 270 (L. 1913, c. 779).

<sup>6</sup> Tax L. § 270 (L. 1913, c. 779).

<sup>7</sup> Tax L. § 270 (L. 1913, c. 779).

tificate assigned in blank.<sup>6</sup> When the sale or transfer is evidenced only by the corporate books, the person making or effectuating such sale or transfer must procure and furnish to the corporation the requisite stamps, and the corporation must affix and cancel them; when the case is one of an agreement to sell or one of a sale effected by delivery of the certificate assigned in blank, apparently either the buyer or seller may affix and cancel the stamps, but the bill or memorandum of such sale to which the stamps must be affixed and cancelled must be made and delivered by the seller to the buyer.<sup>7</sup> In every case in which an adhesive stamp is used to denote the payment of the stock transfer tax the person using or affixing it must write or stamp thereupon the initials of his name and the date upon which it is attached or used, and must cut or perforate the stamp in a substantial manner so that it cannot be again used.<sup>8</sup> No further tax is imposed upon the delivery of the certificate of stock, or upon the actual issue of a new certificate, when the original certificate of stock is accompanied by the duly stamped memorandum of sale provided for by law.<sup>9</sup>

**§ 682. Id.: Bill, Memorandum or Agreement of Sale.**—Every such bill or memorandum of sale or agreement to sell must show (1) the date of the transaction which it evidences, (2) the name of the seller, (3) the stock to which it relates, (4) the number of shares thereof, and (5) a number upon its face which shall not be borne on any other bill or memorandum of sale made by the seller on any given day.<sup>10</sup> The identification number on a bill or memorandum of sale must in all cases be recorded in the book of account required by law to be kept by every one negotiating shares or certificates of stock or transacting a brokerage business.<sup>11</sup>

**§ 683. Id.: Penalties for Not Paying Tax, Not Cancelling or Not Affixing, or Illegally Using, Stamps.**—“ . . . the purpose of the section was to deny to an offender who violates its provisions the right to enforce through the courts a contract which he by his own inadvertence or wrong has made unenforceable;” and it does not prevent proof by a would-be vendee of stock of a sale thereof instead of a pledge, as claimed by the vendor, though no stamps were affixed as part of the transaction.<sup>12</sup> The fact that the tax on transfers of stock was not paid by the seller at the time of sale through inadvertence

<sup>6</sup> Tax L. § 270 (L. 1913, c. 779).

<sup>7</sup> Id.

<sup>8</sup> Tax L. § 273 (L. 1911, c. 352).

<sup>9</sup> Tax L. § 270 (L. 1913, c. 779).

<sup>10</sup> Tax L. § 270 (L. 1913, c. 779).

<sup>11</sup> Tax L. §§ 270, 276 (L. 1913, c. 779).

<sup>12</sup> Hall v. Davis, 95 Misc. 315, 159 N. Y. Supp. 60 (1916); Tax L. § 278 (L. 1909, c. 62).

and ignorance of the law does not save him from having his action to recover the purchase price unpaid thereon dismissed.<sup>13</sup> The penalty of being considered guilty of a misdemeanor and, upon conviction thereof paying a fine of not less than five hundred nor more than one thousand dollars or being imprisoned for not more than six months or of both paying such fine and suffering such imprisonment in the discretion of the court is imposed in some cases for failure to pay the stock transfer tax and in some cases for failure to have stamps affixed: (1) For failure to pay the tax, upon any person or persons liable to pay it, and any one who acts in the matter as agent or broker for such person or persons, who makes any sale, transfer or delivery of shares or certificates of stock; and (2) For failure to have stamps affixed, upon any person who in pursuance of the sale or transfer of or agreement, delivers any stock or evidence of the sale or transfer of or agreement to sell any stock, or bill or memorandum thereof, or who transfers or causes it to be transferred upon the books or records of the corporation, and any corporation the stock of which is sold or transferred which transfers or causes it to be transferred upon its books, without having such stamps affixed.<sup>15</sup> If any person makes use of an adhesive stamp to denote the payment of the stock transfer tax without effectually cancelling it by writing or stamping thereupon the initials of his name and the date upon which it is attached or used, and without cutting or perforating the stamp in a substantial manner so that it cannot be again used, such person is deemed guilty of a misdemeanor, and upon conviction thereof must pay a fine of not less than two hundred nor more than five hundred dollars, or be imprisoned for not less than six months, or both, in the discretion of the court.<sup>16</sup> Any person who (1) wilfully removes or knowingly permits to be removed or (2) alters or knowingly permits to be altered, the cancelling or defacing marks of any stamp with intent to use such stamp, or (3) knowingly or wilfully buys, prepares for use, uses, has in his possession or suffers to be used any washed, restored or counterfeit stamp, or (4) intentionally removes or causes to be removed or knowingly permits to be removed, any stamp, is guilty of a misdemeanor, and on conviction thereof is liable to a fine of not less than five hundred

<sup>13</sup> *Sheridan v. Tucker*, 145 A. D. 145, 129 N. Y. Supp. 18 (1911); L. 1905, c. 241, as amend'd L. 1906, c. 414.

<sup>15</sup> Tax L. § 272 (L. 1912, c. 292).

<sup>16</sup> Tax L. § 273 (L. 1911, c. 352).

nor more than one thousand dollars, or to imprisonment for not more than one year, or by both such fine and imprisonment, at the discretion of the court.<sup>17</sup> Any person, firm, company, association or corporation who or which does not procure, affix and cancel stock transfer tax stamps and pay the statutory tax, or delivers any stock or evidence of the sale or transfer of or agreement to sell any stock, or bill or memorandum thereof, or transfers or causes it to be transferred upon the corporate books or records; and any corporation which transfers it or causes it to be transferred on its books, without having the stamps affixed, in addition to other statutory penalties, forfeits to the People of the State a civil penalty of ten dollars for each and every share of stock so sold or transferred or entered upon the books of the corporation.<sup>18</sup>

<sup>17</sup> Tax L. § 275 (L. 1912, c. 292).

<sup>18</sup> Tax L. § 277 (L. 1912, c. 292).

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## CHAPTER XII.

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**§ 684. Foreign Corporations, Definitions.**—Every corporation which is not a domestic corporation—that is, incorporated by or under the laws of the State or Colony of New

York—is a foreign corporation, except as provided by the Code of Civil Procedure for the purpose of construing such code.<sup>1</sup> For the purpose of the Code of Civil Procedure a foreign corporation is defined to be any other than a corporation created by or under the laws of New York State, or located in New York State and created by or under the laws of the United States, or by or pursuant to the laws, in force in the Colony of New York, before the nineteenth day of April, in the year seventeen hundred and seventy-five.<sup>2</sup>

**§ 685. Id.: Rights, Powers and Liabilities Under New York Laws; In General.**—The courts of this State recognize not only the legal existence of corporations created under charters from other states, but the rights and immunities conferred upon the corporators, except so far as these are cut down by our own legislation.<sup>3</sup> “. . . a corporate franchise granted by one State cannot be revoked or annulled by the courts of another, and especially in a proceeding in which the corporation is not a party.”<sup>4</sup> “This State cannot prohibit a foreign corporation from selling within the State merchandise to be manufactured without the State; nor can it impose conditions which operate directly upon such a sale, so as to be a burden (*citations*); nor can it deny to such a corporation the right to maintain an action upon such a contract of sale until the corporation has procured the certificate . . .”<sup>5</sup> No law of New York makes it illegal for a foreign corporation to guarantee payment of the principal and interest as due, of bonds of another corporation; and such an obligation is valid at common law.<sup>6</sup> “. . . in case a foreign corporation is engaged in business in this State, where all its property is situated, it becomes amenable to the laws of this State to the same extent as a domestic corporation.”<sup>7</sup> Foreign corporations asking the privilege of doing business under the laws of New York cannot be exempt from the obligations and liabilities which attach to domestic corporations; “and as to the business transacted here, the company must be regarded as domiciled by the residence of its general agent and its local organization.”<sup>8</sup> The statutory provisions for the exam-

<sup>1</sup> Gen. Corp. L. § 3, subd. 5' (L. 1909, c. 28).

<sup>2</sup> C. C. P. § 3343, subd. 18.

<sup>3</sup> Merrick v. Van Santvoord, 34 N. Y. 208 (1866).

<sup>4</sup> Merrick v. Van Santvoord, 34 N. Y. 208 (1866).

<sup>5</sup> Hargraves Mills v. Harden, 25 Misc. 665, 56 N. Y. Supp. 937

(1898); Gen. Corp. L. § 15 (L. 1892, c. 687).

<sup>6</sup> Dougan v. Evansville & Terre Haute R. R. Co., 15 A. D. 483, 44 N. Y. Supp. 503 (1897).

<sup>7</sup> Gray v. Fuller, 17 A. D. 29, 44 N. Y. Supp. 883 (1897).

<sup>8</sup> Martine v. International Life Ins. Soc., 53 N. Y. 339 (1873).

ination of a corporation before trial apply to a foreign as well as to a domestic corporation.<sup>9</sup> A foreign corporation which has not obtained any license to do business in New York may nevertheless "file a lien under the Mechanics' Lien Law of this State, where the material is actually delivered in this State, and used in the construction of the building against which the lien is filed."<sup>10</sup> A contract made in the name of a foreign insurance corporation in this State by an appointee of its agent here, authorized by it to receive insurance proposals, to act as surveyor, to appoint surveyors and to attend to the duties of his agency as prescribed by the company, binds the corporation.<sup>11</sup> Although the Secretary of State seems to have authority to revoke a certificate issued to a foreign corporation to do business in New York only for failure by it to designate a person on whom process against it may be served, yet it seems that by authorizing an action by the People to redress violations by a foreign corporation of the statutes of the State, the Legislature intended to permit the court to annul the corporation's right to do business here.<sup>12</sup>

**§ 686. Id.: As to Real Estate.**—Any foreign corporation (1) doing business in New York State and (2) created under the laws of (a) the United States, or (b) any State or Territory of the United States, or (c) any foreign state or nation which borders on the United States of America and which by its laws confers similar privileges on corporations created by the laws of the State of New York, may acquire and hold such real property in New York State as may be necessary for its corporate purposes in the transaction of its business in this State, and may convey such realty by deed or otherwise in the same manner as a domestic corporation.<sup>13</sup> Any foreign corporation may purchase at a sale (1) upon the foreclosure of any mortgage held by it, or (2) upon any judgment or decree for debts due it, or (3) upon any settlement to secure such debts, any real property within New York State covered by or subject to such mortgage, judgment, decree or settle-

Payment of premiums by a citizen of the Confederate States on a life insurance policy issued by a foreign corporation doing business here is excused during the continuance of the Civil War.

<sup>9</sup> *Bluthenthal & Bickart, Inc. v. Crowley*, No. 2, 138 A. D. 845, 123 N. Y. Supp. 520 (1910); C. C. P. § 370 *et seq.*

<sup>10</sup> *Matter of Simonds Furnace Co.*,

30 Misc. 209, 61 N. Y. Supp. 974 (1900); Gen. Corp. L. §§ 15, 16.

<sup>11</sup> *Kuney v. Amazon Insurance Co.*, 36 Hun, 66 (1885).

<sup>12</sup> *People v. American Ice Co.*, 135 A. D. 180, 120 N. Y. Supp. 41 (1909); Gen. Corp. L. § 15; Gen. Corp. L. § 131.

<sup>13</sup> Gen. Corp. L. § 20 (L. 1910, c. 66).

ment; and may hold such realty for not exceeding five years from the date of such purchase, and convey it by deed or otherwise in the same manner as a domestic corporation.<sup>14</sup> Any foreign corporation may take by devise any real property situated within the State, and may hold it for not exceeding five years from the time when the right to the possession thereof vests in it as such devisee, and may convey it by deed or otherwise in the same manner as a domestic corporation.<sup>15</sup> The statutory permission to a foreign corporation to do business in New York and acquire realty therein like a domestic one does not confer the right of eminent domain.<sup>16</sup> "By comity we recognize the existence of a corporation in another State, and permit it to exercise the powers with which it is endowed in our own, unless such exercise is repugnant to our policy, or injurious to our interests. It is not more contrary to State policy to allow an artificial than a natural person of another State to take a testamentary gift of money from a donor residing here."<sup>17</sup> The law of this State prohibiting religious corporations from selling their real property without leave of the court does not extend to foreign corporations.<sup>18</sup> Under the laws of New York State a foreign corporation incorporated for the purpose of dealing in the purchase and sale of real property may come into this State and transact here such kind of corporate business.<sup>19</sup> A conveyance by a foreign corporation *de facto*, possessing some charter capacity to acquire and convey realty, of real estate in this State, is unimpeachable as *ultra vires* unless some statute of New York expressly or impliedly disable it from dealing in land in this State.<sup>20</sup>

<sup>14</sup> Gen. Corp. L. § 21 (L. 1909, c. 28).

<sup>15</sup> Gen. Corp. L. § 21 (L. 1909, c. 28).

<sup>16</sup> Whitaker v. Kilby, 55 Misc. 337, 106 N. Y. Supp. 511 (1907); Gen. Corp. L. §§ 15, 16, 17; Transp. Corps. L. §§ 100, 101, 102.

<sup>17</sup> Sherwood v. American Bible Society, 40 N. Y. (1 Keyes) 561 (1864).

<sup>18</sup> Muck v. Hitchcock, 212 N. Y. 283, 106 N. E. 75 (1914); Relig. Corps. L. § 12, and Gen. Corp. L. § 21.

<sup>19</sup> Lancaster v. Amsterdam Improvement Co., 140 N. Y. 576, 24 L.R.A. 322, 35 N. E. 964 (1894).

<sup>20</sup> Lancaster v. Amsterdam Improvement Co., 140 N. Y. 576, 24 L.R.A. 322, 35 N. E. 964 (1894).

On right of foreign corporation to own real estate, see note in 24 L.R.A. 322.

On conveyance by public service corporation to foreign corporation incapable of taking title, continued duty and liability of former to members of public, see note in 33 L.R.A. (N.S.) 362.

As to who may take advantage of statute rendering foreign corporation incapable of taking title to real property, see note in 33 L.R.A. (N.S.) 355.

**§ 687. Id.: As to Proceedings Supplementary to Execution.—**

“ Proceedings supplementary to execution are not authorized when based upon judgments against domestic corporations or against foreign corporations doing business in or having an agency in this State, except in proceedings brought by or against the People of the State. . . . A foreign corporation not doing business in the State, nor having any business or fiscal agency therein nor an agency for the transfer of its stock, does not come within the prohibition of the statute, and proceedings may be maintained upon a judgment against such a foreign corporation.”<sup>1</sup> The provisions of the Code of Civil Procedure relating to proceedings supplementary to execution apply to a foreign corporation doing no business and having no agency in this State.<sup>2</sup> A foreign corporation not having a place of business within this State cannot be examined as a judgment debtor in supplementary proceedings for the purpose of the appointment of a receiver of its assets to be applied upon an execution; but the creditor may seek relief in equity.<sup>3</sup>

**§ 688. Id.: As to Assignments, Preferential and Otherwise.—**

A foreign corporation may validly make a general assignment for the benefit of creditors under the laws of this State provided such assignment is also valid under the law of the corporation's domicile.<sup>4</sup> A general assignment in this State by a foreign corporation without preference except to employees in pursuance of New York laws will be upheld although void under the law of the corporation's home state.<sup>5</sup> “. . . the laws of New York prohibiting the transfer by a corporation of any portion of its assets to give preference to a creditor in anticipation of insolvency ” do not apply to a transfer by a foreign corporation.<sup>6</sup> The statute prohibiting preferences by a corporation in this State does not apply to foreign corporations; but a statute providing that, in all general assignments for the benefit of creditors, any preference is not valid

<sup>1</sup> *Keystone Publishing Co. v. Hill Dryer Co.*, 55 Misc. 625, 105 N. Y. Supp. 894 (1907); C. C. P. §§ 1812, 2463.

<sup>2</sup> *Logan v. McCall Publishing Co.*, 140 N. Y. 447, 35 N. E. 655 (1893); C. C. P. §§ 1810, 1812, 2463.

<sup>3</sup> *Stevens v. Page*, 4 Misc. 517, 24 N. Y. Supp. 698 (1893); C. C. P. §§ 2463, 1812, 1810.

<sup>4</sup> *Rogers v. Pell*, 154 N. Y. 518, 49 N. E. 75 (1898).

<sup>5</sup> *First National Bank v. Rock City Falls Paper Co.*, 22 Misc. 599, 50 N. Y. Supp. 746 (1898). The corporation was a manufacturing one but did its industrial business in New York.

<sup>6</sup> *Lane v. Wheelwright*, 69 Hun, 180, 23 N. Y. Supp. 576 (1893); *aff'd* 143 N. Y. 634, 37 N. E. 826.

except to the amount of one-third in value of the assigned estate left after deducting wages, etc., does apply to a foreign corporation.<sup>7</sup> A foreign corporation doing business in New York and transferring property to its officers in contemplation of insolvency is not subject to the statute in this State which would make such a transfer by a domestic corporation void.<sup>8</sup>

**§ 689. Id.: As to Monopoly, Merger and Sequestration.**—No foreign corporation doing business in New York State must combine with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life.<sup>9</sup> Any foreign stock corporation authorized to do business in New York State lawfully owning all the stock of any other stock corporation organized for or engaged in business similar or incidental to that of the possessor corporation may file in the office of the Secretary of State, under its common seal, a certificate of such ownership and of the resolution of its board of directors to merge such other corporation; and thereupon it acquires and becomes and is possessed of all the estate, property, rights, privileges and franchises of such other corporation, and they vest in and are held and enjoyed by it as fully and entirely and without change or diminution as they were before held and enjoyed by such other corporation, and are managed and controlled by the board of directors of the possessor corporation and in its name, but without prejudice to any liabilities of such other corporation or the rights of any creditors thereof.<sup>10</sup> The statute of this State relating to sequestration proceedings against corporations applies to domestic and not to foreign corporations; and while a New York court will entertain a creditor's bill to recover property which has been fraudulently disposed of by a foreign corporation in this State, it is necessary in order that jurisdiction should attach that the fraudulent disposition of the property should be proven.<sup>11</sup>

<sup>7</sup> *Matter of Halsted*, 42 A. D. 101, 58 N. Y. Supp. 898 (1899); St. Corp. L. § 48, now § 66; General Assignment Act, § 30 (L. 1877, c. 466).

<sup>8</sup> *Worthington v. Pfister Book-binding Co.*, 3 Misc. 418, 23 N. Y. Supp. 295 (1893); L. 1890, c. 564, § 48.

<sup>9</sup> St. Corp. L. § 14 (L. 1909, c. 61).

<sup>10</sup> St. Corp. L. § 15 (L. 1909, c. 61).

<sup>11</sup> *Dreyfus & Co. v. Seale & Co.*, 37 A. D. 351, 55 N. Y. Supp. 1111 (1899); C. C. P. § 1784.

**§ 690. Id.: As to Banking and Political Contributions.**—No foreign corporation other than one formed under or subject to the banking laws of New York State or of the United States, except as permitted by such laws, is by any implication or construction deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, of receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt for circulation as money, or of engaging in any other form of banking; or of receiving for transmission or transmitting money by draft, traveler's check, money order or otherwise, except an express company having contracts with railroad companies, or a transatlantic steamship company, or a telegraph company, or a corporation incorporated prior to the year eighteen hundred and fifty to promote the welfare of emigrants.<sup>12</sup> The prohibition against political contributions by corporations is made by the statute effective on all corporations "doing business in this state," and, consequently, must be held binding on foreign corporations if they do business in New York.<sup>13</sup> The subject of political contributions by corporations is fully treated in regard to domestic corporations, and reference is made to that treatment.<sup>14</sup>

**§ 691. Id.: License or Certificate to Do Business in New York, In General.**—As a condition of permitting the use by a foreign corporation of its institutions the State of New York prescribes certain rules with which foreign corporations must comply. The principal point to determine in the relations between a foreign corporation and the State of New York is whether or not it does business or employs capital in this State; and this point is fully treated in the following sections.

**§ 692. Id.: Papers To Be Filed Before License of Certificate Issues.**—Before granting to any foreign corporation a certificate to do business in New York, the New York Secretary of State must require it to file in his office (1) a copy of its charter or certificate of incorporation (a) in the English language and (b) sworn to, and (2) a statement (a) under its corporate seal and (b) the signature of its president, vice-president or other acting head, particularly setting forth (c) the business or objects of the corporation which it is engaged in carrying on or which it proposes to carry on within New York State, and (d) a place within the State of New York which is to be its principal place of business, and designating

<sup>12</sup> Gen. Corp. L. § 22 (L. 1909, c. 28).

<sup>14</sup> See § 432, *supra*.

<sup>13</sup> Gen. Corp. L. § 44 (L. 1909, c. 28).

(e) a person upon whom process against the corporation may be served within New York State, and specifying (f) the office or place of business of such person (which must be at the place where such corporation is to have its principal place of business within New York State) and the street and street number thereof if any, if within a city, or other suitable designation of the particular locality; and (3) the written consent of the person designated; and the Secretary of State may require the execution of any such designation or consent to be authenticated as he deems proper, and may refuse to file it without such authentication.<sup>15</sup> The statement filed by a foreign corporation with the New York Secretary of State, along with its charter, when it obtains a certificate to do business in New York, must contain a designation, authenticated as the Secretary of State deems proper, of a person upon whom process against the corporation may be served within New York State, who must have an office or place of business at the place where such corporation is to have its principal place of business in New York State, and who must give his written consent to such designation, also authenticated as the Secretary of State deems proper, to accompany the corporation's statement, which continues in force either until revoked by an instrument, authenticated as the Secretary of State deems proper, in writing (by the corporation) designating in like manner some other person upon whom process against the corporation may be served in New York State, or until the filing in the same office of a written revocation of such consent executed by the person so designated and authenticated as the Secretary of State deems proper.<sup>16</sup> The Secretary of State collects a fee of fifty dollars for filing the statement and designation and copy of certificate of incorporation of a foreign corporation desiring to do business in this State.<sup>17</sup>

**§ 693. Id.: Form of License or Certificate.**—No foreign stock corporation (other than a moneyed corporation) can do business in New York State without having first procured from the New York Secretary of State a certificate (1) that it has complied with all the requirements of law to authorize it to do business in New York State and (2) that the business of the corporation to be carried on in New York State is such as may be lawfully carried on by a corporation incorporated

<sup>15</sup> Gen. Corp. L. § 16 (L. 1909, c. 28).

<sup>17</sup> Executive L. § 26 (L. 1917, c. 69).

<sup>16</sup> Gen. Corp. L. § 16 (L. 1909, c. 28).

under the laws of New York State for such or similar business, or, if more than one kind of business, by two or more corporations so incorporated for such kinds of business respectively.<sup>18</sup>

**§ 694. Id.: What Corporations Entitled To.**—The New York Secretary of State must deliver such certificate to every such corporation so complying with the requirements of law, except that no such certificate must be granted to any foreign corporation (a) having the same name as an existing domestic corporation, or (b) having a name so nearly resembling the name of an existing domestic corporation as to be calculated to deceive, or (c) having as a part of its name the word "trust," "bank," "banking," "insurance," "assurance," "indemnity," "guarantee," "guaranty," "savings," "investment," "loan," or "benefit"—unless the corporation using one of such words be a moneyed or insurance corporation.<sup>19</sup> No business corporation can be authorized to do business in New York State unless its name has such word or words, abbreviation, affix or prefix, therein or thereto, as will clearly indicate that it is a corporation as distinguished from a natural person, firm or co-partnership; or unless such corporation uses with its corporate name, in New York State, such an affix or prefix.<sup>19a</sup> A foreign corporation will not be authorized by the New York Secretary of State to do business in New York if its name does not clearly indicate it to be a corporation, even though another foreign corporation of which it is the reorganized successor had the same name as that which the successor has, and was authorized to do business under that name in New York.<sup>19b</sup>

**§ 695. Id.: When Corporation "Doing Business" in New York So as to Need License.**—The statute requiring foreign corporations to obtain a certificate or license makes them procure it as a condition precedent to doing business in New York.<sup>20</sup> The question of whether a corporation is or is not doing business in New York arises in connection with its taxation as well as its licensing and is therefore discussed under a separate heading.<sup>1</sup>

**§ 696. Id.: Penalty for Not Obtaining License or Making and Keeping Alive Designation of Agent.**—Neither any foreign stock corporation nor any assignee of such corporation

<sup>18</sup> Gen. Corp. L. § 15 (L. 1909, c. 28).

<sup>19</sup> Gen. Corp. L. § 15 (L. 1909, c. 28).

<sup>19a</sup> Gen. Corp. L. § 6 (L. 1917, c. 594).

<sup>19b</sup> *People ex rel. United Verde Copper Co. v. Hugo*, 181 A. D. 149 (1917); Gen. Corp. L. §§ 6, 15.

<sup>20</sup> Gen. Corp. L. § 15 (L. 1909, c. 28).

<sup>1</sup> See § 697 *et seq.*, *infra*.

nor any person claiming under such corporation or such assignee, or under either of them, can, if such foreign stock corporation do business in New York State, maintain any action in New York State upon any contract made by it in this State, unless prior to the making of such contract the foreign corporation has procured the statutory certificate from the Secretary of State.<sup>2</sup> The New York Secretary of State may revoke the authority of a foreign corporation to do business in New York if it does not, within thirty days of (a) the death or (b) removal from the place where the corporation has its principal place of business within New York of its designated agent or (c) filing by such agent of revocation of his consent to act as such, designate in like manner and with such authentication as the Secretary of State deems proper another person upon whom process against the corporation may be served within New York State; and process against the corporation in an action upon any liability incurred within New York State before such revocation may, after such death or removal or revocation of consent and before another designation is made, be served upon the Secretary of State.<sup>3</sup> The Secretary of State may refuse to file any designation by a foreign corporation of an agent on whom process may be served in this State, or any revocation by the corporation of such designation or by the agent of his consent to be such, or any consent by the agent to act as such, if such designation, revocation or consent be executed without such authentication as the Secretary of State deems proper.<sup>4</sup>

**§ 696-a. Id.: Revocation for Nuisance.**—Any corporation organized under the laws of any State other than New York and other than corporations operating railroad or steamboat lines, which so conducts its business, without New York State, by the emission or discharge of dust, smoke, gas, steam or offensive, noisome or noxious odors or fumes, so as to unreasonably injure or endanger the health or safety in New York State of any considerable number of the people of New York State, is deemed guilty of a nuisance and its certificate of authority to do business in New York State is deemed revoked and annulled in the manner prescribed by the statute and must not be revived except as prescribed in the statute.<sup>5</sup> Complaints may be made to the State Commissioner of Health

<sup>2</sup> Gen. Corp. L. § 15 (L. 1909, c. 28).

<sup>3</sup> Gen. Corp. L. § 16 (L. 1909, c. 28).

<sup>4</sup> Gen. Corp. L. § 16 (L. 1909, c. 28).

<sup>5</sup> Gen. Corp. L. §§ 200, 202 (L. 1917, c. 292).

by any person, association or corporation aggrieved, by petition or complaint in writing, setting forth any act or thing done or omitted to be done claimed to constitute a nuisance within the provisions of the statute.<sup>6</sup> Upon the presentation of such a complaint, the State Commissioner of Health must cause a copy thereof to be served upon the corporation complained of in the manner provided by law for the service of a summons, accompanied by a notice directed to such corporation requiring that the matters complained of be abated or that the charges be answered in writing within a time to be specified by such Commissioner.<sup>7</sup> If the charges contained in such complaint be not thus satisfied, and it appears to the Commissioner of Health that there are reasonable grounds therefor, he must cause such charges to be investigated in such manner and by such means as he deems proper, and fix a time for a hearing upon such complaint and cause notice thereof to be forwarded to the complainant and the corporation complained of.<sup>8</sup> If the State Commissioner of Health, or his successor, after such notice to such corporation, and an opportunity for a hearing being given it, finds that it is so conducting its business, without New York State, as to unreasonably injure or endanger the health or safety in New York State of any considerable number of people of New York State, he must file such findings in duplicate in the offices of the Secretary of State and the Attorney-General.<sup>9</sup> A certificate of the Secretary of State giving notice of the filing of such findings must be served upon the corporation or upon its designated agent and thereupon its certificate of authority to do business in New York State is suspended for the period of thirty days.<sup>10</sup> Any person who exercises or attempts to exercise any powers by virtue of a certificate of authority which has been so suspended, during the period of such suspension, is guilty of a misdemeanor.<sup>11</sup> If at the expiration of such period the State Commissioner of Health upon further proof and opportunity to such offending corporation to be heard finds and determines that it continues to conduct its business so as to constitute such nuisance, he must cause a notice of such determination to be served upon the corporation or its designated agent and published once

<sup>6</sup> Gen. Corp. L. § 200 (L. 1917, c. 292).

<sup>7</sup> Gen. Corp. L. § 200 (L. 1917, c. 292).

<sup>8</sup> Gen. Corp. L. § 200 (L. 1917, c. 292).

<sup>9</sup> Gen. Corp. L. § 200 (L. 1917, c. 292).

<sup>10</sup> Gen. Corp. L. § 200 (L. 1917, c. 292).

<sup>11</sup> Gen. Corp. L. § 200 (L. 1917, c. 292).

a week for two successive weeks in the official State paper.<sup>12</sup> On the tenth day after such service and publication the certificate of authority of such corporation to do business in New York State is deemed to be revoked and cancelled.<sup>13</sup> Any person who exercises or attempts to exercise any powers by virtue of a certificate of authority which has been so revoked is guilty of a misdemeanor.<sup>14</sup> When any corporation has ceased to perform the acts or maintain the nuisance by reason of which its certificate of authority has been revoked and satisfactorily guarantees that it will not perform such acts or maintain such nuisance in the future, its certificate of authority may be revived in the manner prescribed by the statute with the same force and effect as if such certificate had not been revoked.<sup>15</sup> If such corporation files a petition in writing with the New York State Commissioner of Health setting forth that the nuisance in fact no longer exists and it appears that there are reasonable grounds therefor, the Commissioner must cause an investigation to be made in such manner and by such means as he deems proper, and if after such investigation he finds and certifies that such corporation has ceased to conduct its business so as to constitute such nuisance and files such findings in duplicate in the offices of the Secretary of State and Attorney-General, the corporation's certificate of authority is deemed to be revived with full force and effect.<sup>16</sup> A supplemental certificate of the Secretary of State must be served and published in like manner, and upon such service and publication such revival becomes effective; but such revival does not prevent a subsequent revocation of the certificate of the same corporation for the same or a similar offense.<sup>17</sup>

**§ 696-b. Id.: Voluntary Surrender.**—A foreign corporation having authority under section sixteen of the General Corporation Law to do business in New York State may surrender such authority by filing in the office of the New York State Secretary of State a certificate (a) under its corporate seal, and (b) under the signature of its president, vice-president or other acting head, with (c) proof attached of execution in the form prescribed by section three hundred and nine of the Real Property Law, and with (d) the certificate of authority attached (unless such certificate of authority has

<sup>12</sup> Gen. Corp. L. § 200 (L. 1917, c. 292).

<sup>13</sup> Gen. Corp. L. § 200 (L. 1917, c. 292).

<sup>14</sup> Gen. Corp. L. § 200 (L. 1917, c. 292).

<sup>15</sup> Gen. Corp. L. § 201 (L. 1917, c. 292).

<sup>16</sup> Gen. Corp. L. § 201 (L. 1917, c. 292).

<sup>17</sup> Gen. Corp. L. § 201 (L. 1917, c. 292).

been lost or destroyed, in which event there must be attached an affidavit of the president, vice-president, secretary or other officer of the corporation to the effect that such certificate has been lost or destroyed, as the case may be).<sup>18</sup> Such certificate of surrender must set forth: (1) The name of the corporation; (2) the State under the laws of which it is formed; (3) the date on which it received authority to do business in New York State; (4) revocation of its designation of the person upon whom process against it might be served in New York State; (5) the surrender of its authority to do business in New York State and, as evidence of such surrender, its return to the New York State Secretary of State, for cancellation, of its certificate of authority to do business in New York State, or its loss or destruction.<sup>19</sup> On the filing of such certificate the Secretary of State must make a note of the filing thereof on his index of corporations and thereupon the corporation's authority to do business within New York State ceases and determines, and no such corporation doing business in New York State after the filing of such certificate of surrender of authority can maintain any action in New York State upon any contract made by it in New York State subsequent to the filing of such certificate of surrender of authority.<sup>20</sup> The filing of such certificate does not, however, affect any action pending at the time of such surrender, or affect any action in New York State upon any contract made by the corporation in New York State before the filing of the certificate of surrender of authority.<sup>1</sup> Process against the corporation in an action upon any liability incurred within New York State before the filing of such certificate of surrender of authority may, after the filing thereof, be served upon the Secretary of State of the State of New York.<sup>2</sup> At the time of such service the plaintiff must pay the Secretary of State two dollars, to be included in his taxable costs and disbursements, and the Secretary of State must forthwith mail a copy of such process to such corporation, if its address or the address of any officer thereof is known to him.<sup>3</sup>

**§ 697. Doing Business or Employing Capital in New York, Governing Statutes.**—One statute prohibits a foreign stock corporation from doing business in New York unless it has

<sup>18</sup> Gen. Corp. L. § 16-a (L. 1918, c. 193).

<sup>19</sup> Gen. Corp. L. § 16-a (L. 1918, c. 193).

<sup>20</sup> Gen. Corp. L. § 16-a (L. 1918, c. 193).

<sup>1</sup> Gen. Corp. L. § 16-a (L. 1918, c. 193).

<sup>2</sup> Gen. Corp. L. § 16-a (L. 1918, c. 193).

<sup>3</sup> Gen. Corp. L. § 16-a (L. 1918, c. 193).

been licensed to do it by the Secretary of State; and prohibits such a corporation so doing business from suing in this State on any contract made by it in this State before obtaining such a license.<sup>5</sup> A second statute requires a foreign corporation doing business in New York to appoint a resident agent upon whom process against it may be served as a condition precedent to licensing it.<sup>6</sup> A third statute requires every foreign corporation doing business in New York to make an annual report to the Secretary of State.<sup>7</sup> A fourth statute requires every foreign corporation having an office for the transaction of business in New York to keep a stock-book.<sup>8</sup> A fifth statute imposes upon a foreign corporation authorized to do business under the General Corporation Law a license fee for the privilege of exercising its corporate franchises or carrying on its business in New York State, to be computed on the basis of its capital stock employed by it within this State.<sup>9</sup> A sixth statute imposes upon a foreign manufacturing or mercantile corporation for the privilege of doing business in New York State an annual franchise tax to be computed upon the basis of its net income for the preceding year.<sup>10</sup> A seventh statute imposes upon a foreign corporation, other than a manufacturing or mercantile one, "doing business" in this State, an annual franchise tax to be computed on the basis of the amount of its capital stock employed during the preceding year within New York State.<sup>11</sup> An eighth statute taxes non-residents doing business in New York State on the capital invested in such business.<sup>11a</sup> It is, therefore, important to know when the courts will consider a foreign corporation to be doing business or employing capital in New York.

**§ 698. Id.: In General.**—The policy of New York State is not to impose any unconscionable restrictions on the transactions of foreign corporations within its boundaries, and its statutory requirement that they obtain certificates from its

<sup>5</sup> Gen. Corp. L. § 10 (L. 1909, c. 28).

<sup>6</sup> Gen. Corp. L. § 16 (L. 1909, c. 28).

<sup>7</sup> St. Corp. L. § 34 (L. 1909, c. 61).

<sup>8</sup> St. Corp. L. § 33 (L. 1909, c. 61).

<sup>9</sup> Tax L. § 181 (L. 1917, c. 490).

<sup>10</sup> Tax L. § 209 (L. 1918, c. 276).

<sup>11</sup> Tax L. § 182; Tax L. § 207 (L. 1917, c. 726).

<sup>11a</sup> Tax L. § 7 (L. 1909, c. 61).

Transactions pursuant to agreement with local dealer to sell product of foreign corporation within State as doing business therein, see note in 44 L.R.A.(N.S.) 1094.

On effect of agreement by foreign corporation to install article within the State to bring it within statute regulating foreign corporations, see note in 14 L.R.A.(N.S.) 674.

Secretary of State if they do business here is not intended to prohibit "all corporate transactions by foreign corporations, irrespective of their nature, or of the condition under which they occurred . . . To bring into operation the statutory provision, the facts should show more than a solitary, if not accidental, transaction . . . They should establish that the corporation was conducting a continuous business. To be 'doing business in this State' implies corporate continuity of conduct in that respect; such as might be evidenced by the investment of capital here, with the maintenance of an office for the transaction of its business, and those incidental circumstances, which attest the corporate intent to avail itself of the privilege to carry on a business."<sup>12</sup> A foreign corporation, by refraining from making any contract within this State, cannot transact any amount of business here and escape taxation while still having recourse to the New York courts to enforce its rights.<sup>13</sup> A foreign corporation not doing business in New York may sue an individual in this State though it have no license to do business in this State.<sup>14</sup> "It is only when a foreign corporation, 'doing business in this State,' in competition with domestic corporations, has made a contract within this State, that it is denied the aid of our courts in its enforcement unless it has complied with the statute, and has become, in practical effect, a domestic corporation for all purposes . . . it is demanded that in return for the privileges of suing upon local contracts in the courts of this State, the foreign corporation must place itself in a situation where it can be sued with equal convenience within this State."<sup>15</sup> A certificate of authority to do business in New York is not a condition precedent to an action by a foreign corporation in this State unless it appears that it is doing business in New York.<sup>16</sup>

<sup>12</sup> Penn Collieries Co. v. McKeever, 183 N. Y. 98, 2 L.R.A. (N.S.) 127, 75 N. E. 935 (1905); Gen. Corp. L. § 15.

<sup>13</sup> International Text Book Co. v. Connelly, 67 Misc. 49, 124 N. Y. Supp. 603 (1910); aff'd 140 A. D. 939, 125 N. Y. Supp. 1125; Tax L. § 181; Gen. Corp. L. § 15.

<sup>14</sup> Batchelder & Lincoln Co. v. Knopf, 54 A. D. 329, 66 N. Y. Supp. 513 (1900); Gen. Corp. L. § 15 (L. 1892, c. 687).

<sup>15</sup> Eclipse Silk Mfg. Co. v. Hiller, 145 A. D. 568, 129 N. Y. Supp. 879 (1911); Gen. Corp. L. § 15.

<sup>16</sup> Lukens Iron & Steel Co. v. Payne, 13 A. D. 11, 43 N. Y. Supp. 376 (1897); L. 1892, c. 687, § 15. See now Gen. Corp. L. § 15.

Compelling designation of person upon whom process may be served as a condition of right of foreign corporation to do business in the State, see note in 1 L.R.A. (N.S.) 558.

§ 699. **Id.: When Business Must Be Done.**—Obtaining by a foreign corporation of a license to do business in New York some time before the year in which it is assessed for a personal property tax is not conclusive that it is carrying on business in this State so as to be liable to taxation.<sup>17</sup> The prohibition against a foreign corporation which does business in New York suing on a contract made here unless it has a license applies not only to a company doing business here at the time the action is commenced but doing business before getting a license.<sup>18</sup> Under a statute that no foreign corporation doing business in New York should do so after December thirty-first, eighteen hundred ninety-two, without having procured a certificate from the Secretary of State, but that any contract made prior thereto might be enforced in the State thereafter, a foreign corporation shipping goods January fourth, eighteen hundred ninety-three, pursuant to an order delivered to it in another State on November first, eighteen hundred ninety-two, is not doing business contrary to the statute.<sup>19</sup>

§ 700. **Id.: What Kind of "Business" Is Meant By Statute.**—The words "doing business" in the statutes regulating domestic has no different meaning when used in the statutes regulating foreign corporations, and means simply to put them on an equal footing, not inhospitality to the foreign companies.<sup>20</sup> In determining whether a foreign corporation is doing business in this State so as to be precluded from suing in New York unless it has obtained a certificate from the Secretary of State, "doing business relates to the ordinary business which the corporation was organized to do."<sup>1</sup> The business of a foreign corporation done in this State which requires it to obtain a license before it can sue in New York on a contract made in New York is such business as it was

<sup>17</sup> *People ex rel. Goetz Silk Mfg. Co. v. Wells*, 42 Misc. 86, 85 N. Y. Supp. 533 (1903); *aff'd* 93 A. D. 613, 87 N. Y. 1144; L. 1896, c. 908, § 7.

<sup>18</sup> *Portland Co. v. Hall & Grant Construction Co.*, 121 A. D. 779, 106 N. Y. Supp. 649 (1907); Gen. Corp. L. § 15 (L. 1892, c. 687, as amend'd).

<sup>19</sup> *Novelty Mfg. Co. v. Connell*, 88 Hun, 254, 34 N. Y. Supp. 717 (1895); L. 1892, c. 687, § 15.

<sup>20</sup> *Angldile Computing Scale Co.*

*v. Gladstone*, 164 A. D. 370, 149 N. Y. Supp. 807 (1914); Gen. Corp. L. § 15.

<sup>1</sup> *Kline Brothers & Co. v. German Union Fire Ins. Co.*, 147 A. D. 790, 132 N. Y. Supp. 181 (1911); *aff'd* 210 N. Y. 534, 103 N. E. 1125; Gen. Corp. L. § 15. A Florida tobacco corporation having an office in this State used by its president and contracting for insurance here for its property there is not "doing business" in this State.

primarily organized to do and not the incidental business of insuring its property located in another state, nor yet the employment of an agent to solicit orders to be sent to and accepted by it, doing business in another state.<sup>2</sup> The statute requiring a foreign corporation "doing business" in this State to secure a certificate from the Secretary of State, etc., is to protect domestic corporations and is not generally violated, if the foreign corporation is doing its regular business within its home State and is not maintaining a branch with offices, etc., in this State, by its making contracts, etc., here through agents, unless a manipulation of agents violate the spirit of the statute.<sup>3</sup>

**§ 701. Id.: Sporadic Transactions in New York.**—A single act cannot constitute doing business by a foreign corporation in this State.<sup>4</sup> Two distinct sales only alleged in a complaint by a foreign corporation does not constitute doing business in this State so as to require a license by the plaintiff as a prerequisite to suit.<sup>5</sup> "The crucial test in (*sic*) doing business within the meaning of this statute is not an isolated transaction within the State or the transshipment of goods from the home office, pursuant to orders taken by drummers within the State, but it is the establishment of an agency or branch office within our State limits."<sup>6</sup> A foreign corporation is not doing business in this State so as to be precluded from suing on a contract made in New York because of failure to procure a certificate from the Secretary of State if the transaction in question was the only one in the nature of a sale in which it had engaged in this State and consisted of preliminary negotiations had in an office in this State for which it paid nothing though its name appeared thereon and it had some of its property there; and of the vendee signing an order blank and cheque which were sent by the person having the office

<sup>2</sup> Cummer Lumber Co. v. Associated Manufacturers' Ins. Co., 67 A. D. 151, 73 N. Y. Supp. 668 (1901); *aff'd* 173 N. Y. 633, 66 N. E. 1106.

<sup>3</sup> Angldile Computing Scale Co. v. Gladstone, 164 A. D. 370, 149 N. Y. Supp. 807 (1914); Gen. Corp. L. § 15.

<sup>4</sup> New York Terra-Cotta Co. v. Williams, 102 A. D. 1, 92 N. Y. Supp. 808 (1905); *aff'd* 184 N. Y. 579, 77 N. E. 1192; Gen. Corp. L. § 15 (L. 1901, c. 583).

<sup>5</sup> Ozark Cooperage Co. v. Quaker

City Cooperage Co., 112 A. D. 62, 98 N. Y. Supp. 113 (1906); Gen. Corp. L. § 15 (L. 1904, c. 490).

<sup>6</sup> Vaughn Machine Co. v. Lighthouse, 64 A. D. 138, 71 N. Y. Supp. 799 (1901); Gen. Corp. L. § 15 (L. 1892, c. 687, § 15). An incorporator made in this State a contract with a resident that the corporation would deliver him a machine. The corporation sold machines by correspondence as well as by personal contact, sending them direct from out of the State into the State. It had no office in New York.

where the corporation's was to the latter at its home address, whence the goods were shipped; and the person received his commission.<sup>7</sup> A foreign corporation is not doing business in this State so as to be precluded from suing therein in the absence of a certificate from the Secretary of State because deliveries were made by it from time to time over a period of ten months under a contract negotiations for which were begun in New York and continued largely by correspondence from its place of business in a foreign state, it having no place of business in New York.<sup>8</sup> The facts that letters were addressed by individuals in this State to a foreign corporation in another State which had no office here, never obtained any permission to transact business in this State and did not generally transact business with other persons in this State, soliciting a renewal policy of insurance on property here, and that the foreign corporation accepted and mailed the policy to this State, are not sufficient to constitute the transaction of business by it in New York.<sup>9</sup> A foreign corporation doing business within its own State may come into this State and enforce payment of a claim arising out of a sale of goods within this State although it has obtained no certificate from the Secretary of State of New York.<sup>10</sup> A foreign corporation is not doing business in this State within the meaning of the statute requiring it if so doing to procure a license from the Secretary of State when it has done no business therein beyond presenting for sale and selling to individual purchasers, or floating on the market, either its stocks or its bonds.<sup>11</sup>

**§ 702. Id.: When Has Office in New York, In General.—**

“ . . . it is not necessary that a foreign corporation maintain an office in this State in order to transact business here and to come within the prohibition of the statute.”<sup>12</sup> A foreign corporation which has its “ home office ” in this

<sup>7</sup> *Acorn Brass Mfg. Co. v. Rutenberg*, 147 A. D. 533, 132 N. Y. Supp. 600 (1911); Gen. Corp. L. § 15, as amend'd L. 1901, cc. 96, 538, and L. 1904, c. 490.

<sup>8</sup> *Haddam Granite Co., Inc., v. Brooklyn Heights R. R. Co.*, 131 A. D. 685, 116 N. Y. Supp. 96 (1909); Gen. Corp. L. § 15.

<sup>9</sup> *Huntington v. Sheehan*, 206 N. Y. 486, 100 N. E. 41 (1912).

<sup>10</sup> *Angildile Computing Scale Co. v. Gladstone*, 164 A. D. 370, 149

N. Y. Supp. 807 (1914); Gen. Corp. L. § 15.

<sup>11</sup> *Union Trust Co. v. Sickels*, 125 A. D. 105, 109 N. Y. Supp. 262 (1908); Gen. Corp. L. § 15.

Single or isolated transaction by foreign corporation as doing business within the State, see note in 10 L.R.A.(N.S.) 693.

<sup>12</sup> *Woodbridge Heights Construction Co. v. Gippert*, 92 Misc. 204, 155 N. Y. Supp. 363 (App. T. 1915); Gen. Corp. L. § 15.

State does business here.<sup>13</sup> A foreign corporation maintaining in this State its only business office whence all the products of its mills at home are sold and moneys collected is doing business in New York.<sup>14</sup> A foreign corporation maintaining numerous offices in New York and superintendents in charge thereof, with power of employment and dismissal of assistants, qualified to give and giving mathematical instruction is doing business in New York.<sup>15</sup> A foreign corporation is not subject to a franchise tax in this State on the theory that it is doing business in New York because it has an office in New York which takes orders for insertion of advertisements in foreign states, sends the orders to the corporation's home office, and deposits the charge in New York to the credit of the corporation which cheques against it in its home state.<sup>16</sup> A foreign corporation authorized to do business in New York is not "doing business" in this State so as to be subject to municipal taxation because it has an office here with furniture used for directors' meetings and declaration of dividends on preferred stock, and because it has money in bank here used to pay such dividends.<sup>17</sup>

**§ 703. Id.: Plus Something More.**—A foreign corporation cannot claim that it is not doing business in the State and has no capital invested in it so as to escape taxation if it imports foreign goods and sells them here; has continuity in the course of its business; maintains an office here at which the proceeds of sales of its goods are received and deposited in bank; and has here a bank account out of which are defrayed all the expenses of the business in this country, the surplus only being remitted to its native country at a convenient period.<sup>18</sup> A foreign corporation which has obtained a license to do business in New York State, maintains an office, sales-room and storage rooms and keeps goods for sale and sells them in this State, is carrying on a permanent business in

<sup>13</sup> *Strout Farm Agency v. Hunter*, 85 Misc. 476, 148 N. Y. Supp. 924 (1914); Gen. Corp. L. § 15.

<sup>14</sup> *People ex rel. Union Sulphur Co. v. Glynn*, 125 A. D. 328, 109 N. Y. Supp. 868 (1908); Tax L. §§ 181, 182 (L. 1907, c. 734).

<sup>15</sup> *International Textbook Co. v. Connelly*, 67 Misc. 49, 124 N. Y. Supp. 603 (1910); *aff'd* 140 A. D. 939, 125 N. Y. Supp. 1125; Gen. Corp. L. § 15.

<sup>16</sup> *People ex rel. Kellogg Co. v. Roberts*, 30 A. D. 150, 51 N. Y.

Supp. 686 (1898). "Office conveniences are permitted here to a foreign corporation doing business in another State to solicit orders to be executed in other States without liability to our franchise tax."

<sup>17</sup> *People ex rel. Dives-Pelican Co. v. Feitner*, 77 A. D. 189, 78 N. Y. Supp. 1017 (1902); L. 1896, c. 908, §. 7.

<sup>18</sup> *People ex rel. Tracy & Oppenheim Co. v. Wells*, 183 N. Y. 264, 76 N. E. 24 (1905).

New York and is taxable, even though it does not manufacture any of its goods in New York.<sup>19</sup> A foreign corporation is "doing business" in this State so as to be liable to taxation when its officers have their offices at permanent offices of the company here, in which the directors hold their annual meetings and declare and pay dividends; when its bullion is sent and sold here and the proceeds received here and partly used, deposited and loaned here.<sup>20</sup> A foreign corporation which has obtained a license to do business in New York, has uninterruptedly sold and delivered goods from its principal place of business in this State, has kept on hand continuously a stock of goods, has had a regular bank account to defray local expenses, has determined in its New York office terms of sale, credits and collections, etc., is taxable in New York, though the proceeds over the expenses of the office in this State were at once remitted to the home office and it did no manufacturing in New York.<sup>1</sup> A foreign corporation has no capital stock employed in New York so as to be subject to taxation if it manufactures all its goods in its home state, rents part of a building in New York in which is an office in charge of a selling agent where are kept and distributed to a number of traveling agents and to customers samples, pays about twenty employees and incidental expenses from the New York office by monthly remittances from the home office, has an average monthly balance in bank in New York of five thousand dollars (less than its ever present outstanding indebtedness in New York), takes orders at its New York office both from its salesmen in this State and others, all of which are approved or disapproved at the home office and filled thence.<sup>2</sup> A foreign corporation should not be subjected to taxation on capital invested in this State when it maintains a sales-room in New York City, keeps an average stock on hand there of \$8,000, has half a dozen employees there, keeps no bank account in the State but gets money needed here weekly by draft on it in another State, and goods shipped it here are mainly reshipped to places outside this State.<sup>3</sup> A foreign corporation which

<sup>19</sup> People *ex rel.* Carey Manufacturing Co. v. Commissioners, 39 Misc. 282, 79 N. Y. Supp. 485 (1902).

<sup>20</sup> People v. Horn Silver Mining Co., 105 N. Y. 76, 11 N. E. 155 (1887); L. 1880, c. 542, as amend'd L. 1881, c. 361, and L. 1882, c. 151. See now Tax L. § 182.

<sup>1</sup> People *ex rel.* Collar Co. v. Feit-

ner, 31 Misc. 553, 65 N. Y. Supp. 518 (1900).

<sup>2</sup> People *ex rel.* Washington Mills Co. v. Roberts, 8 A. D. 201, 40 N. Y. Supp. 417 (1896); *aff'd* 151 N. Y. 619, 45 N. E. 1134; L. 1890, c. 522.

<sup>3</sup> People *ex rel.* Tower v. Wells, 98 A. D. 82, 90 N. Y. Supp. 313 (1904); *aff'd* 182 N. Y. 553, 75

has an office in this State for the transaction of business, makes a contract here to supply materials for and to build elevators, builds them, furnishing the labor needed to build them and alleges as ground of recovery a substantial performance of the contract by which they were built here, is doing business in New York.<sup>4</sup> A deposit paid and to be repaid in New York on non-acceptance of a contract by a foreign corporation at its home office and maintenance by it of an office in this State from which it carried on business in the State, constitute a doing of business in the State precluding the corporation from suing on the contract here in the absence of a certificate from the Secretary of State to it.<sup>5</sup> A foreign corporation is not "doing business" in this State so as to be debarred from suing therein unless it has a license if it has no office or capital here; and consigns its goods to a storekeeper paying his own rent who sells them on salary and commission under an agreement terminable by him or it on notice, the payments being made direct to a bank.<sup>6</sup>

**§ 704. Id.: Transactions in New York Through Agents or Salesmen.**—A foreign corporation manufacturing goods in its home state and occasionally shipping them to New York pursuant to orders taken by agents within this State is not "doing business" in New York.<sup>7</sup> "But soliciting and taking orders within the State by commercial travelers is not 'doing business within this State' within the meaning of the act where plaintiff has no capital employed, nor goods stored, nor branch office within the State."<sup>8</sup> A foreign corporation shipping goods into New York on orders obtained by its drummers in this State is not doing business in this State so as to be precluded from suing for want of a license.<sup>9</sup> That orders for goods sold by a foreign corporation suing to recover their price were obtained in this State is not equivalent to their being sold and delivered in New York; and does not constitute "doing business" in this State.<sup>10</sup> Orders

N. E. 1132; Tax L. § 7 (L. 1896, c. 908).

<sup>4</sup> Portland Co. v. Hall & Grant Construction Co., 121 A. D. 779, 106 N. Y. Supp. 649 (1907); Gen. Corp. L. § 15 (L. 1892, c. 687, as amend'd).

<sup>5</sup> American Case & Register Co. v. Griswold, 143 A. D. 807, 128 N. Y. Supp. 206 (1911); Gen. Corp. L. § 15.

<sup>6</sup> Lederweeke v. Capitelli, 92 Misc. 260, 155 N. Y. Supp. 651 (1915); Gen. Corp. L. § 15.

<sup>7</sup> Novelty Tufting Machine Co. v. Hutkoff, 56 Misc. 522, 107 N. Y. Supp. 88 (1907); Gen. Corp. L. § 15.

<sup>8</sup> Vio Chemical Co. v. Studholme, 53 Misc. 470, 103 N. Y. Supp. 463 (1907); aff'd 121 A. D. 927; Gen. Corp. L. § 15.

<sup>9</sup> Murphy Varnish Co. v. Connell, 10 Misc. 553, 32 N. Y. Supp. 492 (1894); Gen. Corp. L. § 15.

<sup>10</sup> St. Albans Beef Co. v. Aldridge, 112 A. D. 803, 99 N. Y. Supp. 398

obtained by traveling salesmen upon exhibition for a foreign corporation do not constitute doing business in this State so as to preclude the corporation from suing on a contract made by it in this State because it has obtained no certificate from the Secretary of State.<sup>11</sup> A foreign corporation may sue in this State without having obtained a license to do business on a contract made in New York by its traveling salesman subject to approval and execution by it at its home office.<sup>12</sup> A foreign corporation soliciting orders in New York, by agents or traveling salesmen sent from its home office, which did not become binding till accepted and approved at its home office is not "doing business within this State."<sup>13</sup> "The procuring of orders for goods by commercial agents traveling in this State, which orders have to be transmitted to the home office in another State for approval there, and then the goods shipped from the home place of business to the purchaser in this State, where the foreign corporation has no office or place of business, does not, I think, constitute 'doing business in this State' within the meaning of the statute."<sup>14</sup> A foreign corporation soliciting orders in New York through agents which are filled direct from its factory in its home state to the buyer, having, as an incident to such solicitation, a lease of an office in New York City in which it kept samples worth several thousand dollars, and also keeping a bank account there with an average balance of several thousand dollars, is not taxable for franchise tax on its business in this State or on account of such lease, the value of such samples or such bank balance.<sup>15</sup> A foreign corporation taking orders through an agent residing in New York and paying him his salary and the rent of his house where he took orders and it temporarily stored packages in process of delivery from its home office, is not doing business in New York so as to be liable to a franchise tax.<sup>16</sup>

(1906); Gen. Corp. L. § 15 (L. 1904, c. 490).

<sup>11</sup> *Page & Co. v. Sherwood*, 146 A. D. 618, 131 N. Y. Supp. 322 (1911); Gen. Corp. L. § 15.

<sup>12</sup> *National Knitting Co. v. Bronner*, 20 Misc. 125, 45 N. Y. Supp. 714 (1897); L. 1892, c. 687, § 15.

<sup>13</sup> *Jones v. Keeler*, 40 Misc. 221, 81 N. Y. Supp. 648 (1903); L. 1901, c. 538.

<sup>14</sup> *Tallapoosa Lumber Co. v. Holbert*, 5 A. D. 559, 39 N. Y. Supp.

432 (1896); Gen. Corp. L. § 15 (L. 1892, c. 687). The purchaser gave his note to the foreign corporation which was executed, made payable and delivered to its agent in this State, but was given for an order which, though taken here, was transmitted to and accepted in its home State.

<sup>15</sup> *People ex rel. Smith Co. v. Roberts*, 27 A. D. 455, 50 N. Y. Supp. 355 (1898).

<sup>16</sup> *People ex rel. Brewing Co. v.*

**§ 705. Id.: Transactions Through Commission Merchants in New York.**—The obtaining by a resident commission merchant of orders for goods in behalf of a foreign corporation, the sending of such orders to it for approval and the filling thereof by transmission of the goods direct from its factories, is not doing business in New York so as to subject it to a franchise tax.<sup>17</sup> The consignment of goods by a non-resident or foreign manufacturing corporation to a resident commission-merchant for cash sale does not constitute a doing business by the corporation within this State within the meaning of the statute imposing a franchise tax.<sup>18</sup> A foreign corporation is not doing business in this State so as to preclude it from suing without first having obtained a license because its president came to a city in New York and arranged with a commission man there to buy fruit in the foreign state and ship it to such city, billed at cost and accompanied by a draft on the commission man for the cost which the latter was to honor, and then sell the fruit and divide any profit equally with the foreign corporation.<sup>19</sup> A foreign corporation sending goods from its home office direct to a purchaser in New York on an order taken in this State by commission merchants is not doing business in New York so as to be precluded from suing for the purchase price in this State because of its failure to procure a license and pay a tax.<sup>20</sup> A foreign corporation having no office in this State, but consigning the product it manufactures in its foreign mill to a commission merchant doing business in this State, with authority to sell the goods, receive the proceeds and remit is not doing business in this State so that it cannot sue in New York without procuring a certificate from the Secretary of State authorizing it to do business in New York.<sup>1</sup>

**§ 706. Id.: Miscellaneous Cases.**—A foreign corporation is not carrying on business in New York so as to be liable to a personal property tax if it has an agent in this State whose

Roberts, 22 A. D. 282, 47 N. Y. Supp. 949 (1897); L. 1895, c. 240; L. 1880, c. 542, as amend'd.

Authorities discussing the question as to whether soliciting trade is doing business within the State are collated in notes in 9 L.R.A.(N.S.) 1214; 23 L.R.A.(N.S.) 834; L.R.A. 1916E, 236.

<sup>17</sup> *People ex rel. Cotton Oil Co. v. Roberts*, 25 A. D. 13, 48 N. Y. Supp. 1028 (1898).

<sup>18</sup> *People ex rel. Cotton Oil Co. v.*

*Roberts*, 25 A. D. 13, 48 N. Y. Supp. 1028 (1898).

<sup>19</sup> *Brown Seed Co. v. Richardson*, 53 Misc. 517, 103 N. Y. Supp. 243 (1907); Gen. Corp. L. § 15.

<sup>20</sup> *Waller v. Rothfield*, 36 Misc. 177, 73 N. Y. Supp. 141 (1901); L. 1892, c. 687, § 15; L. 1896, c. 908, § 181.

<sup>1</sup> *Brookford Mills, Inc., v. Baldwin*, 154 A. D. 553, 139 N. Y. Supp. 195 (1913); Gen. Corp. L. § 15.

Establishing agency to handle a

compensation is solely commissions on orders obtained by him and who pays for part of the corporation's only office, while it pays the rest; if the only other employee in New York is an office boy; if all orders are approved at its home office; if all goods are shipped thence to the New York office and thence distributed; and if all payments are made direct to the home office.<sup>2</sup> A foreign corporation placing a sum with a domestic partnership in which it became a special partner and through which it sold in this State all its manufactured products is doing business in this State so as to be subject to pay a franchise tax.<sup>3</sup> A foreign corporation does not employ any of its capital within the State of New York so as to be subject to tax on its capital "employed within this State" when it has no property in the State except office furniture, disburses no money here and incurred no obligations except rent for its office and salary for its agent, which were discharged by cheques drawn in its home state on a bank there and there paid.<sup>4</sup> A foreign corporation which apportioned the territory of the country and leases and licenses persons and corporations the use of telephones in the apportioned districts, with necessary appliances, upon terms securing its profit and security, but which requires that the licensees and lessees conduct their business with their own capital and under their own management, is not doing business in this State so as to be subject to a tax upon its capital stock employed herein.<sup>5</sup> A foreign holding corporation is taxable as doing business for a profit and employing its capital within this State if it receives dividends through its constituent companies in which it holds stock.<sup>6</sup> A foreign corporation loaning money on bond and mortgage and selling the bonds which has an office in this State, a license for an investment business from the New York banking department, two of its offices here, and which

corporation's products within the State as doing business therein see note in 18 L.R.A.(N.S.) 142.

<sup>2</sup> *People ex rel. Goetz Silk Mfg. Co. v. Wells*, 42 Misc. 86, 85 N. Y. Supp. 533 (1903); *aff'd* 93 A. D. 613, 87 N. Y. Supp. 1144; L. 1896, c. 908, § 7: "Non-residents of the state doing business in the state . . . shall be taxed . . ."

<sup>3</sup> *People ex rel. Badische Fabrik v. Roberts*, 152 N. Y. 59, 36 L.R.A. 756, 46 N. E. 761 (1897).

<sup>4</sup> *People ex rel. Harlan & Hollingsworth Co. v. Campbell*, 139 N. Y. 68,

34 N. E. 753 (1893); L. 1880, c. 542, as amend'd L. 1881, c. 36; L. 1888, c. 501; L. 1889, c. 463. See now Tax L. § 182.

<sup>5</sup> *People v. American Bell Telephone Co.*, 117 N. Y. 241, 22 N. E. 1057 (1889); L. 1880, c. 542, as amend'd L. 1881, c. 361, and L. 1885, c. 501. See now Tax L. § 182.

<sup>6</sup> *People ex rel. Manhattan Silk Co. v. Miller*, 125 A. D. 296, 109 N. Y. Supp. 866 (1908); *aff'd* 197 N. Y. 577, 91 N. E. 1119; Tax L. §§ 181, 182 (L. 1901, c. 558).

deposits proceeds of sales in New York in this State for remittance to its home state, employs part of its capital here and must pay a franchise tax.<sup>8</sup> A foreign corporation having headquarters in New York whence directions were given and orders received for a business of selling goods exclusively in foreign countries employs no capital in this State so as to be liable for a license fee.<sup>9</sup> A foreign corporation the business of which is to buy, hold and sell, under supervision in this State, securities of corporations organized and doing business in foreign states, is subject to a license tax on moneys on deposit, securities and furniture had and employed in New York.<sup>10</sup> A foreign corporation is not doing business here so as to be precluded from suing on a contract in the absence of a license if the order was made here addressed to it at its home office where it was accepted and whence the goods were shipped; it maintained a salesroom in the State at which only samples and no books were kept; and all employees were paid from the home state, no bank account being kept in New York.<sup>11</sup> A foreign corporation having no office in New York and doing no business in this State other than furnishing and installing furnaces and doing work under a contract therefor which was submitted in this State and accepted there and approved in a foreign State, as usual, by the foreign corporation's secretary, is not doing business in this State so as to be precluded from suing because it has no certificate from the Secretary of State.<sup>12</sup>

**§ 707. Id.: What Constitutes Doing a Manufacturing Business in New York.**—Prior to the statute subjecting foreign corporations doing business in New York State to a franchise tax based on income as distinguished from the previously existing franchise tax imposed generally on foreign corporations based on capital stock employed in this State, foreign manufacturing corporations to the extent of their capital actually employed in this State in manufacturing and in the sale of the product of such manufacturing were exempted from such franchise tax if at least forty per cent of their capital stock were invested in property in New York and used

<sup>8</sup> *People ex rel. New England Loan & Trust Co. v. Roberts*, 25 A. D. 16, 49 N. Y. Supp. 10 (1898); *aff'd* 156 N. Y. 688, 50 N. E. 1120.

<sup>9</sup> *People ex rel. Dutilh-Smith & Co. v. Miller*, 90 A. D. 545, 85 N. Y. Supp. 849 (1904).

<sup>10</sup> *People ex rel. North American Co. v. Miller*, 90 A. D. 560, 86 N. Y. Supp. 386 (1904); *aff'd* 182 N. Y.

521, 74 N. E. 1124; Tax L. §§ 181, 182 (L. 1901, c. 558).

<sup>11</sup> *Burrowes Co. v. Caplin*, 127 A. D. 317, 111 N. Y. Supp. 498 (1908); Gen. Corp. L. § 15.

<sup>12</sup> *White Furnace Co. v. Miller Transfer Co.*, 131 A. D. 559, 115 N. Y. Supp. 625 (1909); Gen. Corp. L. § 15.

by it in its manufacturing business therein; and decisions rendered under that statute as to what corporations were so exempt are collated in the note,<sup>13</sup> and in other sections.<sup>13a</sup>

<sup>13</sup> The statute referred to is Tax L. § 183. "When it is apparent that all that is done here by a foreign corporation, organized for manufacturing purposes and engaged in such business in the state of its creation, consists of some incidental additional work to its manufactured products sent here from the other state where its actual manufacturing operations are authorized by its charter and carried on, such as may be conveniently and suitably added at the place where the goods are exposed for sale, this is not carrying on the business of manufacturing within the meaning of the statute. Such a corporation cannot send its manufactured products here in an incomplete state, and then by putting the several parts together, and by adjusting them to each other, or by performing some comparatively slight operation upon the article or on the parts of which it is composed, though it may involve necessary labor before suitable for use or sale, entitle itself to exemption on the ground that it is carrying on a manufacturing business." *People ex rel. Roebling's Sons' Co. v. Wemple*, 138 N. Y. 582, 34 N. E. 386 (1893); Corp. Tax Act, L. 1880, c. 542, as amended L. 1881, c. 361; L. 1885, c. 359; L. 1889, c. 353. (The charter provided for manufacturing in the home state only and for an office in New York, on the storage floors of which two or three men adapted the manufactured articles, *e. g.*, by attaching loops to wire ropes for use as switching rods.) "A manufacturing corporation of another state cannot bring its products here, and by putting the several parts together and adjusting them to each other, or by performing upon the article some slight operation, though it may involve labor that may be necessary before using it or

exposing it for sale, and thereby entitle itself to exemption from taxation on the ground that it is carrying on manufacturing within this state." *People ex rel. Seth Thomas Clock Co. v. Wemple*, 133 N. Y. 323, 31 N. E. 238 (1892); L. 1880, c. 542, as amend'd L. 1881, c. 361, L. 1882, c. 151; L. 1885, c. 359; L. 1889, c. 353. A foreign manufacturing corporation which has a place for the sale of its goods in New York, for which it pays rent and hires agents and from which it sells its products is subject to a New York corporation tax on its business in this State. *People ex rel. Parke, Davis & Co. v. Roberts*, 91 Hun, 158, 36 N. Y. Supp. 368 (1895); aff'd 149 N. Y. 608, 44 N. E. 1127; U. S. Const. art. 4, § 2. A foreign corporation conducting in this State the business of making paint by mixing oil and white lead into a paste, putting the paste in a tank and adding oil, turpentine and a dryer, stirring and grinding the result and running the result into cans, is doing a manufacturing business, insofar as taxation goes, whether or not it itself make all the ingredients or articles which go to make up the finished product. *People ex rel. Devoe Co. v. Roberts*, 51 A. D. 77, 64 N. Y. Supp. 494 (1900). A foreign corporation manufacturing in New York kindling wood by buying green slabs from logs, sawing them into strips, cutting the strips into pieces, kilndrying the strips, gathering the dried strips into bundles, compressing the bundles and tying them—all by machinery—is engaged in carrying on manufacture and is not liable to a franchise tax. *People ex rel. Standard Wood Co. v. Roberts*, 20 A. D. 514, 47 N. Y. Supp. 122 (1897); L. 1880, c. 542, as amended.

<sup>13a</sup> § 726, *infra*, and § 572 *et seq.*, *supra*.

**§ 708. Id.: Books, In General.**—The books of a foreign corporation “may be used to prove its corporate acts or transactions and . . . are presumptive evidence for that purpose even where the corporation is a party.”<sup>14</sup> The provisions of a foreign statute for winding up corporations will not be enforced in this State to the prejudice of residents of or persons doing business in New York, especially when the remedy sought is unknown to the courts of New York, *e. g.*, a motion by the foreign liquidator to compel the production of certain books.<sup>15</sup> In the absence of proof that the books of a defendant foreign corporation are in this State no order can be made authorizing their examination.<sup>16</sup> An order requiring a witness to *deposit* the books of a corporation doing business in this State with a commissioner appointed by a foreign court to take testimony here in an action pending therein is improper; it should merely require him to *produce* them.<sup>17</sup> A trustee depository of stock of a foreign corporation is not chargeable with knowledge of the law of the corporation’s home state, differing from the law of New York, so as to make it liable for failure to have the stock transferred to its name as trustee and for loss resulting from such failure through its attachment by the depositor’s creditors under such foreign law.<sup>18</sup>

**§ 709. Id.: Stock Book, In General.**—A complaint by a stockholder of a foreign corporation to recover the penalty imposed by statute for failure to permit inspection by him of its books must allege that the corporation is a stock corporation; and if it is not the defendant may take advantage of the objection at any time—even after withdrawal of its demurrer.<sup>19</sup> A trustee appointed on the bankruptcy of a

<sup>14</sup> *Sigua Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194 (1902); C. C. P. §§ 929, 930.

<sup>15</sup> *Matter of Great Northern Construction Co.*, 50 Misc. 467, 100 N. Y. Supp. 564 (1906); C. C. P. §§ 914, 915.

<sup>16</sup> *Snow, Church & Co. v. Snow-Church Co.*, 80 A. D. 40, 29 N. Y. Supp. 842 (1903). An order directing the examination of the books of a foreign corporation may properly direct that such of the books as are within the state be produced; but, in respect of books at its home office in a distant state, should direct that sworn copies of their con-

tents relating to the subject-matter of the order should be produced and delivered to those seeking the order, within a reasonable time to be fixed in the order. *Ervin v. Oregon Ry. & Navigation Co.*, 22 Hun, 566 (1880).

<sup>17</sup> *Matter of Randall*, 87 A. D. 245, 84 N. Y. Supp. 294 (1903).

<sup>18</sup> *New Jersey Construction Co. v. Farmers’ Loan & Trust Co.*, 39 Misc. 672, 80 N. Y. Supp. 622 (1903). Had the stock paid dividends or the amount deposited been enough to control the corporation, the rule might be different.

<sup>19</sup> *Seydel v. Corporation Liquidat-*

stockholder of a foreign corporation occurring pending an action by such stockholder to recover a penalty from a resident transfer agent for refusing to exhibit the corporate books cannot intervene after judgment is rendered for the stockholder on behalf of the latter's creditors, although he may be entitled to the proceeds if the judgment is affirmed on appeal.<sup>20</sup>

**§ 710. Id.: What Corporations Must Keep.**—Every foreign stock corporation having an office for the transaction of business in New York State, except moneyed and railroad corporations must keep a stock book.<sup>1</sup> It is the having by a foreign corporation of an office in this State for the transaction of business, and not the doing of the business or the extent thereof, which determines if it must keep its stock book in New York; and leaving its blank stock certificates and its stock book with an agent who delivers new certificates delivered to it by the corporation to persons presenting old ones is not doing business in such sense.<sup>2</sup> The existence within the State of a transfer agent of a foreign corporation does not constitute the maintenance of an office by it in New York for the transaction of business; so that no liability attaches to such corporation for a refusal by such agent to permit an inspection of its stock books pursuant to the statute providing for such inspection of the books of a foreign corporation "having an office for the transaction of business in this State."<sup>3</sup> A foreign corporation does not have an office for "the transaction of business in this State" so as to be liable for the statutory penalty for failure to keep a list of stockholders at its office in this State, if its entire arrangement in this State can "be fairly summarized as furnishing and constituting an headquarters for salesmen traveling in that locality where they might meet customers and conduct correspondence."<sup>4</sup> A foreign corporation which has merely a

ing Co., 46 Misc. 576, 92 N. Y. Supp. 225 (1905); St. Corp. L. § 53 (L. 1897, c. 384), now § 33.

<sup>20</sup> Althause v. Giroux Consolidated Mines Co., 150 A. D. 580, 135 N. Y. Supp. 500 (1912); St. Corp. L. § 53.

<sup>1</sup> St. Corp. L. § 33 (L. 1916, c. 127).

<sup>2</sup> Althause v. Guaranty Trust Co., 78 Misc. 181, 137 N. Y. Supp. 945 (1912); St. Corp. L. § 33.

<sup>3</sup> Wadsworth v. Equitable Trust Co., 153 A. D. 737, 138 N. Y. Supp. 842 (1912); St. Corp. L. § 33.

<sup>4</sup> Hovey v. De Long Hook & Eye

Co., 211 N. Y. 420, 105 N. E. 667 (1914); St. Corp. L. § 33. The corporation was organized and had its factory and general offices in Pennsylvania; sold goods in New York through traveling salesmen whose orders were transmitted to the Pennsylvania office and were thence filled if approved; rented office in New York with stenographer, typewriter, office furniture, name and that of vice-president and manager on door, to which small cash amounts for postage, carfare, etc., were forwarded from Pennsylvania; had no

transfer agency in New York is subject to the law requiring a foreign corporation having in this State an office for the transaction of business to keep a stock-book, and to the penalty imposed for refusal to permit inspection thereof.<sup>5</sup> An officer in this State of a foreign corporation which has not any stock book in this State is not liable for the statutory penalty imposed on corporate officers for refusal after demand to allow a stockholder to inspect such book.<sup>6</sup>

**§ 711. Id.: Where To Be Kept.**—The stock book required to be kept by a foreign corporation must be kept in its office in New York State for the transaction of business in such State, or, if the corporation has in New York State a transfer agent (whether such agent be a corporation or a natural person) such stock book may be deposited in the office of such agent.<sup>7</sup> Every foreign stock corporation having an office for the transaction of business in this State, except moneyed and railroad corporations, has imposed upon it by statute the duty of keeping a stock book which shall be open for the inspection of the persons designated by law, although if it maintain a transfer agent within the State it has the option of depositing the required stock book in the office of the agent, where it may be inspected, instead of keeping it in the corporation's office for the transaction of business.<sup>8</sup>

**§ 712. Id.: Form and Contents.**—The stock book of a foreign corporation must contain (1) the names, alphabetically arranged, of all persons who are stockholders of the corporation, showing (2) their places of residence, (3) the number of shares of stock held by them respectively, (4) the time when they respectively became the owners of such shares of stock, and (5) the amount paid on such shares of stock.<sup>9</sup>

**§ 713. Id.: Inspecting and Making Extracts from.**—A foreign corporation's stock book kept in its office for the transaction of business in New York State must be open daily during business hours for inspection and making extracts therefrom by any (1) judgment creditor of the corporation (2) officer of New York State authorized by law to investigate the affairs

bank account or books of any kind in New York.

<sup>5</sup> *People ex rel. Miles v. Montreal & Boston Copper Co.*, 40 Misc. 282, 81 N. Y. Supp. 974 (1903); *St. Corp. L. § 53* (L. 1897, c. 384, § 3), now § 33.

<sup>6</sup> *Kellner v. Shelley*, 178 A. D. 657, 165 N. Y. Supp. 833 (1917); *St. Corp. L. § 33* (L. 1909, c. 61).

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<sup>7</sup> *St. Corp. L. § 33* (L. 1916, c. 127).

<sup>8</sup> *Wadsworth v. Equitable Trust Co.*, 153 A. D. 737, 138 N. Y. Supp. 842 (1912); *St. Corp. L. § 33*.

<sup>9</sup> *St. Corp. L. § 33* (L. 1916, c. 127).

of any such corporation, (3) person who has been a stockholder of record in such corporation for at least six months immediately preceding his demand, (4) person holding stock of such corporation to an amount equal to five per centum of all of its outstanding shares, (5) person thereunto in writing authorized by the holders of stock of such corporation to an amount equal to five per centum of all of its outstanding shares; and the stock book of any such foreign corporation which has in New York State a transfer agent (whether such agent be a corporation or a natural person) with which or whom such stock book is deposited must be open to inspection at all times during the usual hours of transacting business to any (1) stockholder, (2) judgment creditor, or (3) officer of the State of New York authorized by law to investigate the affairs of such corporation.<sup>10</sup> Whatever rights a stockholder has to examine the books of his foreign corporation in New York come to him by statute and not by the common law.<sup>11</sup> Under a statute providing without qualification that corporations' stock books shall be open daily during business hours for the inspection of stockholders, a stockholder has an absolute right and the corporation an absolute duty; and no statement or proof of any particular intent upon the part of the person demanding the inspection is required — all that is needed is that the applicant be a stockholder and that he prefer his request during business hours.<sup>12</sup> "A stockholder has done all that he can do when he has gone to the office [of his foreign corporation] and made demand upon the person apparently in charge that an inspection be permitted."<sup>13</sup> A case for the statutory penalty for failure to exhibit corporate books on demand of a stockholder is not made out by an oral and written demand upon two officers of a corporation, which had not been dissolved but had ceased to do business, made at a stockholder's office in the corner of which the corporate books were deposited.<sup>14</sup> A demand for inspection of corporate stock books made after commencement of an action for refusal of an earlier demand is basis for

<sup>10</sup> St. Corp. L. § 33 (L. 1916, c. 127).

<sup>11</sup> *People ex rel. Singer v. Knickerbocker Trust Co.*, 38 Misc. 446, 77 N. Y. Supp. 1000 (1902).

<sup>12</sup> *Henry v. Babcock & Wilcox Co.*, 196 N. Y. 302, 89 N. E. 942 (1909); St. Corp. L. § 53, see now § 33. Foreign corporations.

<sup>13</sup> *Pelletreau v. Greene Consoli-*

*dated Gold Mining Co.*, 49 Misc. 233, 97 N. Y. Supp. 391 (1906); St. Corp. L. §§ 29, 53, now §§ 32, 33.

<sup>14</sup> *Fuller v. O'Connor*, 61 Misc. 279, 113 N. Y. Supp. 684 (1908); St. Corp. L. § 53, now § 33. The two officers consulted counsel who the next day mailed a list of stockholders to the enquirer.

a second suit, as such a procedure is not to be condemned as a cumulation of penalties.<sup>15</sup> “. . . the officers and agents of a corporation are not required to exhibit the [stock] book to persons who demanded to see them, where such persons are unknown to them, without first exacting reasonable proof of the identity of the said demandants that they are in fact the persons who are the stockholders of the company.”<sup>16</sup> “The right [of a stockholder] to inspect the [corporate stock] book includes the right on the part of the stockholder to aid his memory by copying therefrom” to a reasonable extent.<sup>17</sup> The State statute permitting inspection of a stockholder of his corporation’s stock book applies to foreign as well as domestic corporations.<sup>18</sup>

The power of the courts to compel by mandamus or judgment the production for examination by any stockholder of the stock books of a corporation is not impaired by the statute permitting such inspection of corporate stock books.<sup>19</sup> “. . . the courts of this State have no jurisdiction to grant upon an application by a stockholder of a foreign corporation a writ of mandamus to compel an inspection by him of the books and records of such corporation, and . . . the right to such inspection is enforceable only by the courts of the State in which the corporation has its legal existence.”<sup>20</sup> A stockholder in a foreign corporation cannot have from the courts of New York mandamus to compel it to permit him to inspect its books, if he have no legal or equitable action pending against it.<sup>1</sup> A stockholder of a foreign corporation having an office in this State may mandamus the agents in charge thereof to compel them to allow him to examine its books

<sup>15</sup> Gould v. Olympic Mining Co., 49 Misc. 612, 96 N. Y. Supp. 455 (1905); St. Corp. L. § 53, now § 33.

<sup>16</sup> Theile v. Merlis, 85 Misc. 351, 147 N. Y. Supp. 405 (1914); St. Corp. L. § 33. Production of a certificate of stock in a name identical with demandant’s, of a written demand for inspection acknowledged by him before a notary and of another person, unknown to defendant, to identify demandant, insufficient.

<sup>17</sup> Henry v. Babcock & Wilcox Co., 196 N. Y. 302, 89 N. E. 942 (1909); St. Corp. L. § 53, now § 33.

<sup>18</sup> People *ex rel.* Lorge v. Consolidated National Bank, 105 A. D. 409, 94 N. Y. Supp. 173 (1905); St. Corp. L. § 29 (L. 1901, c. 354), now § 32.

<sup>19</sup> St. Corp. L. § 33 (L. 1916, c. 127).

<sup>20</sup> Matter of Mitchell v. Northern Security Oil & Transportation Co., 44 Misc. 514, 90 N. Y. Supp. 60 (1904).

<sup>1</sup> Matter of Rappleye, 43 A. D. 84, 59 N. Y. Supp. 338 (1899); St. Corp. L. § 29 (L. 1892, c. 688), now § 32, relates only to domestic corporations.

showing what a stock book would show if it kept one.<sup>2</sup> An alternative but not a peremptory writ of mandamus should issue to a resident transfer agent of a foreign corporation to compel him to exhibit its transfer book to a stockholder, when the question whether he is such agent is raised on the application.<sup>3</sup> The court has power to order a reference to take proof of the facts alleged on both sides of an application for peremptory mandamus against a foreign corporation and its agents to compel it and them to permit a stockholder to inspect its transfer books.<sup>4</sup>

**§ 714. Id.: Penalty for Refusing Inspection.**—For any refusal to allow a foreign corporation's stock book to be inspected such corporation and the officer or agent so refusing each forfeit the sum of fifty dollars, to be recovered by the person to whom such refusal was made; but it is a defense to any action for penalties that the person suing therefor has within two years sold or offered for sale any list of stockholders of such corporation or of any other corporation or has aided or abetted any person in procuring any stock list for any such purpose.<sup>5</sup> A foreign stock corporation bound by statute to keep a stock book at its office in this State for the transaction of business which does not do so is liable to the statutory penalty to a stockholder who applies according to law for leave to inspect such book.<sup>6</sup> A claim that a statute imposing a penalty for failure to permit inspection of the stock book of a foreign corporation is unconstitutional because the penalty is more severe than in the case of a domestic corporation is untenable.<sup>7</sup> A foreign corporation is not liable to any penalty for failure to exhibit its stock book on demand if at the time of the demand the book is in the possession of the United States government by virtue of a subpoena; and the corporation's failure to exhibit on such demand a list of persons who have bought stock after seizure of the stock book by the government does not subject it to the penalty.<sup>8</sup> A corporation refusing to allow a stockholder to inspect its

<sup>2</sup> People *ex rel.* Singer v. Knickerbocker Trust Co., 38 Misc. 446, 77 N. Y. Supp. 1000 (1902); St. Corp. L. § 53 (L. 1897, c. 384, § 3); now § 33.

<sup>3</sup> People *ex rel.* Daniels v. Crawford, 68 Hun, 547, 22 N. Y. Supp. 1025 (1893).

<sup>4</sup> People *ex rel.* Del Mar v. St. Louis & San Francisco Ry. Co., 44 Hun, 552 (1887).

On right of stockholders of

foreign corporation to inspect books, see note in 45 L.R.A. 454.

<sup>5</sup> St. Corp. L. § 33 (L. 1916, c. 127).

<sup>6</sup> Hovey v. Procter & Gamble Co., 139 A. D. 521, 124 N. Y. Supp. 128 (1910); St. Corp. L. § 33.

<sup>7</sup> Pelletreau v. Greene Consolidated Gold Mining Co., 49 Misc. 233, 97 N. Y. Supp. 391 (1906); St. Corp. L. §§ 29, 53, now §§ 32, 33.

<sup>8</sup> Otto v. Franklin's, Incorporated,

books, under an intermediate court's ruling that such refusal was justified in a like case, is not subject to a penalty prescribed by statute for such refusal, because the Court of Appeals later decides that in a case such as the one in question inspection was proper.<sup>9</sup> One will not be awarded by the court the statutory penalty for failure by a corporation to permit him to inspect its books when the refusal arose after he had refused to give his reasons, after he had had an hour's inspection, while two other actions by him against the same corporation were awaiting judicial decision after trial, and when, further, the object was to aid in circularizing to effect the sale of stock of other companies and the demandant had in four months brought fourteen actions against different companies to recover the same penalties.<sup>10</sup> A stockholder of a foreign corporation may recover the penalty imposed by statute when it refuses to allow him to take extracts from a book which purported to be kept according to the statute but did not contain the street and number of urban stockholders and had "unknown" written in the column provided for the amount paid on stock as to more than half the stockholders.<sup>11</sup> The penalty imposed on a foreign corporation for refusing to exhibit its stock book in this State to a stockholder is recoverable if the demand for inspection and refusal thereof is made at its or its transfer agent's office in New York; it is not necessary for the stockholder to go elsewhere.<sup>12</sup> On proof of a demand made of a corporation appointed by a foreign corporation as its transfer agent in New York for inspection of the foreign corporation's stock book by a stockholder of the latter and refusal, the stockholder may recover the statutory penalty from the corporate agent and from the principal corporation, too, if the point is not raised that the principal was relieved from such penalty on depositing the stock book with its agent; and the fact that the book does not contain every particular item required by the statute to be recorded therein is no defense.<sup>13</sup> A corporate agent cannot be subjected to the penalty imposed by statute for failure

90 Misc. 311, 153 N. Y. Supp. 107 (1915).

<sup>9</sup> *Hollaman v. El Arco Mines Co.*, 137 A. D. 862, 122 N. Y. Supp. 852 (1910); St. Corp. L. § 33.

<sup>10</sup> *Althause v. Giroux*, No. 2, 56 Misc. 511, 107 N. Y. Supp. 193 (1907); St. Corp. L. § 53 (L. 1892, c. 688), now § 33.

<sup>11</sup> *Fay v. Coughlin-Sandford Switch Co.*, 47 Misc. 687, 94 N. Y.

Supp. 628 (1905); St. Corp. L. § 53, now § 33.

<sup>12</sup> *Recknagel v. Empire Self-Lighting Oil Lamp Co.*, 24 Misc. 193, 52 N. Y. Supp. 635 (1898); St. Corp. L. § 53 (L. 1897, c. 384), now § 33.

<sup>13</sup> *Tyng v. Corporation Trust Co.*, 104 A. D. 486, 93 N. Y. Supp. 928 (1905); St. Corp. L. § 53 (L. 1897, c. 384, § 3), now § 33.

to permit inspection of the stock book of his foreign corporation if he did not have it in the office when and where demand was made to inspect it.<sup>14</sup> The "agent" of a foreign corporation made liable for the penalty imposed by statute for failure to allow a stockholder to inspect the stock book kept in this State is not an agent appointed to make sales, with no power to procure a stock book and no knowledge of the stockholders, but a "transfer agent" by whom the book could be kept and upon whom an obligation to allow an inspection was imposed.<sup>15</sup> One questionably an officer, though a stockholder, of a foreign corporation will not be held liable for the penalty imposed by statute for refusing to allow inspection of its stock book in this State when the demand was made of him only a couple of months after the statute became law, he said when asked to show the book that he could not because there was none in the State, the corporation learned of the statute only after such demand and then procured such a book.<sup>16</sup> One may have the penalty prescribed by statute on failure of a corporation to permit inspection by its stockholder of its stock book even though the stock was transferred to him by another in order to permit such inspection to enable him to try to buy the holdings of other stockholders on the books and not for any hostile purpose toward the corporation.<sup>17</sup>

**§ 715. Id.: Annual Report to Secretary of State, When to Be Made.**—Every foreign stock corporation doing business within New York State (except moneyed and railroad corporations) must make a report to the Secretary of State each year during the month of January, unless it is doing business without the United States, when the time set is the first day of May.<sup>18</sup> A corporation endeavoring to sell its stock abroad and by obtaining foreign patents to prevent foreigners from manufacturing its own distinctive product is not doing business without the United States so as to be relieved from filing an annual report until the first of May under the statute requiring domestic and foreign stock corporations "doing business without the United States" to file such a report "before the first day of May."<sup>19</sup>

<sup>14</sup> Gould v. Olympic Mining Co., 49 Misc. 612, 96 N. Y. Supp. 455 (1905); St. Corp. L. § 53, now § 33.

<sup>15</sup> Hovey v. Eiswald, 139 A. D. 433, 124 N. Y. Supp. 130 (1910); St. Corp. L. § 33.

<sup>16</sup> Green v. Shain, 22 Misc. 720, 49 N. Y. Supp. 1061 (1898); St. Corp. L. § 53 (L. 1897, c. 384), now § 33.

<sup>17</sup> Lawshe v. Royal Baking Powder

Co., 54 Misc. 220, 104 N. Y. Supp. 361 (1907); St. Corp. L. § 53, now § 33.

<sup>18</sup> St. Corp. L. § 34 (L. 1909, c. 61).

<sup>19</sup> West v. Grosvenor, 102 A. D. 266, 92 N. Y. Supp. 429 (1905); St. Corp. L. § 30 (L. 1897, c. 384), now § 34.

**§ 716. Id.: Contents and Form.**—The report must (1) be as of the first day of January, and state (2) the amount of the corporation's capital stock, (3) the proportion of the capital stock actually issued, (4) the amount of its debts or an amount which they do not exceed, (5) the amount of its assets or an amount which they at least equal, (6) the names of (a) all the directors, (b) all the officers, and (c) the person designated in the manner prescribed by law as a person upon whom process against the corporation may be served within New York State.<sup>20</sup> The report must be made by (1) the president, or (2) a vice-president, or (3) a secretary, or (4) the treasurer of the corporation.<sup>1</sup>

**§ 717. Id.: Filing of Report.**—The report must be filed in the office of the Secretary of State of New York.<sup>2</sup>

**§ 718. Id.: Penalty for Failure to Make and File.**—If a foreign corporation's annual report to the Secretary of State of New York is not made and filed, no penalty is imposed unless written request so to do is made by a creditor or stockholder; so that it is not customary to make and file the report unless such request is made. If it is made, the president or a vice-president or the treasurer or a secretary of the corporation who thereafter neglects or refuses to make and file such report within ten days after the written request so to do has been made by such creditor or stockholder forfeits to the People of the State the sum of fifty dollars for every day he so neglects or refuses.<sup>3</sup>

**§ 719. Id.: Taxation, Right to Tax Foreign Corporations.**—The jurisdiction of this State to impose a tax on foreign corporations is gained by reason of the business which they are privileged to do here under the protection of our laws.<sup>4</sup> The acts imposing taxes upon foreign corporations doing business in this State are constitutional.<sup>5</sup> Commissioners assessing the capital stock in this State of a foreign corporation may take into consideration the refusal of its officer, testifying on its application for reduction, to state anything as to its business in its home state, as they have the right to know the amount of its business there.<sup>6</sup> A foreign corporation is

<sup>20</sup> St. Corp. L. § 34 (L. 1909, c. 61).

<sup>1</sup> St. Corp. L. § 34 (L. 1909, c. 61).

<sup>2</sup> St. Corp. L. § 34 (L. 1909, c. 61).

<sup>3</sup> St. Corp. L. § 34 (L. 1909, c. 61).

<sup>4</sup> People *ex rel.* A. J. Johnson Co.

*v. Roberts*, 159 N. Y. 70, 45 L.R.A. 126, 53 N. E. 685 (1899).

<sup>5</sup> People *v. Horn Silver Mining Co.*, 105 N. Y. 76, 11 N. E. 155 (1887); L. 1880, c. 542, as amend'd L. 1881, c. 361, and L. 1882, c. 151.

<sup>6</sup> People *ex rel.* Claffin Co. *v. Feitner*, 58 A. D. 468, 69 N. Y. Supp. 410 (1901); Tax L. § 36 (L. 1896,

as much amenable as a domestic corporation to a proceeding by the taxing authorities for proceedings supplementary to execution to collect a tax imposed.<sup>6a</sup>

**§ 720. Id.: Real and Personal Property Taxes, In General.**—Nonresidents of New York State are taxable (1) if doing business in this State, on the capital invested in such business, as personal property, at the place where such business is carried on, to the same extent as if residents of this State; and (2) if doing business in this State or not, on personal property having an actual situs in this State and not forming a part of capital invested in business in this State, unless exempt by law, except that in the latter case money, negotiable or collateral securities deposited by, or debts owing to such non-residents, are not to be considered personal property.<sup>7</sup> The thirty-first section of the Tax Law regulates the procedure for the assessment of domestic corporations only, and not of foreign ones, which are cared for by the seventh section.<sup>8</sup> In the main office of the Department of Taxes and Assessments of the City of New York is kept a record called "The annual record of the assessed valuations of real and personal estate of corporations."<sup>9</sup> The receiver of taxes must proceed in enforcing the collection and payment of taxes against corporations and their officers, directors or trustees in the same manner as against individuals; and such taxes must be paid out of the funds of the company and be ratably deducted from the dividends of those stockholders whose stock was taxed or be charged upon such stock if no dividends be afterward declared.<sup>10</sup> The personal property of a foreign corporation should be assessed as that of a non-resident individual.<sup>11</sup> Commissioners in assessing a foreign corporation may consider all statements submitted and sworn to by it in determining if it is doing business in New York.<sup>12</sup> A foreign corporation is properly assessed for capital invested

c. 908); Greater N. Y. Charter, § 895 (L. 1897, c. 378).

<sup>6a</sup> Matter of Bruere, 174 A. D. 298 (1916); Tax L. § 299 (L. 1909, c. 62).

On taxation of capital stock of foreign corporations, generally, see note in 58 L.R.A. 523.

<sup>7</sup> Tax L. § 7 (L. 1909, c. 61).

<sup>8</sup> New York Milk Products Co. v. Damon, 57 A. D. 261, 68 N. Y. Supp. 183 (1901); aff'd 172 N. Y. 661, 65 N. E. 1119; Tax L. §§ 7, 11 (L. 1896, c. 908).

<sup>9</sup> Greater N. Y. Charter, § 893 (L. 1901, c. 466).

<sup>10</sup> Greater N. Y. Charter, § 921 (L. 1901, c. 466).

<sup>11</sup> New York Milk Products Co. v. Damon, 57 A. D. 261, 68 N. Y. Supp. 183 (1901); aff'd 172 N. Y. 661, 65 N. E. 1119; Tax L. § 11 (L. 1896, c. 908).

<sup>12</sup> People ex rel. McShane Mfg. Co. v. Barker, 23 A. D. 530, 48 N. Y. Supp. 558 (1897); aff'd 155 N. Y. 665, 49 N. E. 1103; L. 1855, c. 37. See now Tax L. § 7.

in business in this State as personal property if its property is continuously under the protection of the laws of New York, the proceeds of its sales in this State are not immediately remitted to its home state office, part of its capital is practically invested and reinvested in New York, credit is given in New York in the usual way, bills receivable are retained in this State for collection in due course and it has obtained a certificate to do business in New York.<sup>13</sup> Merchandise which, if it were in specie in this State, would be subject to taxation, is not removed from New York because belonging to a foreign corporation, if it enters into the general business conducted in this State, has been sold upon credit in New York, the credit has not expired and credit therefore is given in books kept in the State.<sup>14</sup> “. . . for foreign capital transmitted here, for the purpose of being loaned [though by a foreign corporation] to our own citizens, and employed by them in their business, no tax should be assessed either upon the foreign capitalist or his agent residing in this State.”<sup>15</sup>

**§ 721. Id.: Place of Taxation.**—Nonresidents doing business here are taxable on the capital invested in such business at the place where such business is carried on, and on personalty not forming part of such capital in the tax district where situated.<sup>16</sup> The real estate of all incorporated companies liable to taxation must be assessed in the tax district in which it lies, in the same manner as the real estate of individuals.<sup>17</sup> All the personal estate of every incorporated company liable to taxation on its capital must be assessed in the tax district where the principal office or place for transacting the financial concerns of the company is; or if such company have no principal office, or place for transacting its financial concerns, then in the tax district where the operations of such company are carried on.<sup>18</sup> Foreign corporations doing business, and having a principal office or place for the transaction of their financial concerns in this State are to be assessed in the town or ward where such office is located, exclusively, for all their personal estate liable, to taxation in this State.<sup>19</sup>

<sup>13</sup> *People ex rel. Crane Co. v. Feitner*, 49 A. D. 108, 62 N. Y. Supp. 1107 (1900); Tax L. § 7 (L. 1896, c. 908).

<sup>14</sup> *People ex rel. Yellow Pine Co. v. Barker*, 23 A. D. 524, 48 N. Y. Supp. 553 (1897); *aff'd* 155 N. Y. 665, 49 N. E. 1103; L. 1855, c. 37. See now Tax L. § 7.

<sup>15</sup> *People ex rel. Bank of Montreal*

*v. Comm'rs of Taxes, etc.*, 59 N. Y. 40 (1874); L. 1851, c. 176, § 2; L. 1855, c. 37. See now Tax L. § 7.

<sup>16</sup> Tax L. § 7 (L. 1909, c. 61).

<sup>17</sup> Tax L. § 11 (L. 1909, c. 62).

<sup>18</sup> Tax L. § 11 (L. 1909, c. 62).

<sup>19</sup> *People ex rel. Bay State Shoe & Leather Co. v. McLean*, 80 N. Y. 254 (1880); L. 1855, c. 37. See now Tax L. § 7. The head-note of

§ 722. **Id.: What Taxable.**—Foreign corporations are of course taxable on their real property situated in New York State; and on capital invested in any business which they do in this State and on personal property (exclusive of money, negotiable collateral securities deposited by, or debts owing to them) having an actual situs here which does not form part of such capital.<sup>20</sup> The furniture and goods for sale kept by a foreign corporation in its New York office are taxable in this State.<sup>1</sup> A foreign corporation manufacturing in another country, maintaining a selling agency in New York City, remitting all the agency's net proceeds to the home office, and renting quarters here for the agency, is not taxable on the value of its goods on hand for sale here though it is taxable on the value of the office furniture in the agency.<sup>2</sup> A personal property tax against a foreign corporation is imposed not against the corporation but against specific property; and before it can deduct from such property, viz. the amount invested in business in this State, debts which it owes, it must show that such debts were incurred in the relation to its investments in business in New York.<sup>3</sup> Debts due a foreign corporation on open accounts for imported goods sold in original packages are taxable.<sup>4</sup> While no tax can be imposed on imported goods in the hands of the importer in the original packages, or on their sale, yet a tax may be imposed on the proceeds of their sale if they have become part of the common mass of property within the State, so as to have a situs here; and the deposits of a foreign corporation in bank in this State, invested here; and notes held by it here, and not in the course of transmission to the home office, are taxable here.<sup>5</sup> The mains, pipes and tanks for receiving and distributing natural gas, located in a municipality of this State and belonging to a foreign corporation, are taxable as real estate at their full and true value, and the privilege of laying and maintaining

British Commercial Life Ins. Co. v. Com'rs of Taxes, 31 N. Y. 32 (1865), reads: "The place for assessment of a foreign corporation, doing business in this State, for the purposes of taxation, is where the principal business of the corporation is transacted."

<sup>20</sup> Tax L. § 7 (L. 1909, c. 61).

<sup>1</sup> People *ex rel.* Martin Bros. Co. v. Barker, 14 Misc. 382, 36 N. Y. Supp. 76 (1895).

<sup>2</sup> People *ex rel.* Farcy & Oppen-

heim Co. v. Wells, 42 Misc. 423, 87 N. Y. Supp. 84 (1904); *aff'd* 104 A. D. 629, 93 N. Y. Supp. 1143; Tax L. § 7 (L. 1896, c. 908).

<sup>3</sup> People *ex rel.* Dunlap's Express Co. v. Raymond, 54 Misc. 330, 105 N. Y. Supp. 1007 (1907).

<sup>4</sup> People *ex rel.* Burke, Ltd. v. O'Donnel, 62 Misc. 560 (1909), 115 N. Y. Supp. 140.

<sup>5</sup> People *ex rel.* Burke v. Wells, 184 N. Y. 275, 12 L.R.A.(N.S.) 905, 77 N. E. 19 (1906).

them can be taxed solely under some special statute affecting franchises.<sup>6</sup>

**§ 723. Id. Exemptions.**—On personal property actually situated here and not forming part of its capital invested here on which it is taxed, a foreign corporation is taxable unless it is exempt by law or it consists of money, negotiable collateral securities, deposited by, or debts owing to it.<sup>7</sup> “The general rule is that all property within this State is liable to taxation, and when a claim of exemption is made, it must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption.”<sup>8</sup> “Assuming that the personal property of an incorporation which is located abroad or outside of the State, is at all entitled to exemption, the change should be permanent, positive and unequivocal. If such an exemption can be upheld at all, it cannot be sustained where the change is only for a season, uncertain and vacillating, and merely consists in the building of vessels which are owned by an incorporation which has a location for the purpose of taxation within the State.”<sup>9</sup>

**§ 724. Id.: On Sums Invested in New York Business.**—A foreign corporation is taxable on its capital invested in business in this State which it does.<sup>10</sup> Foreign corporations are included within the terms of the act taxing non-residents doing business in this State on all sums invested in such business.<sup>11</sup> The act taxing non-residents doing business in this State on all sums invested in such business does not permit the deduction of debts from such sums.<sup>12</sup> Under a statute requiring all non-residents doing business in the State to be taxed “on all sums invested in any manner in said business the same as if they were residents,” if a foreign corporation buys property here and pays cash for a portion of it and promises to pay the balance at some future day it is taxable only on the sum paid, as a sum “invested,” and not on the sum promised to be paid: “The non-resident corpo-

<sup>6</sup> *People ex rel. Keystone Gas Co. v. Martin*, 48 Hun, 193 (1888); L. 1881, c. 293.

<sup>7</sup> Tax L. § 7 (L. 1909, c. 61).

<sup>8</sup> *People ex rel. Savings Bank of New London v. Coleman*, 135 N. Y. 231, 31 N. E. 1022 (1892); 1 R. S. 388, § 4.

<sup>9</sup> *People ex rel. Pacific Mail Steamship Co. v. Comm'rs of Taxes*, 64 N. Y. 541 (1876).

<sup>10</sup> Tax L. § 7 (L. 1909, c. 61).

<sup>11</sup> *People ex rel. Thurber, Wyland Co. v. Barker*, 141 N. Y. 118, 23 L.R.A. 95, 35 N. E. 1073 (1894); L. 1855, c. 37. See now Tax L. § 7.

<sup>12</sup> *People ex rel. Thurber, Wyland Co. v. Barker*, 141 N. Y. 118, 23 L.R.A. 95, 35 N. E. 1073 (1894); L. 1855, c. 37. See now Tax L. § 7.

ration investing a sum of money in this State is to be assessed for the full sum it invests here, although it may owe debts enough outside of such investment to render it insolvent. The indebtedness it has incurred in the transaction from which the purchase of the property is the result, is no part of the sum it has invested in such purchase and no assessment can be made which includes the amount of that indebtedness."<sup>13</sup> A foreign manufacturing corporation is not assessable under a statute making all persons doing business in New York as merchants, etc., and not residents of this State, taxable on all sums invested in such business, the same as though residents, if it has a salesroom in New York City to which it sends manufactured goods to be sold, the proceeds of which are at once remitted to the home office less a small amount to pay the expenses of the business conducted in New York City, and if it had in its New York office goods for sale averaging in value fifteen thousand dollars and office furniture worth five hundred dollars.<sup>14</sup>

**§ 725. Id.: Special Franchise Tax.**—A foreign corporation which has received from the State a certificate entitling it to the rights and privileges accorded to a like domestic corporation and which is performing the functions of a public corporation in transporting natural gas is taxable as for a special franchise though it has no express consent from a town's officials to lay its pipes across highways if it does in fact do so and has done so for a long time without objection from the town and with the express consent of the adjoining property owners.<sup>15</sup>

**§ 726. Id.: Franchise Tax or Income Tax.**—For the privilege of doing business in New York State every foreign manufacturing and every foreign mercantile corporation must annually pay in advance for the year beginning November first next preceding an annual franchise tax to be computed by the tax commission upon the basis of its net income for its fiscal or the calendar year next preceding, which is presumptively the income on which it pays a tax to the United States.<sup>16</sup>

<sup>13</sup> *People ex rel. Milling Co. v. Barker*, 147 N. Y. 31, 29 L.R.A. 393, 41 N. E. 435 (1895); L. 1855, c. 37. See now Tax L. § 7.

<sup>14</sup> *People ex rel. Sherwin Co. v. Barker*, 5 A. D. 246, 39 N. Y. Supp. 151 (1896); aff'd 149 N. Y. 623, 44 N. E. 1128; L. 1855, c. 37. See now Tax L. § 7.

<sup>15</sup> *People ex rel. United Natural*

*Gas Co. v. Priest*, 152 A. D. 249, 136 N. Y. Supp. 575 (1912).

<sup>16</sup> Tax L. § 209 (L. 1918, c. 276). Corporations liable to a tax under § 184 of the Tax Law, or owning or operating elevated or surface railroads not operated by steam, or formed for supplying water or gas or for electric or steam heating, lighting or power purposes and lia-

What corporations are to be considered manufacturing and mercantile corporations has been previously discussed.<sup>17</sup> The license tax paid by a foreign manufacturing or mercantile corporation is similar to that paid by any other foreign corporation; while the franchise tax paid by it is now based on its income instead of the amount of its capital employed in New York. Reference is made to the appropriate section of this work for a discussion of its franchise-income tax.<sup>18</sup> Foreign corporations having officers, agent or representatives within New York State must annually on or before July first transmit to the Tax Commission a similar report as must domestic corporations.<sup>19</sup> The other details of the law imposing a State tax upon the income of foreign corporations are equally pertinent to domestic corporations and have already been treated.<sup>20</sup>

ble to a tax under §§ 185 and 186 of the Tax Law are exempt from the franchise-income tax. See §§ 572, 573 and 574, *supra*, of this book.

<sup>17</sup> See § 572 *et seq.*, *supra*. Decisions as to foreign manufacturing corporations when they escaped taxation as to so much of their capital employed within New York if it equalled forty per cent of their capital are given in this note and in a note to section 707, *supra*. A foreign manufacturing corporation which kills cattle, refrigerates them, sells some and cooks or smokes others, makes the fat into oil and the scraps into fertilizer, and sells the hides and horns, all partly in this State, but also receives in New York beef from its home state which is practically completed for market there, placed here in the ice house and sold from there, is not wholly engaged in manufacturing in New York so as to escape taxation on the amount of its capital stock employed within New York. *People ex rel. Schwarzschild Co. v. Roberts*, 11 A. D. 449, 42 N. Y. Supp. 317 (1896); *aff'd* 156 N. Y. 690, 50 N. E. 1121. In determining what tax on its capital employed in this State a foreign manufacturing corporation must pay it is not proper to consider that its

capital stock employed in this State is in proportion to the whole capital stock as the amount of sales made in this State is to the total amount of sales made everywhere; but the value of goods kept in hand in this State and money on deposit here, used in its business, and not sales made here by sample with delivery from the foreign factory, are the proper basis of taxation. *People ex rel. Seth Thomas Clock Co. v. Wemple*, 133 N. Y. 323, 31 N. E. 238 (1892); L. 1880, c. 542, as amend'd L. 1881, c. 361; L. 1882, c. 151; L. 1885, c. 359, and L. 1889, c. 353. See now Tax L. §§ 181, 182. In determining the tax which a foreign manufacturing corporation must pay on its capital employed in this State "the rule must be the same whether the corporation is weak or strong, whether its total product is a few thousand dollars or millions." *People ex rel. Seth Thomas Clock Co. v. Wemple*, 133 N. Y. 323, 31 N. E. 238 (1892); L. 1880, c. 542, as amend'd L. 1881, c. 361; L. 1882, c. 151; L. 1885, c. 359; L. 1889, c. 353. See now Tax L. §§ 181, 182.

<sup>18</sup> See § 726, *supra*.

<sup>19</sup> See § 577 *et seq.*, *supra*.

<sup>20</sup> See §§ 570-587, *supra*.

Every foreign corporation not paying a franchise tax based upon its income as a manufacturing or mercantile corporation must pay in advance an annual tax for the privilege of doing business in New York State, which must be computed on the basis of the amount of its capital stock employed during the preceding year within this State, unless exempt by special provision of law; and as the tax is arrived at in the same way for a foreign as for a domestic corporation, reference is made to the treatment of this subject hereinbefore in regard to domestic corporations.<sup>1</sup> "The amount of the [franchise] tax does not depend upon the precise length of time for which the corporation carries on business, or upon the amount of business done."<sup>2</sup> The franchise tax on a foreign corporation is "for the privilege of exercising its corporate franchises" within this State, is based on the amount of the capital stock employed in New York, and is to be imposed notwithstanding its capital stock is used in a business which in its nature constitutes commerce between the States.<sup>3</sup> It seems that even if a foreign corporation's business is interstate or foreign commerce it is no objection *per se* to the imposition of a franchise tax upon it.<sup>4</sup> The tax imposed on the capital of a foreign corporation doing business in this State is not in conflict with the provisions of the Federal Constitution conferring on Congress the exclusive power to regulate commerce between the States, as "the property of a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in the same business, but a tax or other burden imposed upon the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters, over which the transportation is made, is invalid and void, as interference with and obstruction of the power of congress in the regulation of commerce."<sup>5</sup> The State of New York cannot tax a foreign corporation upon its business carried on in this State which is exclusively the business of interstate commerce; in other

<sup>1</sup> Tax L. § 182 (L. 1916, c. 323). See § 588 *et seq.*, *supra*.

<sup>2</sup> *People ex rel. International Elevating Co. v. Roberts*, 116 A. D. 30, 101 N. Y. Supp. 184 (1906).

<sup>3</sup> *People ex rel. Union Sulphur Co. v. Glynn*, 125 A. D. 328, 109 N. Y. Supp. 868 (1908); Tax L. §§ 181, 182 (L. 1907, c. 734).

<sup>4</sup> *People ex rel. International Elevating Co. v. Roberts*, 116 A. D. 30, 101 N. Y. Supp. 184 (1906).

<sup>5</sup> *People ex rel. Southern Cotton Oil Co. v. Wemple*, 131 N. Y. 64, 29 N. E. 1002 (1892); L. 1881, c. 361. See now Tax L. § 182.

words, a State cannot "tax a foreign corporation whose business in such State is exclusively that of interstate commerce, for the privilege of transacting that business here." <sup>6</sup> The State of New York does not infringe the Federal Constitutional provision giving the Congress power, to the exclusion of the States, to regulate commerce with foreign nations, by taxing the capital stock employed by a foreign corporation in this State if some, though a small part of its business is domestic, while the most of it is foreign commerce.<sup>7</sup> This State cannot tax the franchises of foreign corporations because they are derived from and are taxable by the government of their creation only; and so it is that the tax in New York on foreign corporations is computed on the basis of the capital employed by them in this State, which means only such of the capital as is represented by the value of property, whether of money, goods or other tangible things.<sup>8</sup> "If a foreign corporation or a corporation created by the laws of a sister State employs the whole or a portion of its capital here, and thus has the benefit and protection of the government and laws of the State to the extent of the capital so employed, there is no reason why it should not be subjected, to the extent of the capital so employed, to the same burdens and obligations as a domestic corporation. The tax is not imposed upon its property, but for the privilege which is extended to it by the State of doing business here as a corporation and in its corporate name."<sup>9</sup> While a foreign corporation cannot be taxed as to its property situate outside the State, as to its business not done here or as to its franchise, yet it may be taxed on its business done here; and a tax on the business of a foreign corporation will be construed to mean a tax on its business in this State.<sup>10</sup> "The jurisdiction to tax foreign corporations . . . depends upon the existence of two concurring conditions, namely, that the corporation sought to be taxed shall be 'doing business' in this State, and, second, that its capital

<sup>6</sup> *People ex rel. Pennsylvania R. Co. v. Wemple*, 138 N. Y. 1, 19 L.R.A. 694, 33 N. E. 720 (1893); L. 1880, c. 542; L. 1881, c. 361; L. 1882, c. 151; L. 1885, c. 501; L. 1890, c. 522, § 3. See now Tax L. § 182.

<sup>7</sup> *People ex rel. Klipstein & Co. v. Roberts*, 36 A. D. 597, 55 N. Y. Supp. 950 (1899); *aff'd* 167 N. Y. 617, 60 N. E. 1117; U. S. Const. art. 1, § 10.

<sup>8</sup> *People ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 70, 45 L.R.A. 126, 53 N. E. 685 (1899).

<sup>9</sup> *People ex rel. Southern Cotton Oil Co. v. Wemple*, 131 N. Y. 64, 29 N. E. 1002 (1892); L. 1881, c. 361. See now Tax L. § 182.

<sup>10</sup> *People v. Equitable Trust Co.*, 96 N. Y. 387 (1884); L. 1880, c. 542, as amend'd L. 1881, c. 361. See now Tax L. § 182.

or some portion thereof shall have been 'employed within this State.'"<sup>11</sup> "While, in most cases, a foreign corporation doing business within this State will employ some portion of its capital in the prosecution of such business, it is quite possible that the business which is prosecuted here may not require the use of any part of its capital, and, when this is the case, there can be no taxation for the reason that there is no basis for taxation, since the basis for the tax is the 'amount of capital stock employed within this State.'"<sup>12</sup> "The small amount invested [by a foreign corporation] in office furnishings and the fact that it rented an office in the City of New York and held it under lease, did not alone justify the imposition of the tax. . . ."<sup>13</sup> The basis for the assessment of the franchise tax against a foreign corporation doing business in this State is the capital and not the capital stock employed in New York.<sup>14</sup> " . . . 'the amount of capital stock' made by statute the basis of taxation, cannot exceed the amount authorized by its charter."<sup>15</sup> "The general rule is that the capital stock of a foreign corporation employed in this State is represented by the actual value of its property within this State, whether in money or goods or other tangible things (*citation*), not exceeding the amount authorized by its charter."<sup>16</sup> ". . . the capital

<sup>11</sup> *People ex rel. Chicago Junction Rys., etc., v. Roberts*, 154 N. Y. 1, 47 N. E. 974 (1897); L. 1880, c. 542, and amendments. See now Tax L. § 182.

<sup>12</sup> *People ex rel. Chicago Junction Rys., etc., v. Roberts*, 154 N. Y. 1, 47 N. E. 974 (1897); L. 1880, c. 542, and amendments. See now Tax L. 182. A New Jersey investment company, managed by ten directors two of whom resided in New York, having an office in Jersey City where meetings to elect directors were annually held, and an office in New York City at an annual rent of \$1,500, containing furniture worth \$1,000, and paying \$10,000 a year to a treasurer, secretary, clerk and stenographer employed in New York City, the whole capital of which was invested in stock and bonds of an Illinois corporation, as contemplated on its organization, and the stock of which Illinois company was deposited in New York as security for

the payment of certain bonds issued by it, other facts being also present, was held not taxable.

<sup>13</sup> *People ex rel. Chicago Junction Rys., etc., v. Roberts*, 154 N. Y. 1, 47 N. E. 974 (1897); L. 1880, c. 542, and amendments. See now Tax L. § 182.

<sup>14</sup> *People ex rel. National Enameling Co. v. Miller*, 112 A. D. 880, 98 N. Y. Supp. 751 (1906); Tax L. § 182 (L. 1901, c. 558).

<sup>15</sup> *People ex rel. Advertising Co. v. Roberts*, 4 A. D. 288, 39 N. Y. Supp. 448 (1896); *aff'd* 151 N. Y. 621, 45 N. E. 1135. The foreign corporation had an authorized and fully paid capital of \$5,000. It employed \$40,000, and made \$20,000 a year in its business in New York. The Comptroller's valuation of \$40,000 as the amount of its capital stock employed in this State was reduced to \$5,000.

<sup>16</sup> *People ex rel. Contracting Co. v. Roberts*, 27 A. D. 400, 50 N. Y.

of a foreign corporation employed within the State is represented by the actual value of its property within this State, whether in money or goods or other tangible things (*citations*), less, very likely, the amount which, in a proper case, may be deemed to be income or profits."<sup>17</sup> Government bonds constituting the investment by a foreign corporation of its accumulated surplus moneys for use in lean years should not be included as capital employed by it in this State in determining its franchise tax.<sup>18</sup> A foreign corporation should not be exempted entirely from franchise taxation because all its capital is employed in the foreign State and an amount employed in this State is a part of its surplus; nor that such amount is expended on structures on leased ground which might by law become the property of the owner.<sup>19</sup> A foreign corporation, all the assets of which are invested in the stock of a domestic corporation and the sole income of which is the dividend it receives upon such stock, is not subject to a franchise or license tax.<sup>20</sup> A foreign holding corporation is taxable on money invested in its constituents' stock if such was one of its purposes.<sup>1</sup> In determining the capital stock of a foreign corporation in order to impose the franchise tax because of its being partly within this State, stock held by it in another foreign corporation, entirely without the State, is part of its capital but if it is not employed in this State it is not to be considered in computing the holding company's franchise tax, and the form of the consideration for its purchase is immaterial.<sup>2</sup> Surplus earnings of a foreign corporation invested in real estate in this State, under lease and not occupied by it, but on which it intends to erect new buildings when the lease expires and to use a small portion for its offices and to lease the rest, are not a part of its capital stock employed in this State but an independent investment, not

Supp. 302 (1898); *aff'd* 158 N. Y. 666, 52 N. E. 1125; L. 1880, c. 542, as amend'd. See now Tax L. § 182.

<sup>17</sup> *People ex rel. New England Loan & Trust Co. v. Roberts*, 25 A. D. 16, 49 N. Y. Supp. 10 (1898); *aff'd* 156 N. Y. 688, 50 N. E. 1120. Franchise tax.

<sup>18</sup> *People ex rel. International Elevating Co. v. Roberts*, 116 A. D. 30, 101 N. Y. Supp. 184 (1906).

<sup>19</sup> *People ex rel. Long Dock Mills & Elevator v. Wilson*, 121 A. D. 376, 106 N. Y. Supp. 1 (1907); *aff'd* 193 N. Y. 671, 87 N. E. 1125.

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<sup>20</sup> *People ex rel. Edison Light & Power Installation Co. v. Kelsey*, 101 A. D. 205, 91 N. Y. Supp. 709 (1905); Tax L. § 181 (L. 1901, c. 558); Tax L. § 182 (L. 1901, c. 558).

<sup>1</sup> *People ex rel. Manhattan Silk Co. v. Miller*, 125 A. D. 296, 109 N. Y. Supp. 866 (1908); *aff'd* 197 N. Y. 577, 91 N. E. 1119; Tax L. §§ 181, 182 (L. 1901, c. 558).

<sup>2</sup> *People ex rel. New York Central, etc., R. R. Co. v. Knight*, 173 N. Y. 255, 65 N. E. 1102 (1903).

subject to taxation.<sup>3</sup> "The doctrine, as settled by authority, is that the incorporeal right of discovery is protected by national authority against all interference; but the use of the tangible property, which comes into existence by the application of the discovery, is not beyond the control of State legislation."<sup>4</sup> The copyrights of a foreign corporation doing business here cannot be included in the valuation of its capital employed in this State for the purpose of determining the amount of tax it must pay; although the plates, instruments, books, etc., are taxable.<sup>5</sup> "While the good will of a corporation has been held at times to be a part of the capital employed within this State, it has never been so held where substantially all the business of the corporation was carried on in foreign countries."<sup>6</sup> It seems that "good will embraces at least two elements, the advantage of continuing an established business in its old place, and of continuing it under the old style or name;" and when it results from the exercise by a foreign corporation of its franchise and business in this State, and is inseparable from that business, it is taxable here.<sup>7</sup> In determining the value of a foreign corporation's capital stock employed in New York, for the purpose of assessing its franchise tax, the value of its trade mark may be considered as part of its capital stock employed in the State.<sup>8</sup> In determining the franchise tax to be paid by a corporation incorporated in a foreign State but doing business and having its only real office in this State it is proper to include claims by it against non-residents on advertising contracts obtained for periodicals published by it from persons all over the country.<sup>9</sup> Reference is made to the immediately succeeding sections of this work, dealing with the license tax on a foreign corporation, for further decisions of that shall and what shall not be considered capital of the foreign corpo-

<sup>3</sup> People *ex rel.* Singer Mfg. Co. v. Wemple, 150 N. Y. 46, 44 N. E. 787 (1896); Corp. Tax Act, L. 1880, c. 542, as amend'd L. 1885, c. 501. See now Tax L. § 182.

<sup>4</sup> People *ex rel.* A. J. Johnson Co. v. Roberts, 159 N. Y. 70, 45 L.R.A. 126, 53 N. E. 685 (1899). Copyright.

<sup>5</sup> People *ex rel.* A. J. Johnson Co. v. Roberts, 159 N. Y. 70, 45 L.R.A. 126, 53 N. E. 685 (1899).

<sup>6</sup> People *ex rel.* Dutilh-Smith & Co. v. Miller, 90 A. D. 545, 85 N. Y. Supp. 849 (1904).

<sup>7</sup> People *ex rel.* A. J. Johnson Co. v. Roberts, 159 N. Y. 70, 45 L.R.A. 126, 53 N. E. 685 (1899); Tax L. § 182. *Dictum* in opinion of Vann, J.

<sup>8</sup> People *ex rel.* Spencerian Pen Co. v. Kelsey, 105 A. D. 132, 93 N. Y. Supp. 971 (1905); *aff'd* 185 N. Y. 546, 77 N. S. 1195; Tax L. § 181 (L. 1901, c. 558).

<sup>9</sup> People *ex rel.* Williams Co. v. Sohmer, 151 A. D. 764, 137 N. Y. Supp. 23 (1912); Tax L. § 182.

ration employed in New York, as the license as well as the franchise tax are based on such employment of the corporate capital. In seeking to offset its indebtedness against its capital on ascertainment of its liability for a franchise tax in this State, a foreign corporation cannot deduct debts contracted for its general business throughout the country, but only debts for the use or on account of its business in New York.<sup>10</sup> It may be that in some cases the indebtedness within this State of a foreign holding corporation should be offset against capital employed within the State in determining its tax, but this is only when the indebtedness is in respect of the specific assets which are found within the State and not when the indebtedness is general, *i. e.*, is incurred generally in the business, in which case it should be deducted from the sum of the company's assets wheresoever found and an amount offset against the value of the assets within this State as will be proportionate.<sup>11</sup>

**§ 727. Id.: Taxation: License Tax, What Corporations Subject To.**—Every foreign corporation (except banking corporations, fire, marine, casualty and life insurance companies, co-operative fraternal insurance companies, and building and loan associations) doing business in New York State must pay a license fee.<sup>12</sup>

**§ 728. Id.: To Whom Paid.**—A foreign corporation's license fee is to be paid to the New York State Treasurer for the use of the State.<sup>13</sup>

**§ 729. Id.: When to be Paid.**—The statute says that no foreign corporation doing business in New York can sue in the courts of this State without getting a receipt for the New York State license fee within thirteen months after beginning such business.<sup>14</sup>

<sup>10</sup> *People ex rel. National Enameling Co. v. Miller*, 112 A. D. 880, 98 N. Y. Supp. 751 (1906); Tax L. § 182 (L. 1901, c. 558).

<sup>11</sup> *People ex rel. Manhattan Silk Co. v. Miller*, 125 A. D. 296, 109 N. Y. Supp. 866 (1908); *aff'd* 197 N. Y. 577, 91 N. E. 1119; Tax L. §§ 181, 182 (L. 1901, c. 558).

<sup>12</sup> Tax L. § 181 (L. 1917, c. 490).

<sup>13</sup> Tax L. § 181 (L. 1917, c. 490).

<sup>14</sup> Tax L. § 18: "The statute as it formerly read which directed that the license fee payable by a foreign corporation is to be computed upon the basis of the capital

stock employed by it within New York during the first year of carrying on its business and that "the tax imposed by this section on a corporation not heretofore subject to its provisions shall be paid on the first day of December, nineteen hundred and one, unless on such date such corporation shall not have employed capital within the State for a period of thirteen months, in which case it shall be paid within the time otherwise provided by this section" has, as its only possible interpretation, this: "that if the corporation has not done business for twelve

**§ 730. Id.: For What Paid.**—The license fee paid by a foreign corporation is paid for the privilege of exercising its corporate franchises or carrying on its business in such corporate organized capacity in the State of New York.<sup>15</sup> The tax imposed upon foreign corporations under the one hundred and eighty-first section of the Tax Law, though measured by the amount of capital employed in this State, is a license tax upon corporations authorized to do business under that law.<sup>16</sup>

**§ 731. Id.: Amount and Computation of Tax.**—The license fee paid by a foreign corporation is one-eighth of one per centum, to be computed upon the basis of the capital stock employed by it within New York State during the first year of carrying on its business in this State, which first payment must not be less than ten dollars; and if any year thereafter any such corporation employs more than eight thousand dollars of its capital stock within New York State on which a license fee has not been paid then a license fee at the rate of one-eighth of one per centum is due and payable upon any such increase.<sup>17</sup> The measure of the amount of capital stock employed in New York State is found in this way: (1) Take the issued capital stock; (2) take the gross assets employed in any business within New York State; (3) take the gross assets wherever employed in business; (4) find what the proportion of the second item, viz., gross assets employed in this State, is to the third item, viz., gross assets employed everywhere; (5) take that proportion of the issued capital stock, and you have the measure of the amount of capital stock employed in this State.<sup>18</sup> For purposes of taxation, the capital stock of a corporation invested in the stock of another corporation is deemed to be assets located where the physical property represented by such stock is located.<sup>19</sup> “. . . the Comptroller has no right to review his own decision by arbitrarily reassessing and readjusting a license fee imposed and paid (*citation*); and . . . a foreign corporation should be assessed upon the amount of capital employed by it within

months it shall pay the license fee at the time otherwise prescribed in the section, to wit, between twelve and thirteen months after it shall have commenced to employ capital within the State.” *People ex rel. Dutilh-Smith & Co. v. Miller*, 90 A. D. 545, 85 N. Y. Supp. 849 (1904); *Tax L. § 181* (L. 1901, c. 558).

<sup>15</sup> *Tax L. § 181* (L. 1917, c. 490).

<sup>16</sup> *International Text Book Co. v. Tone*, 220 N. Y. 313, 115 N. E. 914 (1917); *Tax L. § 181*.

<sup>17</sup> *Tax L. § 181* (L. 1917, c. 490).

<sup>18</sup> *Tax L. § 181* (L. 1917, c. 490).

<sup>19</sup> *Tax L. § 181* (L. 1917, c. 490).

this State and not upon the amount of its capitalization.”<sup>20</sup> The Comptroller cannot by his own motion correct what he deems an error by himself or his predecessor in determining the license fee of a foreign corporation by increasing it, unless there has been an increase in its capital stock employed in New York.<sup>1</sup> The basis for the assessment of the license fee against a foreign corporation for doing business in this State is the capital and not the capital stock employed in New York.<sup>2</sup> The license fee of a foreign corporation should be computed on the amount of its capital employed in this State and not on the amount of its authorized capital stock.<sup>3</sup> The license tax imposed upon foreign corporations for the privilege of doing business in this State is to be based upon the par value of the capital stock which is employed in business in the State.<sup>4</sup> Though that percentage of machines leased by a foreign corporation in this State to all its leased machines in all the states might be held to represent its only capital employed in New York, for the franchise and license tax purposes, if it neither had a place of business in New York nor employed additional capital therein, yet if these conditions do not exist such will not be held the capital employed here.<sup>5</sup>

**§ 732. *Id.*: Tax Commission Fixes Capital Taxable, Examines Corporate Books, Records and Employees, and Comptroller Collects Taxes.**—The amount of capital upon which a foreign corporation's license fees are to be paid, must be fixed by the State Tax Commission, which has the same authority to examine the books and records in New York State of such foreign corporation and its employees as it has in the case of domestic corporations.<sup>6</sup> The Comptroller of the State of New York has the same power to issue his warrant for the collection of license fees due from a foreign corporation as he now has with regard to domestic corporations.<sup>7</sup>

<sup>20</sup> *People ex rel. Nesmith & Constantine Co. v. Miller*, 105 A. D. 326, 94 N. Y. Supp. 193 (1905); Tax L. § 181 (L. 1901, c. 558).

<sup>1</sup> *People ex rel. Spencerian Pen Co. v. Kelsey*, 105 A. D. 132, 93 N. Y. Supp. 971 (1905); aff'd 185 N. Y. 546, 77 N. E. 1195; Tax L. § 181 (L. 1901, c. 558).

<sup>2</sup> *People ex rel. National Enameling Co. v. Miller*, 112 A. D. 880, 98 N. Y. Supp. 751 (1906); Tax L. § 181 (L. 1901, c. 558).

<sup>3</sup> *People ex rel. Consolidated Ginseng Co. of America v. Kelsey*, 105 A. D. 175, 93 N. Y. Supp. 369

(1905); aff'd 182 N. Y. 526, 74 N. E. 1123; Tax L. § 181 (L. 1901, c. 558).

<sup>4</sup> *People ex rel. Ellicott-Fisher Co. v. Sohmer*, 148 A. D. 514, 132 N. Y. Supp. 789 (1911); aff'd 206 N. Y. 634, 99 N. E. 1115; Tax L. § 181, as amend'd L. 1906, c. 474.

<sup>5</sup> *People ex rel. Vending Co. v. Kelsey*, 101 A. D. 325, 91 N. Y. Supp. 955 (1905); aff'd 181 N. Y. 512, 73 N. E. 1130; Tax L. § 181 (L. 1901, c. 558).

<sup>6</sup> Tax L. § 181 (L. 1917, c. 490).

<sup>7</sup> Tax L. § 181 (L. 1917, c. 490).

**§ 733. Id.: Penalty for Failure to Pay.**—No action can be maintained or recovery had in any of the courts of New York State by a foreign corporation doing business in this State after thirteen months from the time of beginning such business within the State without obtaining a receipt from the Comptroller of New York State for the payment of the license fee upon the capital stock employed by it within New York State during the first year of carrying on its business in this State.<sup>8</sup>

**§ 734. Id.: Manufacturing Corporations.**—The law enacted in nineteen hundred seventeen and amended in nineteen hundred eighteen subjecting both domestic and foreign manufacturing corporations to a franchise tax based on income exempted manufacturing corporations from assessment on any personal property or capital stock, as provided in the twelfth section of the Tax Law, and from the franchise tax imposed by the one hundred and eighty-second section of the Tax Law.<sup>9a</sup> Prior to such law of nineteen seventeen-eighteen a manufacturing corporation, subject to the franchise tax imposed by the one hundred eighty-second section of the Tax Law, was exempted to the extent of its capital actually employed in this State in manufacturing and in the sale of the product of such manufacturing if at least forty per centum of its capital stock was invested in property in this State and used by it in its manufacturing business in this State.

**§ 735. Id.: Actions By and Against, In General.**—There is no reason why the courts of this State should refuse to recognize a corporation organized under the laws of another state even though all its incorporators, directors, etc., are citizens of this State.<sup>9</sup> The fact that all the incorporators save one of a foreign corporation are citizens and residents of this State does not deprive it of recognition by the courts of New York.<sup>10</sup> Relief will not be withheld by our courts from a corporation because it is incorporated in another state.<sup>11</sup> So long as a foreign corporation exists and is recognized by the courts and authorities of its domicile it is entitled to the same recognition here unless it appears that it was formed for purposes illegal here, or was doing acts prohibited by the laws of this State to its own citizens and corporations.<sup>12</sup> For

<sup>8</sup> Tax L. § 181 (L. 1917, c. 490).

<sup>9a</sup> Tax L. § 219-j (L. 1918, c. 417).

<sup>9</sup> *Demarest v. Flack*, 128 N. Y. 205, 13 L.R.A. 854, 28 N. E. 645 (1891).

<sup>10</sup> *Lancaster v. Amsterdam Improvement Co.*, 140 N. Y. 576, 24 L.R.A. 322, 35 N. E. 964 (1894).

<sup>11</sup> *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419 (1887).

<sup>12</sup> *United States Vinegar Co. v. Schlegel*, 143 N. Y. 537, 38 N. E. 729 (1894).

the purpose of determining the venue of an action in this State to which a foreign corporation is a party it cannot be considered a resident of any county in this State or of the State itself.<sup>13</sup> For the purpose of determining the venue of an action a foreign corporation is a nonresident though it has obtained a certificate permitting it to do business in New York, and a corporation organized under the laws of the United States is a resident, and of that county of New York State in which it has its principal place of business.<sup>14</sup> When a party wishes to prove an act or transaction of a foreign corporation, the latter's original books may be used for that purpose as presumptive evidence, whether any or all of the parties are or are not members of the corporation; or a copy of such books or of an entry therein, verified by the deposition taken as prescribed by law or the oral testimony taken at the trial of the person who made it or of a person who has examined and compared it with the original book or the entry therein, may be used with like effect as the original books, provided the party intending to use the copy gives the adverse party at least ten days' notice of his intention, specifying briefly the nature of the evidence proposed to be given; but such methods of proving a foreign corporation's act or transaction cannot be availed of when it is a party to the action and seeks to prove its own act or transaction in its own behalf.<sup>15</sup> The statute makes a debt owing to a decedent by a foreign corporation personal property at the place where the bond, note or other instrument is, for the purpose of conferring jurisdiction upon the surrogate.<sup>16</sup> The statute provides how to serve a citation upon a foreign corporation.<sup>17</sup>

**§ 736. Id.: By One Foreign Corporation Against Another Foreign Corporation.**—An action by one foreign corporation against another may be maintained (1) to recover damages for the breach of a contract (a) made within New York State or (b) relating to property situated within New York State at the time of the making of the contract, (2) to recover real property situated within New York State, (3) to recover a

<sup>13</sup> *Shepard & Morse Lumber Co. v. Burleigh*, 27 A. D. 99, 50 N. Y. Supp. 135 (1898).

<sup>14</sup> *Remington & Sherman Co. v. Niagara Bank*, 54 A. D. 358, 66 N. Y. Supp. 560 (1900); C. C. P. § 984. The foreign corporation plaintiff was ordered to change the place of the trial of its action against a domestic corporation, or-

ganized under the laws of the United States, to the county in which the latter had its principal place of business.

<sup>15</sup> C. C. P. §§ 929, 930, 931.

<sup>16</sup> C. C. P. § 2517.

<sup>17</sup> C. C. P. §§ 2525, 2526.

Generally on right of foreign corporations to sue, see note in 24 L.R.A. 289.

chattel which is replevied within New York State, (4) when the cause of action arose within New York State except when the object of the action is to affect the title to real property situated without New York State, and (5) when a foreign corporation is doing business within New York State.<sup>18</sup> The cases relating to actions by non-resident individuals and foreign corporations alone are here considered; those governing actions by resident individuals and domestic corporations against foreign corporations are hereinafter discussed.<sup>19</sup> The courts of New York have no jurisdiction of the subject-matter of a litigation between foreign corporations except in the case provided in the statute.<sup>20</sup> The statute allowing a right of action against a foreign corporation by a non-resident "where a foreign corporation is doing business in this State" is not retroactive.<sup>1</sup> The courts of this State have no jurisdiction of an action by a foreign corporation against another foreign corporation on the ground of business being done in New York State unless the corporation sued, as distinguished from the corporation suing, is doing business within this State.<sup>2</sup> It seems that the statute permitting a non-resident or foreign corporation to maintain an action against a foreign corporation when the last is doing business within this State is unconstitutional, "since it permits an action to be maintained against a foreign corporation which happens to be doing business in the State of New York upon a cause of action which arose outside of it and not connected in any way with the business there done."<sup>3</sup>

The statutory limitation of the jurisdiction of the courts of this State in actions by foreign corporations against foreign corporations to those in which the cause of action arose within this State is a valid exercise of the power of the State, and when the cause of action is the enforcement of a judgment rendered in a foreign jurisdiction it is not one which in the contemplation of the statute arose within the State.<sup>4</sup> In an action by a non-resident individual against a foreign corpo-

<sup>18</sup> C. C. P. § 1780.

<sup>19</sup> See §§ 758, 759, *infra*.

<sup>20</sup> Snow, Church & Co. v. Snow-Church Co., 80 A. D. 40, 80 N. Y. Supp. 512 (1903); C. C. P. § 1780.

<sup>1</sup> Morrison v. Baltimore & Ohio R. R. Co., 177 A. D. 613, 164 N. Y. Supp. 258 (1917); C. C. P. § 1780, subd. 4 (L. 1913, c. 60).

<sup>2</sup> U. S. Asphalt Refining Co. v. Comptoir National D'Escompte de

Paris, 166 A. D. 64, 151 N. Y. Supp. 604 (1915); C. C. P. § 1780, subd. 4, added by L. 1913, c. 60.

<sup>3</sup> Fairclough v. Southern Pacific Co., 171 A. D. 496, 157 N. Y. Supp. 862 (1916); L. 1913, c. 60, adding subd. 4 to § 1780, C. C. P.

<sup>4</sup> Anglo-American Prov. Co. v. Davis Prov. Co., 169 N. Y. 506, 62 N. E. 587 (1902); C. C. P. § 1780, subd. 3.

ration the jurisdiction of a New York court must depend on the fact that the cause of action arose within this State.<sup>5</sup> In determining whether a cause of action by a non-resident against a foreign corporation arose within the State so as to warrant suit on it in New York, the allegations of the complaint alone may be considered and the action may be maintained "if the breach of the contract occurred within this State," no matter where the contract was made.<sup>6</sup> An action may be maintained in New York by a non-resident against a foreign corporation in a case wherein the courts of this State have possession and jurisdiction of property and are attempting to determine its ownership, and the presence of the foreign corporation as a formal party at least is necessary to the complete disposition of the case and the accomplishment of justice.<sup>7</sup> The courts of New York have jurisdiction of actions against foreign corporations brought by non-residents to recover damages for the breach of a contract made within this State.<sup>8</sup> One foreign corporation cannot sue another foreign corporation in the courts of New York for a cause of action arising in a foreign state, wherein both have their offices, upon a contract made and wholly to be performed, and the alleged breach of which occurred, within that state.<sup>9</sup> A non-resident may sue a foreign corporation in the courts of New York under a contract for services to be performed partly in this State where plaintiff's headquarters were and most of his time was spent.<sup>10</sup> The courts of this State have jurisdiction of an action by one foreign corporation against another on a contract containing no provision as to the place of performance if demand and refusal to perform take place in New York without reason for refusal or claim that performance is to be at any other time or place, as the cause of action then arises in this State; and the fact that the decree rendered will affect realty outside this State is immaterial to the court's jurisdiction if the case involves fraud, trust or contract.<sup>11</sup> An action to recover damages for breach of a

<sup>5</sup> *Fenkart v. Bodenmann*, 64 Misc. 140, 118 N. Y. Supp. 1 (1909); C. C. P. § 1780, subd. 3.

<sup>6</sup> *Rosenblatt v. Jersey Novelty Co.*, 45 Misc. 59, 90 N. Y. Supp. 816 (1904); C. C. P. § 1780.

<sup>7</sup> *Holmes v. Camp*, 219 N. Y. 359, 114 N. E. 841 (1916); C. C. P. § 1780.

<sup>8</sup> *Watson v. Boston Woven Cordage Co.*, 75 Hun, 115, 26 N. Y. Supp. 1101 (1894).

<sup>9</sup> *Duquesne Club v. Penn Bank of Pittsburgh*, 35 Hun, 391 (1885); C. C. P. § 1780; U. S. Const. art. 14, § 1.

<sup>10</sup> *Strawn v. Brandt-Dent Co.*, 71 A. D. 234, 75 N. Y. Supp. 698 (1902); *aff'd* 175 N. Y. 463, 67 N. E. 1090; C. C. P. § 1780, subd. 3.

<sup>11</sup> *Wrightsville Hardware Co. v. Assets Realization Co.*, 159 A. D. 849, 144 N. Y. Supp. 991 (1913); C. C. P. § 1780, subd. 3.

contract made in New York by a foreign corporation to deliver bonds to a copartnership composed of individuals resident in this State in consideration for work to be done by them in a foreign state may be enforced in the courts of this State by another foreign corporation to which the contract has been assigned.<sup>12</sup> A corporation incorporated in a foreign country may sue in the courts of this State to enjoin another corporation organized in the same country and individuals, residents of this State, appointed as arbitrators under an agreement between such corporations, from proceeding with the arbitration.<sup>13</sup>

It is not necessary to give the courts of this State jurisdiction of an action by non-residents against a foreign corporation that all the plaintiffs should have been citizens and clothed with right to sue when the action was commenced if after the action was commenced one intervened as party plaintiff who is a resident and the cause of action be not jointly vested in the parties plaintiff and be not one to which the resident plaintiff was a necessary party when started by the non-resident; and this is true though judgment in the action was entered before the law was passed permitting suit by a non-resident against a foreign corporation.<sup>14</sup> An action by one a non-resident when suit is brought and at the time the contract sued on was made against a foreign corporation must be dismissed at any stage of the proceeding when the facts are called to the court's attention.<sup>15</sup> A suit against a foreign corporation which could only be maintained by a resident may be instituted by a clerk in a stockbroker's office who had never had any connection with the corporation until, for the purpose of enabling him to bring the action in question, a *bona fide* but non-resident stockholder deposited money with the stockbroker to the clerk's credit, who drew his cheque on the stockbroker for the amount of the deposit to the order of the depositing non-resident stockholder, who thereupon handed the clerk a certificate for shares of stock in the company, endorsed in blank, which it was never attempted to have transferred.<sup>16</sup> The right of a non-resident to assign his claim

<sup>12</sup> O'Brien v. Peoria Water Co., 5 A. D. 229, 39 N. Y. Supp. 121 (1896); C. C. P. § 1780. There was nothing to show where payment of the bonds was to be made.

<sup>13</sup> Direct U. S. Cable Co. v. Dominion Telegraph Co., 84 N. Y. 153 (1881).

<sup>14</sup> Grant v. Greene Consolidated

Copper Co., 169 A. D. 206, 154 N. Y. Supp. 596 (1915); C. C. P. § 1780, as amend'd L. 1913, c. 60.

<sup>15</sup> Jones v. Burr Brothers, Inc., 142 A. D. 640, 127 N. Y. Supp. 478 (1911); C. C. P. § 1780.

<sup>16</sup> Ervin v. Oregon Ry. & Navigation Co., 35 Hun, 544 (1885).

against a foreign corporation to a resident for the express purpose of enabling the latter to sue thereon does not extend so far as to permit an assignment after the commencement of the action.<sup>17</sup>

The court has power to decline jurisdiction of an action by a non-resident against a foreign corporation which the statute permits it to entertain.<sup>18</sup> The courts of New York will not entertain an action by one foreign corporation against another relating to realty in their home state.<sup>19</sup> The courts of New York have no jurisdiction of an action by one who at the time of its commencement and trial was a non-resident against a foreign corporation to affect property in a still different state.<sup>20</sup> A non-resident's cause of action not arising within this State, based upon a foreign statute, not relating to property within this State, in which the defendant is a foreign corporation, should not be entertained in the courts of this State.<sup>1</sup> The Supreme Court will retain jurisdiction of an action on contract brought in New York by one foreign corporation against another when the plaintiff through its agent, then temporarily in New York, accepted in New York City the telegram of the defendant from without the State offering the goods in question — even though the court might refuse jurisdiction.<sup>2</sup>

§ 737. *Id.*: **By, In General.**—“ But it is well settled that a foreign corporation may sue in the courts of this State; and equally well settled that such suit is allowed only by the comity existing between one state or country, and another. . . . A corporation not allowed to sue in its own state, certainly cannot be allowed by the friendly courtesy of another to bring its action here.”<sup>3</sup> “. . . *prima facie*, a foreign corporation may sue on a note here the same as a domestic

<sup>17</sup> *Ervin v. Oregon Ry. & Navigation Co.*, 28 Hun, 269 (1882); C. C. P. § 1780.

<sup>18</sup> *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 178 A. D. 662, 165 N. Y. Supp. 910 (1917); C. C. P. § 1780 (L. 1913, c. 60).

<sup>19</sup> *Cumberland Coal & Iron Co. v. Hoffman Steam Coal Co.*, 30 Barb. 159 (1859).

<sup>20</sup> *Johnson v. Victoria Chief Copper Mining & Smelting Co.*, 150 A. D. 653, 135 N. Y. Supp. 1070 (1912); C. C. P. § 1780. It was

alleged moneys of the company were on deposit in New York.

<sup>1</sup> *Payne v. New York, Susquehanna & Western R. R. Co.*, 157 A. D. 302, 142 N. Y. Supp. 241 (1913); app. dism'd, 211 N. Y. 557, 105 N. E. 1092; C. C. P. § 1780.

<sup>2</sup> *Wakefield Mills Co. v. Whitman Mills*, — Misc. — (1918), N. Y. L. J., April 17, p. 208; C. C. P. § 1780.

<sup>3</sup> *Hoyt v. Thompson*, 5 N. Y. 320 (1851).

corporation or natural person.”<sup>4</sup> Once a foreign corporation has begun suit in New York on a cause permitted by statute it cannot discontinue, even on payment of costs, if the defendant objects, even though it has no license to do business in this State.<sup>5</sup> An objection to the legal capacity of a foreign corporation to sue is waived if not raised by demurrer or answer.<sup>6</sup>

**§ 738. Id.: In What Court and County.**—The City Court has no jurisdiction of an action by a foreign corporation against a non-resident on a cause not arising in New York city in which the summons was not served in such city.<sup>7</sup> The Municipal Court cannot take jurisdiction of an action by a foreign corporation because its jurisdiction cannot be in excess of that of the County Court, which could not entertain such an action.<sup>8</sup> An action not specified in the nine hundred eighty-second and eighty-third sections of the Code of Civil Procedure by a foreign corporation should properly be tried in a county in which one of the defendants in this State permanently resides — and this is not changed by such defendant's business interests, official position and temporary sojourn being in another county.<sup>9</sup> “. . . a foreign corporation operating a railroad in this State is within the contemplation of . . . [the statute providing that an action must be tried in the county in which one of the parties resided at the commencement thereof], is a State corporation and is to be deemed a resident of this State for the purpose of determining the particular locality within the State where its actions shall be tried.”<sup>10</sup>

**§ 739. Id.: When May Bring, In General.**—An action may be maintained by a foreign corporation in like manner and subject to the same regulations as when the action is brought by a domestic corporation, except as otherwise specially prescribed by law; but a foreign corporation cannot maintain an action founded upon an act or upon a liability or obligation, express or implied, arising out of or made and entered into

<sup>4</sup> *Mutual Benefit Life Ins. Co. v. Davis*, 12 N. Y. 569 (1855).

<sup>5</sup> *Barney & Smith Car Co. v. Bliss Co.*, 100 Misc. 21, 164 N. Y. Supp. 800 (1917); Gen. Corp. L. § 15.

<sup>6</sup> *Pyro-Gravure Co. v. Staber*, 30 Misc. 658, 64 N. Y. Supp. 520 (1900); C. C. P. §§ 488, 498, 499.

<sup>7</sup> *Globe Yarn Mills v. Bilbrough*, 2 Misc. 100, 21 N. Y. Supp. 2 (1892); C. C. P. §§ 315, 316, 1779, 3170.

<sup>8</sup> *Lake Geneva Ice Co. v. Selvage*, 28 Misc. 581, 59 N. Y. Supp. 544 (1899).

<sup>9</sup> *Mills & Gibb v. Starin*, 119 A. D. 336, 104 N. Y. Supp. 230 (1907); C. C. P. § 984.

<sup>10</sup> *Polley v. Lehigh Valley Railroad Co.*, 138 A. D. 636, 122 N. Y. Supp. 708 (1910); *aff'd* 200 N. Y. 585, 94 N. E. 1098; C. C. P. § 984.

in consideration of an act which the laws of the State forbid a corporation or association of individuals to do, without express authority of law, provided that such prohibition does not affect the validity of a meeting of the stockholders or directors of a foreign corporation held within the State when such a meeting is authorized by the laws of the State, country or government by or under which the corporation is created; or of an act done at such a meeting which is not in conflict with the same laws or the laws of New York State.<sup>11</sup> A foreign corporation is to be barred from suing in the courts of New York only as provided by statute.<sup>12</sup> A foreign corporation may recover in this State the amount of the indebtedness to it of a domestic corporation from one who was a director thereof when the indebtedness was incurred if the domestic corporation's charter makes every director personally liable to an amount in excess of such indebtedness for all debts incurred by his corporation during his administration; and the corporate creditor need not first recover judgment against the corporate debtor.<sup>13</sup> A stockholder's interest in the capital of a domestic corporation is property situated in this State, and an action by him, who is also a stockholder in a foreign corporation owning the stock of the domestic one, in the name of the foreign corporation which has refused to sue, to compel restitution to the foreign corporation of shares of the stock of the domestic corporation which individual directors of the foreign corporation had fraudulently had transferred to themselves, may be maintained by him in New York and he may have service of process therein by publication, though himself a non-resident.<sup>14</sup>

**§ 740. Id.: When Has Not Obtained License to Do Business and Paid Fee Therefor, In General.**—No foreign stock corporation doing business in New York State can maintain any action in this State upon any contract made by it in this State unless prior to the making of such contract it has procured from the New York Secretary of State a certificate that it has complied with all the requirements of law to authorize it to do business in this State and that the business of the corporation

<sup>11</sup> C. C. P. § 1779.

<sup>12</sup> *Fresno Home Packing Co. v. Turtle & Skidmore*, 60 Misc. 79, 111 N. Y. Supp. 839 (1908); *aff'd* 132 A. D. 930, 117 N. Y. Supp. 1134; *Gen. Corp. L.* § 15.

<sup>13</sup> *State Bank of Rock Valley v. Andrews*, 2 Misc. 394, 21 N. Y. Supp. 948 (1893).

<sup>14</sup> *Holmes v. Camp*, 219 N. Y. 359, 114 N. E. 841 (1916); C. C. P. § 443, subd. 3; § 438, subd. 5; § 1780.

Generally on right of nonresident to sue, see note in 70 L.R.A. 513.

to be carried on in this State is such as may be lawfully carried on by a corporation incorporated under the laws of New York for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business respectively.<sup>15</sup> This prohibition also applies to any assignee of such foreign stock corporation and to any person claiming under such stock corporation or such assignee or under either of them.<sup>16</sup> No action can be maintained or recovery had in any of the courts of New York State by a foreign corporation doing business in this State after thirteen months from the time of beginning such business within the State without obtaining a receipt from the Comptroller of New York State for the payment of the license fee upon the capital stock employed by it within New York State during the first year of carrying on its business in this State.<sup>17</sup> The statutory requirement that a foreign corporation pay a license fee for the privilege of carrying on business in this State is not an express prohibition against doing business without a license but an imposition of a penalty through withholding the right to sue unless a license fee is paid, and is in the nature of a condition subsequent; while the statutory mandate that a foreign corporation do not do business in this State without first procuring a certificate from this State's Secretary is a prohibition against doing business here and is in the nature of a condition precedent; so that in order to establish a cause of action by a foreign corporation in the State compliance with the latter statute must be alleged and proven, while noncompliance with the former must be availed of by answer.<sup>18</sup> A foreign corporation not having a license to do business in New York may nevertheless sue in its courts if it does nothing in this State except in furtherance of interstate commerce.<sup>19</sup> The fact that a plaintiff foreign corporation has, at the time of making a contract in this State on which it sues, paid the franchise tax required by law of foreign corporations duly authorized to do business in this State, will not avail it if it has not prior to the making of the contract obtained a license to do business in New

<sup>15</sup> Gen. Corp. L. § 15 (L. 1909, c. 28).

<sup>16</sup> Gen. Corp. L. § 15 (L. 1909, c. 28).

<sup>17</sup> Tax L. § 181 (L. 1917, c. 490).

<sup>18</sup> Wood v. Selick & Ball, 190 N. Y. 217, 83 N. E. 21 (1907); Tax L. § 181; Gen. Corp. L. § 15.

<sup>19</sup> International Text Book Co. v. Tone, 220 N. Y. 313, 115 N. E. 914 (1917); Gen. Corp. L. § 15 (L. 1909, c. 23); Tax L. § 181 (L. 1909, c. 60).

York.<sup>20</sup> A foreign corporation which has no right (by reason of not complying with New York law) to transact the business it carries on in this State as a manufacturing corporation cannot enjoin a domestic corporation from using as its name one identical with that of the foreign corporation if the former has honestly adopted the name only after full inquiry from the Secretary of State of New York of its right to do so, and if there be no proof of any fraudulent intent in adopting such name.<sup>1</sup> A foreign corporation, though it has not procured a certificate authorizing it to do business here, may have an injunction against the use by a domestic corporation of a name similar to its own, pending a suit by it in this State to enjoin the use of such name on the ground of unfair competition; because the statute requiring such a certificate only bars an action on contract by a corporation not obtaining it.<sup>2</sup>

**§ 741. Id.: When Doing Business in New York.**—Only foreign corporations “doing business” in New York are within the purview of the statutes prohibiting actions by them in New York unless they have obtained licenses to do business and paid the fees therefor; and what constitutes “doing business” under these statutes has been already discussed.<sup>3</sup> A foreign corporation which is lessee of a building in this State and is subletting it for profit is engaged in doing business in this State.<sup>4</sup>

**§ 742. Id.: On Contract When No License Obtained, In General.**—The only penalty imposed by statute upon a foreign corporation doing business in New York for its failure to obtain, prior to the making of a contract in New York by it, a certificate or license from the New York Secretary of State permitting it to do business in this State, is that it may not maintain any action in New York upon any contract made by it in New York before obtain-

<sup>20</sup> *Emmerich Co. v. Sloane*, 108 A. D. 330, 95 N. Y. Supp. 39 (1905); *Gen. Corp. L. § 15* (L. 1904, c. 490); *Tax L. § 181* (L. 1895, c. 240).

<sup>1</sup> *American Tartar Co. v. American Tartar Co.*, 57 A. D. 411, 68 N. Y. Supp. 236 (1901). The foreign corporation was incorporated before the domestic.

<sup>2</sup> *Hoewel Sandblast Machine Co. v. Hoewel*, 167 A. D. 548, 153 N. Y. Supp. 35 (1915); *Gen. Corp. L.*

*§ 15*. The fact that the plaintiff had not complied with *Tax L. § 181*, was held immaterial. The defendant, formerly the plaintiff's president, had resigned and immediately formed the corporation complained of, under the name *Hoewel Sandblast Machine Co. of New York, Inc.*

<sup>3</sup> See *§ 697 et seq., supra*.

<sup>4</sup> *Cassidy's Ltd. v. Rowan*, 99 Misc. 294, 163 N. Y. Supp. 1079 (1917); *Gen. Corp. L. § 15*.

ing such license.<sup>5</sup> The effect of the statute forbidding any foreign stock corporation doing business in this State to maintain any action in New York on any contract made by it in this State unless prior to the making of such contract it has procured a certificate permitting it to do business in New York is solely to prevent such corporation from suing on such contract in this State; it does not invalidate the contract or prevent the other party to it from suing such corporation thereon in this State.<sup>6</sup> “. . . the statutory requirement [of obtaining a license] which is made a condition precedent to the maintenance of an action upon contract by a foreign corporation has no application to an action against such corporation for tort.”<sup>7</sup> The statute prohibiting a foreign corporation from bringing action in this State until it had procured a license from the Secretary of State “was simply declaratory of the policy of the State that foreign stock corporations should not carry on any business in this State, which similar corporations organized under its laws could not lawfully conduct. Its purpose was not to avoid contracts; but to provide for an effective supervision and control of the business proposed to be carried on here by foreign corporations. It provided no penalty, in the event of a non-compliance, other than the suspension of civil remedies.”<sup>8</sup> A foreign corporation must have obtained a license to do business in New York not only before bringing action on a contract made by it in this State but before entering into the contract, as a condition precedent to suit on the contract.<sup>9</sup> “. . . the inhibition of the statute, as touching the maintenance of an action, goes to a case only where the corporation, so doing business, also sues upon a contract made within

<sup>5</sup> Gen. Corp. L. § 15 (L. 1909, c. 28).

<sup>6</sup> *Mahar v. Harrington Park Villa Sites*, 204 N. Y. 231, 38 L.R.A. (N.S.) 210, 97 N. E. 587 (1912); Gen. Corp. L. § 15. The older cases, such as that following, no longer obtain: The inhibition against action in this State by a foreign corporation upon a contract made within this State until it shall have procured a certificate from the Secretary of State endures only while it is without such certificate: the contract itself stands. *Neuchatel As-*

*phalte Co. v. The Mayor*, 155 N. Y. 373, 49 N. E. 1043 (1898); L. 1892, c. 687, § 15.

<sup>7</sup> *Bischoff v. Automobile Touring Co.*, 97 A. D. 17, 89 N. Y. Supp. 594 (1904); Gen. Corp. L. § 15 (L. 1901, c. 538).

<sup>8</sup> *Neuchatel Asphalte Co. v. The Mayor*, 155 N. Y. 373, 49 N. E. 1043 (1898); L. 1892, c. 687, § 15.

<sup>9</sup> *South Amboy Terra Cotta Co. v. Poerschke*, 45 Misc. 358, 90 N. Y. Supp. 333 (1904); Gen. Corp. L. § 15, as amend'd L. 1901, c. 538.

the State.”<sup>10</sup> To prevent a foreign corporation from suing in this State on a contract made by it on the ground that it has not obtained a license from the Secretary of State it must appear that it is doing business in the State and that the contract was made by it in New York.<sup>11</sup> “The inhibition of the maintenance of an action by a foreign corporation, or its assignee, where no certificate has been procured . . . , is directed only against actions on contracts made within the State, and . . . where the papers do not disclose the fact that the contract was made within the State it is not necessary to aver compliance with the statutory condition in the matter of the certificate, for the purposes of an attachment.”<sup>12</sup>

**§ 743. Id.: What Contracts May Not Be Sued On.**—The statute prohibiting a foreign corporation from suing in this State on a contract unless it has obtained a license from the Secretary of State for New York does not apply to such a contract made before the statute was enacted.<sup>13</sup> A foreign corporation doing business in this State before the enactment of the statute prohibiting a foreign corporation from suing in New York unless it had obtained a license from the Secretary of State may sue without having obtained such a license on any contract made by it before such enactment, and the fact that the debt on which it sues was not due during the existence of default in filing its annual report does not relieve it from liability.<sup>14</sup> A contract to build and erect elevators in a building in New York for its use made by a foreign corporation is not interstate business under the exclusive control of the Federal Government so as to relieve the company from the obligation of securing a license as a prerequisite to suit on the contract in the courts of this State.<sup>15</sup> An action

<sup>10</sup> *American Broom & Brush Co. v. Addickes*, 19 Misc. 36, 42 N. Y. Supp. 871 (1896); L. 1912, c. 687, § 15.

<sup>11</sup> *International Textbook Co. v. Connelly*, 67 Misc. 49, 124 N. Y. Supp. 603 (1910); *aff'd* 140 A. D. 939, 125 N. Y. Supp. 1125; Gen. Corp. L. § 15.

<sup>12</sup> *Box, Board & Lining Co. v. Vincennes Paper Co.*, 45 Misc. 1, 90 N. Y. Supp. 836 (1904); *aff'd* 98 A. D. 623, 90 N. Y. Supp. 1105; Gen. Corp. L. § 15.

On failure to comply with condition of doing business in the state

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as a defense to an action by corporation against officer or agent, see note in L.R.A.1916A, 646.

<sup>13</sup> *Atlantic Construction Co. v. Kreusler*, 40 A. D. 268, 57 N. Y. Supp. 983 (1899); Gen. Corp. L. § 15 (L. 1892, c. 687).

<sup>14</sup> *Providence Steam Co. v. Connell*, 86 Hun, 319, 33 N. Y. Supp. 482 (1895); Gen. Corp. L. § 15 (L. 1892, c. 687).

<sup>15</sup> *Portland Co. v. Hall & Grant Construction Co.*, 121 A. D. 779, 106 N. Y. Supp. 649 (1907); Gen. Corp. L. § 15 (L. 1892, c. 687, as amend'd).

may be maintained by a foreign corporation doing business in this State without a license on a unilateral contract by a borrower of money from it within this State to repay; because the corporation itself makes no contract.<sup>16</sup> A lease made by a foreign corporation as lessor and a New Yorker as lessee signed by the latter outside the United States but delivered in New York is a contract made in this State.<sup>17</sup> A contract by one foreign corporation with another by which the former ships from a foreign State to the latter in this State goods pursuant to the latter's order by letter written in this State and mailed to the former outside the State, is not completed until acceptance in such foreign State, and is, therefore, made there; but, as default in the contract occurs only when the latter corporation makes default in payment, if such payment ought to have been made in New York, the cause of action on the contract arises in New York and suit may be brought in this State.<sup>18</sup> Defendants, one of which is a foreign corporation, if successful in the action, may maintain an action on the undertaking given to obtain an attachment against them in the first action, even though the corporate foreign defendant has not obtained a license to do business in this State; because the contract in the undertaking is not one made by it.<sup>19</sup> A foreign corporation may sue in this State to foreclose a mechanic's lien for goods furnished in this State direct to the owner under the only contract by it for work to be done in this State which it has undertaken, though not authorized to do business in New York.<sup>20</sup>

**§ 744. Id.: By Assignee.**—A prohibition against an assignee of a foreign corporation suing on a claim by it under contract when it had not obtained a license in this State added to a statute which till then had only debarred the corporation itself from suing does not apply to a contract made before the amendment's passage.<sup>1</sup> An action upon a contract made

<sup>16</sup> *Commercial Coal & Ice Co. v. Polhemus*, Nos. 1 & 2, 128 A. D. 247, 112 N. Y. Supp. 566 (1908); *Gen. Corp. L. § 15*.

<sup>17</sup> *Cassidy's Ltd. v. Rowan*, 99 Misc. 274, 163 N. Y. Supp. 1079 (1917); *Gen. Corp. L. § 15*.

<sup>18</sup> *Shelby Steel Tube Co. v. Burgess Gun Co.*, 8 A. D. 444, 40 N. Y. Supp. 871 (1896); *C. C. P. § 1780*, subd. 3.

<sup>19</sup> *Sterling Manufacturing Co. v. National Surety Co.*, 94 Misc. 604,

159 N. Y. Supp. 979 (City Ct., N. Y. C., 1916); *Gen. Corp. L. § 15*.

<sup>20</sup> *New York Terra-Cotta Co. v. Williams*, 102 A. D. 1, 92 N. Y. Supp. 808 (1905); *aff'd* 184 N. Y. 579, 77 N. E. 1192; *Lien L. § 3* (L. 1897, c. 418); *Gen. Corp. L. § 15* (L. 1901, c. 583).

<sup>1</sup> *McNamara v. Keene*, 49 Misc. 452, 98 N. Y. Supp. 860 (1906); *St. Corp. L. § 15*, as amend'd L. 1901, c. 538.

by an individual and assigned to a foreign corporation is not within the statutory inhibition of suit by a foreign corporation which has not obtained a license to do business.<sup>2</sup> An action by assignees of receivers of a foreign corporation on a contract made by it in this State before appointment of the receivers for it (in its home State) cannot be maintained by the receivers if it could not have been maintained by the corporation when the contract was made by reason of its failure to obtain a license to do business in New York.<sup>3</sup>

**§ 745. Id.: For Any Cause When License Fee Not Paid.—**

The penalty imposed by statute against a foreign corporation doing business in New York without obtaining within thirteen months from beginning such business a receipt for its license fee is a prohibition against maintenance by it in this State of any action.<sup>4</sup> The prohibition in the Tax Law against a foreign corporation maintaining any action unless it has paid its license fee applies only to a foreign corporation "authorized to do business under the General Corporation Law"; so that a foreign corporation not shown to need a license to do business in this State is not within the prohibition.<sup>5</sup> Neither a foreign corporation which has done business in this State for more than one year and has not a receipt for its license fee, nor its assignee has any standing to sue in a New York court.<sup>6</sup> Failure of a foreign corporation to obtain a certificate of authority does not prevent it from recovering on a counterclaim put forward by it to an action on a contract against it in this State; but its failure to pay a license tax does.<sup>7</sup>

**§ 746. Id.: Pleading, Practice and Evidence, In General.—**

While a foreign corporation appearing in court must establish its right to bring the suit and make the contract it seeks to enforce, it need not set forth in the pleadings the authority on which it sustains its right but may show it on the hearing of the cause.<sup>8</sup> On a motion by defendants to compel plaintiff's

<sup>2</sup> O'Reilly, Skelly & Fogarty Co. v. Greene, 18 Misc. 423, 41 N. Y. Supp. 1056 (1896).

<sup>3</sup> Myers v. Spangenberg & McLean Co., 65 Misc. 475, 120 N. Y. Supp. 174 (1909); Gen. Corp. L. § 15 (L. 1904, c. 490).

<sup>4</sup> Tax L. § 181 (L. 1917, c. 490).

<sup>5</sup> Portland Co. v. Hall & Grant Construction Co., 121 A. D. 779, 106 N. Y. Supp. 649 (1907); Gen. Corp. L. § 15 (L. 1904, c. 490); Tax L. § 181 (L. 1901, c. 558).

<sup>6</sup> Kinney v. Reid Ice Cream Co., 57 A. D. 206, 68 N. Y. Supp. 325 (1901); Tax L. § 181 (L. 1896, c. 908).

<sup>7</sup> American Ink Co. v. Riegel Sack Co., 79 Misc. 421, 140 N. Y. Supp. 107 (1913); Gen. Corp. L. § 15 and Tax L. § 181.

<sup>8</sup> Marine & Fire Ins. Bank of Ga. v. Jauncey, 1 Barb. 486 (1847).

attorneys to produce their authority for commencing an action by their client, a foreign corporation, the question whether the plaintiff has ceased to exist under the laws of its home State cannot be gone into.<sup>9</sup>

**§ 747. Id.: Verification of Pleadings.**—The agent of or the attorney for a foreign corporation may verify a pleading by it.<sup>10</sup>

**§ 748. Id.: Statement and Proof of Corporate Name and Incorporation.**—In an action or special proceeding brought by a corporation the defendant is deemed to have waived any mistake in the statement of the corporate name unless the misnomer is pleaded in the answer or other pleading in the defendant's behalf.<sup>11</sup> In an action brought by a foreign corporation the complaint must state it to be such and the State, country or government by or under the laws of which it was created, but need not set forth or specially refer to any act or proceeding by or under which it was created.<sup>12</sup> In an action brought by a corporation the plaintiff need not prove upon the trial the existence of the corporation unless the answer is verified and contains an affirmative allegation that the plaintiff or the defendant, as the case may be, is not a corporation.<sup>13</sup> “. . . an omission to set forth the State, country or government by or under whose laws the alleged foreign corporation was created, cannot be said to be one of substance which can be taken advantage of by demurrer.”<sup>14</sup> Whenever, by the laws of any other state or territory, or the Dominion of Canada, a copy of the certificate of organization or incorporation or any other certificate, certified or exemplified by any officer or officers in such state or territory or dominion, is or shall be prima facie evidence of the due formation, creation, existence, organization or capacity of any corporation created, organized or located in such state, territory or dominion, or claiming so to be, such certificate or certificates, duly exemplified, or a duly exemplified copy thereof, must be received in all actions and proceedings in New York State, in or before all courts and officers, with the same force and effect in all respects as prima facie evidence as aforesaid, as in such other state, territory or dominion.<sup>14a</sup>

<sup>9</sup> Havana City Ry. Co. v. Ceballos, 25 Misc. 660, 56 N. Y. Supp. 360 (1898).

<sup>10</sup> C. C. P. § 525.

<sup>11</sup> C. C. P. § 1777.

<sup>12</sup> C. C. P. § 1775.

<sup>13</sup> C. C. P. § 1776.

<sup>14</sup> Fraser v. Granite State Provident Assn., 8 Misc. 7, 28 N. Y. Supp. 65 (1894); C. C. P. § 1775.

<sup>14a</sup> Gen. Corp. L. § 9, para. 2 (L. 1909, c. 28). In United States Vinegar Co. v. Schlegel, 143 N. Y. 537, 38 N. E. 729 (1894), it was

**§ 749. Id.: Security for Costs.**—The defendant in an action brought in a court of record may require security for costs to be given when the plaintiff was when the action was commenced a foreign corporation; but if there are two or more plaintiffs the defendant cannot require security for costs to be given unless he is entitled to require it of all the plaintiffs.<sup>15</sup>

**§ 750. Id.: Corporate Books.**—A foreign corporation suing in this State may be compelled to allow the one it sues to inspect its books as to matters to which such one is entitled to a discovery in connection with the action.<sup>16</sup>

**§ 751. Id.: As to Obtaining License and Paying Fee for Privilege of Doing Business In New York, In General.**—“ . . . when a foreign corporation brings a suit in the courts of this State and states a good cause of action in the complaint, it will be assumed that it is rightfully in the State and properly in the court until the contrary is made to appear.”<sup>17</sup> A complaint by a foreign corporation alleging upon its face a good cause of action cannot be dismissed if there is nothing before the trial court warranting the presumption that it is doing business in this State.<sup>18</sup> A motion to dismiss without stating the ground, based on failure of proof of issuance to a plaintiff foreign corporation of a certificate authorizing it to do business in the State, cannot be urged for the first time upon appeal.<sup>19</sup> What is stated in the bill of particulars given by a foreign plaintiff corporation is not to be considered in determining whether or not it is entitled to sue by reason of not having obtained a license to do business in New York.<sup>20</sup> A foreign manufacturing

held that proof of the corporate character of a foreign corporation was not sufficiently made by putting in evidence the certificate of the secretary of its home state that it is duly incorporated and a certificate signed and acknowledged by five persons described as incorporators, duly filed in such secretary's office; but proof should also be made of the law of the home state that such papers established the corporate character.

<sup>15</sup> C. C. P. §§ 3268, 3270.

<sup>16</sup> *National Distilling Co. v. Van Emden*, 120 A. D. 746, 105 N. Y. Supp. 657 (1907). But, rather than make the plaintiff bring its books to this State, it will be ordered to give a copy of the parts thereof perti-

nent to the defendant's claim to the latter, verified by an officer of the former, and to exhibit its books, so far as pertinent, to defendant at its home office on reasonable (two days') notice.

<sup>17</sup> *Eclipse Silk Mfg. Co. v. Hiller*, 145 A. D. 568, 129 N. Y. Supp. 879 (1911); Gen. Corp. L. § 15.

<sup>18</sup> *Alpha Portland Cement Co. v. Schratwieser Fireproof Construction Co.*, 146 A. D. 571, 131 N. Y. Supp. 142 (1911); Gen. Corp. L. § 15.

<sup>19</sup> *Boynton Furnace Co. v. Trohn*, 141 A. D. 773, 126 N. Y. Supp. 695 (1910); Gen. Corp. L. § 15.

<sup>20</sup> *St. Albans Beef Co. v. Aldridge*, 112 A. D. 803, 99 N. Y. Supp. 398 (1906); Gen. Corp. L. § 15 (L. 1904, c. 490).

corporation having its principal and so far as affects this State its only office in its home State cannot be considered to be doing business in this State so as to have to obtain, and allege in an action the obtention of a license to do business in New York, because it employed an agent who resided in New York and sold the goods for the price of which the action is brought under a written contract addressed to and accepted by the corporation in its home State.<sup>1</sup> A note made in another State and sued on here by a foreign corporation is not a contract made in this State so as to require proof by the corporation that it has obtained a license to do business in New York as a condition precedent to bringing action on the note.<sup>2</sup>

**§ 752. Id.: As to Pleading or Proving Corporation Is a Stock Corporation.**—When it is alleged that the plaintiff is a foreign corporation, there is a presumption that it is a foreign stock corporation, and if it appear that the action is on a contract made in this State no cause of action is stated unless the complaint allege that the plaintiff has received a license to do business in New York.<sup>3</sup> A foreign corporation doing business in New York and not alleged or proven to be a stock corporation must, if a complaint by it aver its compliance with the laws of this State and an answer thereto deny this specifically, prove on the trial that it has complied with the statute governing foreign corporations or else be out of the Courts of New York.<sup>4</sup> From a complaint by a foreign corporation which shows on its face that it is a corporation doing business and which could have been incorporated in New York as a stock but not as a membership corporation, it will be assumed that it is a stock corporation; and, if it is suing on a contract made by it in New York, it must allege compliance with the statute requiring it to obtain a license.<sup>5</sup> If there be no allegation in answer to a complaint by a foreign corporation that it is a stock corporation, and the complaint does not make the fact appear, no defense can be set up against the plaintiff's right to sue on the ground that it has not obtained a license to do business in the State.<sup>6</sup>

<sup>1</sup> *Harvard Co. v. Wicht*, 99 A. D. 507, 91 N. Y. Supp. 48 (1905); *Tax L. § 181* (L. 1896, c. 908).

<sup>2</sup> *Great Northern Moulding Co. v. Bonewur*, No. 1, 128 A. D. 831, 113 N. Y. Supp. 60 (1908); *Gen. Corp. L. § 15*.

<sup>3</sup> *Portland Co. v. Hall & Grant Construction Co.*, 123 A. D. 495, 108 N. Y. Supp. 821 (1908); *Gen. Corp. L. § 15* (L. 1892, c. 687).

<sup>4</sup> *Strout Farm Agency v. Hunter*, 85 Misc. 476, 148 N. Y. Supp. 924 (1914); *Gen. Corp. L. §§ 15, 16*.

<sup>5</sup> *Chicago Crayon Co. v. Slattery*, 68 Misc. 148, 123 N. Y. Supp. 987 (1910); *Gen. Corp. L. § 15*.

<sup>6</sup> *Portland Co. v. Hall & Grant Construction Co.*, 121 A. D. 779, 106 N. Y. Supp. 649 (1907); *Gen. Corp. L. § 15* (L. 1904, c. 490).

**§ 753. Id.: When No License Fee Paid.**—A defendant in an action by a foreign corporation or its assignee seeking to defeat it by reason of the corporation's failure to pay its license fee to the Secretary of this State must allege in the answer that the amount of the license fee had been assessed by the comptroller and that more than thirty days had elapsed before the fee was paid.<sup>7</sup>

**§ 754. Id.: When Assignee Sues.**—“ . . . the defense available against the [foreign] corporation under the statute [requiring it to pay a tax or otherwise not to sue] would also be good as against the [corporation's] assignee [suing here] except as to negotiable paper taken in good faith from the corporation before maturity.”<sup>8</sup> The assignee of a foreign corporation cannot sue on a contract made by the latter in the State where it did business without alleging and proving that the assignor corporation had obtained the statutory license to do business in New York.<sup>9</sup> An individual assignee of a foreign corporation suing in this State need not allege that the assignor is a foreign corporation and that it is created under the laws of such or such a State and country; but if he did have to do so, an allegation that the assignor is *e. g.*, “ a Pennsylvania corporation ” suffices.<sup>10</sup>

**§ 755. Id.: Necessity and Manner of Pleading in Complaint.**—A complaint in an action by a foreign corporation on contract should not be dismissed on the ground that it has not obtained the statutory certificate to do business if the complaint and the answer, neither one, alleges the corporation is doing business or the contract was made in this State, and there is no evidence to such effect.<sup>12</sup> A foreign stock corporation is properly nonsuited if its complaint does not allege obtention by it of a license to do business in New York.<sup>13</sup> When it appears from a complaint that the plaintiff is a foreign stock corporation which must have procured a certificate from the Secretary of State before it made the contract

<sup>7</sup> *Halsey v. Jewett Dramatic Co.*, 190 N. Y. 231, 83 N. E. 25 (1907); Tax L. § 181.

<sup>8</sup> *Halsey v. Jewett Dramatic Co.*, 190 N. Y. 231, 83 N. E. 25 (1907); Tax L. § 181.

<sup>9</sup> *Manufacturers' Commercial Co. v. Blitz*, 131 A. D. 17, 115 N. Y. Supp. 402 (1909); Gen. Corp. L. § 15.

<sup>10</sup> *Roberts v. Pioneer Iron Works*, 125 A. D. 207, 109 N. Y. Supp. 230 (1908); C. C. P. § 1775.

<sup>12</sup> *Stafford Manufacturing Co. v. Newman*, 75 Misc. 636, 133 N. Y. Supp. 1073 (1912); Gen. Corp. L. § 15.

<sup>13</sup> *Wood v. Selick & Ball*, 114 A. D. 743, 100 N. Y. Supp. 119 (1906); *aff'd* 190 N. Y. 217, 83 N. E. 21; Gen. Corp. L. § 15 (L. 1901, c. 538); C. C. P. § 499. But see *O'Reilly, Skelly & Fogarty Co. v. Greene*, 18 Misc. 423, 41 N. Y. Supp. 1056 (1896); L. 1892, c. 687, § 15.

sued on, the complaint is demurrable unless it allege that such certificate has been obtained.<sup>14</sup> "If a foreign corporation alleges in its complaint that it is doing business in this State and alleges the making of the contract sued upon in this State it must also allege compliance with section fifteen of the General Corporation Law, otherwise the complaint is demurrable (*citation*). . . . a complaint states a good cause of action and is not demurrable unless it appears on the face of the complaint that the foreign corporation was doing business in this State and that it made the contract sued upon in this State."<sup>15</sup> It is a necessary statement of a cause of action by a foreign corporation doing business in this State seeking to recover on a contract made by its agent in this State that it allege that it is so doing business and that before making the contract it had procured the proper certificate from the Secretary of State.<sup>16</sup> A statement in a complaint by a foreign corporation on a contract that it is such and is duly authorized to do business in New York is a conclusion of fact sufficient to comply with the statutory mandate that it shall have procured a certificate to do business.<sup>17</sup>

**§ 756. Id.: Necessity and Manner of Pleading, As Defense.**—The cases in this section on pleading compliance or non-compliance with the New York State statutes governing foreign corporations operating in this State must be considered together with the cases in the next section on proving such compliance or non-compliance, in whatever condition the pleadings may be. The absence of an averment in a complaint by a foreign corporation that it has paid the New York statutory license fee is not a demurrable defect.<sup>18</sup> ". . . a failure on the part of a foreign corporation doing business in this State to allege due authority thus to transact business does not affect the substance of 'a claim by it' and is not available upon a demurrer that the complaint does not state facts sufficient to constitute a cause of action."<sup>19</sup> A defendant seeking to avoid payment claimed to be due a foreign corpora-

<sup>14</sup> Welsbach Co. v. Norwich Gas & Electric Co., 96 A. D. 52, 89 N. Y. Supp. 284 (1904); *aff'd* 180 N. Y. 533, 72 N. E. 1152; Gen. Corp. L. § 15 (L. 1892, c. 687).

<sup>15</sup> Frick Co. v. Pultz, 162 A. D. 209, 147 N. Y. Supp. 732 (1914); Gen. Corp. L. § 15; C. C. P. § 1779.

<sup>16</sup> Angildile Computing Scale Co. v. Gladstone, 164 A. D. 370, 149 N. Y. Supp. 807 (1914); Gen. Corp. L. § 15.

<sup>17</sup> United Building Material Co. v. Odell, 67 Misc. 584, 123 N. Y. Supp. 313 (1910); Gen. Corp. L. § 15.

<sup>18</sup> O'Reilly, Skelly & Fogarty Co. v. Green, 18 Misc. 423, 41 N. Y. Supp. 1056 (1896); L. 1895, c. 240.

<sup>19</sup> Emmerich v. Sloane, 108 A. D. 330, 95 N. Y. Supp. 39 (1905); Gen. Corp. L. § 15 (L. 1904, c. 490).

tion plaintiff under a contract on the ground that the making of it by plaintiff was void as constituting "doing business" in this State without having obtained a certificate, etc., from the Secretary of State, must allege in his answer that the plaintiff is a foreign corporation doing business in the State if the complaint does not show these facts.<sup>20</sup> The point that a foreign corporation bringing suit has not obtained a license to do business in New York need not be covered by affirmative allegation in the complaint but must be raised as matter of defense to be taken advantage of.<sup>1</sup> The objection to the maintenance of an action by a foreign corporation that it has not complied with legal requirements permitting it to do business in New York is an affirmative defense which must be pleaded to be made available.<sup>2</sup> An objection that a foreign corporation plaintiff cannot recover in an action without showing that it had complied with the statute requiring a foreign corporation to obtain from the Secretary of State a certificate of authority to do business in New York is not tenable unless affirmatively set out as matter of defense in the answer.<sup>3</sup> It has been held that a defendant, by generally denying upon information and belief a foreign corporation's complaint, waives its right to question the plaintiff's failure to plead compliance with the laws of New York in regard to permission to do business in this State.<sup>4</sup> ". . . if the complaint in an action by a foreign corporation shows that the cause of action alleged is upon a *contract made in this State by a foreign corporation* which is doing business in this State, and fails to allege that the corporation had, before making the contract, procured the certificate required by section fifteen of the General Corporation Law, then, in that event, the complaint is demurrable."<sup>5</sup> ". . . if the complaint in an action,

<sup>20</sup> Angldile Computing Scale Co. v. Gladstone, 164 A. D. 379, 149 N. Y. Supp. 807 (1914); Gen. Corp. L. § 15.

<sup>1</sup> Nicoll v. Clark, 13 Misc. 128, 34 N. Y. Supp. 159 (1895); L. 1892, c. 687, § 15.

<sup>2</sup> Fuller & Co. v. Schrenk, 58 A. D. 222, 68 N. Y. Supp. 781 (1901); aff'd 171 N. Y. 671, 64 N. E. 1126; Gen. Corp. L. § 15 (L. 1892, c. 687).

<sup>3</sup> International Society v. Dennis, 76 A. D. 327, 78 N. Y. Supp. 497 (1902); L. 1892, c. 687, § 15.

<sup>4</sup> Harris Press Co. v. Demarest Pattern Co., 47 Misc. 624, 94 N. Y. Supp. 462 (1905).

<sup>5</sup> Woodward Lumber Co. v. General Supply and Construction Co., 60 Misc. 367, 113 N. Y. Supp. 628 (1908). *Per contra*: "It does not appear from the complaint, nor can it be inferred from the facts pleaded therein, that the plaintiff was doing business in this State or that the contract which is the basis of this action was made in this State. That being the fact, the complaint is not demurrable because it fails to allege that the plaintiff procured from the Secretary of State the certificate referred to."

brought either by the corporation or its assignee, shows that the cause of action alleged was upon a contract made in this State by a foreign stock corporation which is doing business in this State, the complaint is demurrable if it fails to allege in addition that the corporation had before making the contract procured the certificate required by section fifteen of the General Corporation Law (*citations*). The prohibition by the statute of the enforcement of contracts made by a foreign corporation extends only to actions upon contracts made within this State by a foreign stock corporation (other than a moneyed corporation) doing business within this State (*citation*). It follows that, unless the complaint shows these facts as to the character of the corporation, and its doing business and making the contracts within the State, the complaint is not demurrable because it fails to allege that the required certificate was procured.”<sup>6</sup> An answer to a complaint by a foreign corporation should be allowed to be amended on the trial so as to permit an allegation that plaintiff was a foreign corporation doing business in New York which had not secured a license, if the pleadings failed to aver that plaintiff was doing business in this State, as such an amendment would, if established, defeat plaintiff’s right of recovery and plaintiff could not claim surprise.<sup>7</sup>

**§ 757. Id.: Necessity and Manner of Proof Of Compliance or Non-compliance with Statute.**—Proof of the corporate character of a foreign corporation is not sufficiently made by putting in evidence the certificate of the Secretary of its home State that it is duly incorporated and a certificate signed and acknowledged by five persons described as incorporators, duly filed in such Secretary’s office; but proof should also be made of the law of the home State that such papers established the corporate character.<sup>8</sup> A foreign corporation suing in this State on a written contract, which avers it is a foreign corporation and has obtained a license to do business in New York, and which averment is denied, has the burden of proving this as a condition precedent to recovery.<sup>9</sup> A certificate of incorporation of a plaintiff in a foreign State and a certificate of nonpayment by plaintiff of the statutory license

<sup>6</sup> Union Trust Co. v. Sickels, 125 A. D. 105, 109 N. Y. Supp. 262 (1908); Gen. Corp. L. § 15.

<sup>7</sup> Steiger Trunk & Bag Co. v. Wharncliffe, 62 Misc. 14, 114 N. Y. Supp. 462 (1909); Gen. Corp. L. § 15.

<sup>8</sup> United States Vinegar Co. v. Schlegel, 143 N. Y. 537, 38 N. E. 729 (1894).

<sup>9</sup> Pittsburgh Plate Glass Co. v. Ravitch, 58 Misc. 191, 108 N. Y. Supp. 1103 (1908); Gen. Corp. L. § 15.

fee in New York are insufficient to throw plaintiff out of court in an action by it in this State to recover for goods sold.<sup>10</sup> Proof of compliance with the statute requiring a foreign corporation doing business in New York to secure a license from the Secretary of State must be made by the corporation or its assignee when suing on a contract by the corporation made in New York; non-compliance is not a matter of defense.<sup>11</sup> When the evidence properly admitted on the trial in an action by a foreign corporation shows it is a foreign stock corporation doing business in New York State and suing on a contract made within this State, it must prove it has obtained authorization to do business within this State before the making of the contract in order to recover, even though no such defense was raised in the answer.<sup>12</sup>

**§ 758. Id.: Actions Against, In General.**—The statute permitting actions against foreign corporations is not unconstitutional because it is not in terms limited to foreign corporations doing business in the State.<sup>13</sup> New York courts obtain jurisdiction of an action by a resident against a foreign corporation engaged in business in this State though the cause of action sued on has no relation in its origin to the business here transacted.<sup>14</sup> A foreign corporation is doing business in New York so as to be subject to suit by a resident if it maintains an office here in charge of one soliciting business for it upon the door of which is its name and upon the stationery of which person is its name, the office expenses being paid by it; though the agent did business on his own account also, and it had no property in this State except office furniture, and its transactions in New York were not numerous or continuous though substantial, and were always submitted to it for approval by its agent.<sup>15</sup> A foreign corporation is subject to the general jurisdiction of the courts of this State if they have jurisdiction of the subject of the action and personal service is made on it according to

<sup>10</sup> *Stern v. Childs*, 26 Misc. 419, 56 N. Y. Supp. 192 (1899); L. 1896, c. 908, § 181.

<sup>11</sup> *Manufacturers' Commercial Co. v. Blitz*, 131 A. D. 17, 115 N. Y. Supp. 402 (1909); Gen. Corp. L. § 15.

<sup>12</sup> *American Can Co. v. Grassi Contracting Co., Inc.*, 102 Misc. 230, 168 N. Y. Supp. 689 (1918).

<sup>13</sup> *Interocean Forwarding Co. v. McCormick & Co.*, — Misc.— (1917); N. Y. L. J. Dec. 28; N. Y. Sp. T.; C. C. P. § 1780.

<sup>14</sup> *Tanza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1917).

<sup>15</sup> *Interocean Forwarding Co. v. McCormick & Co.*, — Misc.— (1917); N. Y. L. J. Dec. 28, Sp. T. N. Y. Co.; C. C. P. § 1780.

the statute.<sup>16</sup> The court should exercise its discretion in deciding if it will assume jurisdiction of an action by a non-resident against a foreign corporation doing business in New York for a tort not done in connection with such business but outside the State.<sup>17</sup> The courts of this State may well decline to exercise an equitable jurisdiction over a foreign corporation in a cause of action which arises abroad, affects only the internal management of the corporation, and the judgment in which can only be enforced by injunction against its individual members; but may send the party complaining to the State where the corporation has a legal existence.<sup>18</sup> A stockholder of a foreign corporation will not be aided by the courts of this State in the administration of its assets after its legal death by merger in another through an action to compel the consolidated corporation, also a foreign corporation, to account to the complaining stockholder and such other stockholders similarly situated as come in and contribute.<sup>19</sup> A defendant which is a foreign corporation and has no property in New York cannot be bound by a judgment rendered against it in an action in the courts of this State on a cause arising in a foreign State, enforceable whenever any of its property comes within this State.<sup>20</sup> Once a foreign corporation has appeared in an action in a New York court it is as subject to the court's jurisdiction as if it were a domestic corporation.<sup>1</sup> An appearance by a defendant foreign corporation by attorney under a notice demanding a copy of the complaint and stating that he waived no rights to contest the service of the summons or contest the court's jurisdiction is a special appearance.<sup>2</sup> A foreign corporation waives any defect in obtaining jurisdiction of it by appearing specially in the State to remove the action to the Federal court, and moving to open a judgment entered against it in the State court by default

<sup>16</sup> *Heney v. Chartered Co.*, 71 Misc. 237, 128 N. Y. Supp. 436 (1911).

<sup>17</sup> *Waisikoski v. Philadelphia & Reading Coal & Iron Co.*, 173 A. D. 538, 159 N. Y. Supp. 906 (1916); C. C. P. § 1780 (L. 1913, c. 60).

<sup>18</sup> *Howell v. Chicago & Northwestern Ry. Co.*, 51 Barb. 378 (1868).

<sup>19</sup> *Howe v. New York, New Haven & Hartford R. R. Co.*, 142 A. D. 451, 126 N. Y. Supp. 1090 (1911).

<sup>20</sup> *Guffey v. Grand Trunk Ry. Co.*, 67 Misc. 553, 122 N. Y. Supp. 947 (1910).

<sup>1</sup> *Dart v. Farmers' Bank at Bridgeport*, 27 Barb. 337 (1858).

<sup>2</sup> *Eastern Products Corp'n v. Tenn. Coal & Iron R. R. Co.*, — Misc. — (1918); N. Y. L. J. Feb. 27, Sp. T. N. Y. Co.; Gen. Corp. L. §§ 15, 16; C. C. P. § 432, subd. 4.

after the action has been remanded to the State court.<sup>3</sup> Action may be brought in New York to which a foreign corporation is a defendant if it is such because it refused to maintain the action (brought by a stockholder) and if the action is to determine the ownership of property over which the court has jurisdiction and the foreign corporation is a necessary party to such determination and if the foreign corporation does not raise any objection to its being a party.<sup>4</sup> A court which has not been given jurisdiction of an action against a foreign corporation cannot obtain it by the consent of the defendant; and the objection to the jurisdiction may be raised at any time, even on appeal.<sup>5</sup> The Supreme Court in one district may, by order in a proceeding by a stockholder of a foreign corporation for the appointment of an ancillary receiver and the winding up of its affairs, enjoin an action already commenced by a creditor to enforce his claim in the Supreme Court in another district, in connection with enjoining all other actions against the corporation; the order need not be made in the creditor's action to bind him.<sup>6</sup> Stockbrokers buying and selling cotton futures for a foreign savings bank cannot recover from it a balance due when the transactions are closed; not even on the theory that the contract, though *ultra vires*, was executed, if the bank retained or had none of the benefits therefrom.<sup>7</sup> The failure of a foreign corporation to obtain a license to do business in this State does not permit it to take advantage of its failure to defeat an action brought against it here, as the statute requiring such a license was not enacted for the benefit of foreign corporations.<sup>8</sup> Plaintiffs in an action against a foreign corporation in which they are stockholders are bound by a judgment upon a similar cause of action in favor of a stockholder whether the latter action purported to be brought in behalf of all other stockholders or not.<sup>9</sup> An order modifying an injunction against

<sup>3</sup> Tierney v. Helvetia Swiss Fire Insurance Co., 138 A. D. 469, 122 N. Y. Supp. 869 (1910).

<sup>4</sup> Holmes v. Camp, 219 N. Y. 359, 114 N. E. 841 (1916); C. C. P. § 1780.

<sup>5</sup> Parkhurst v. Rochester Machine Co., 65 Hun, 489, 20 N. Y. Supp. 395 (1892). The court was the County Court.

<sup>6</sup> Phoenix Foundry v. North River Construction Co., 33 Hun, 156 (1884).

<sup>7</sup> Jemison v. Citizens' Savings Bank, 44 Hun, 412 (1887); 122 N. Y. 135, 9 L.R.A. 708, 25 N. E. 264.

<sup>8</sup> Gaul v. Kiel & Arthe Co., 199 N. Y. 472, 92 N. E. 1069 (1910); Gen. Corp. L. § 15.

<sup>9</sup> Grant v. Greene Consolidated Copper Co., 169 A. D. 206, 154 N. Y. Supp. 596 (1915).

prosecuting any suit against a foreign corporation, given on appointment of an ancillary receiver for it in New York, so as to not make it applicable to a certain creditor, cannot be legally made if the only reason for the modification alleged is the statement that the corporation was insolvent, and its directors knew it was, when it bought the goods on which such certain creditor's claim arises.<sup>10</sup> The common law rule that the dissolution of a corporation abates actions pending against it will be held in this State not to apply to a foreign corporation here sued if a statute of the State of the corporation's incorporation provides that its incorporations shall continue bodies corporate even after dissolution for the purpose of prosecuting and defending suits and of settling and closing their affairs, because such a statute, regulating as it does the corporation's existence and power, has extraterritorial operation and effect even as does the statute under which the corporation was created.<sup>11</sup> A foreign corporation, dissolved and dead by decree of dissolution in its home State, is alive in this State insofar as to permit action to be brought against it, and its assets here, with which it is doing business in New York, applied to payment of the liens of its creditors in New York.<sup>12</sup> An action against a foreign corporation for which a liquidator has been appointed by its home country on its dissolution cannot be continued against its directors as trustees, not alleged to possess any of its property.<sup>13</sup>

**§ 759. Id.: Who May Sue and For What, In General.**—An action against a foreign corporation may be maintained by a resident of New York State or a domestic corporation for any cause of action, and by a foreign corporation or a non-resident (1) when the action is to recover damages for the breach of a contract made within New York State or relating to property situated within New York State at the time of the making thereof, (2) when the action is to recover real property situated within New York State or a chattel which is replevied within New York State, (3) when the cause of action arose within New York State except when the

<sup>10</sup> *Carson v. New York Terminal Express Co.*, 74 Hun, 536, 26 N. Y. Supp. 639 (1893).

<sup>11</sup> *Sinnott v. Hanan*, 214 N. Y. 454, 108 N. E. 858 (1915); *New Jersey Corporation sued in New York*. The statute was § 53 of the Corporation Act of New Jersey.

<sup>12</sup> *Hammond v. National Life Assn.*, 58 A. D. 453, 69 N. Y. Supp.

585 (1901); *dism'd* 168 N. Y. 262, 61 N. E. 244.

<sup>13</sup> *Wamsley v. Horton & Co.*, 12 A. D. 312, 42 N. Y. Supp. 767 (1896); *aff'd* 153 N. Y. 687, 48 N. E. 1105; C. C. P. § 757; Gen. Corp. L. § 30 (L. 1892, c. 687). The latter statute does not apply to foreign corporations.

object of the action is to affect the title to real property situated without New York State, and (4) when a foreign corporation is doing business within New York State.<sup>14</sup> The decisions given in this section relate to actions against foreign corporations by resident individuals or domestic corporations:—actions against foreign corporations by non-resident individuals and foreign corporations have previously been discussed.<sup>15</sup> “An action against a foreign corporation can be brought in the courts of this State only, 1st. By a resident of this State, for any cause of action. 2d. By a plaintiff not a resident of this State, when the cause of action has arisen, or the subject of the action is situated, within this State.”<sup>16</sup> The jurisdiction of the Supreme Court of New York of an action against a foreign corporation is limited to one “to recover damages for the breach of a contract, made within the State or relating to property situate within the State at the time of the making thereof, or where it is brought to recover real property situate within the State or a chattel which is replevied within the State, or where the cause of action arose within the State, except when the object of the action is to affect the title to real property situate without the State.”<sup>17</sup> In order that an individual may maintain an action against a foreign corporation he must either show that he is a resident or that the cause of action arose within this State: “it is immaterial that some prior owner of the claim may have been a resident of this State.”<sup>18</sup> Under a statute allowing suit against a foreign corporation by “a resident of this State,” an executor, residing in this State, of a non-resident’s estate, may sue.<sup>19</sup> “While section seventeen hundred and eighty of the Code of Civil Procedure provided that an action may be maintained by a resident of this State against a foreign corporation for any cause of action, it has not been held that the section requires the courts of this State to take jurisdiction in this class of actions simply because an admin-

<sup>14</sup> C. C. P. § 1780.

<sup>15</sup> See § 736, *supra*.

<sup>16</sup> *House v. Cooper*, 30 Barb. 157 (1858). Decided before the amendment relating to foreign corporations doing business in New York.

<sup>17</sup> *Ervin v. Oregon Ry. & Navigation Co.*, 28 Hun, 269 (1882); C. C. P. § 1780. The statute since has added the provision covering cases when the foreign corporation is doing business in New York.

<sup>18</sup> *Coolidge v. American Realty Co.*, 91 A. D. 14, 86 N. Y. Supp. 318 (1904); C. C. P. § 1780. “It is the status existing, where the cause of action arose out of the State, at the time of the commencement of the action, which determines the question as to whether the court can acquire jurisdiction by attachment.”

<sup>19</sup> *Palmer v. Phoenix Mutual Life Ins. Co.*, 84 N. Y. 63 (1881); Code, § 427, now C. C. P.

istrator has been appointed in this State.”<sup>20</sup> What is essential to show one a resident of New York so as to permit suit in its courts against a foreign corporation is the intent accompanied by the act of abiding in this State.<sup>1</sup> The courts of this State have jurisdiction of an action by a resident attorney against a non-resident corporation to recover for legal services rendered by him to it under a contract made in New York, where part of the services were rendered, though the price was not fixed by such contract.<sup>2</sup> The courts of this State will take jurisdiction of an action by a resident of this State against a foreign corporation which has an office for the regular transaction of business in this State to compel the transfer on the corporation’s books of shares of its duly issued stock which have been assigned by their holder to the plaintiff and surrendered by the latter to the duly registered transfer agent of the corporation and accepted by him for transfer and to compel the delivery of new certificates, as this is not an attempt by the courts of this State to regulate the internal management of a foreign corporation but simply the enforcement of a contract between the corporation and its members.<sup>3</sup> The courts of this State will entertain an action by a stockholder of a foreign corporation to enjoin a second issue of its stock to be given as a bonus on sale of its bonds at par if its principal office is in New York, plaintiff and all its directors reside in New York and all its directors’ meetings are held in New York.<sup>4</sup> A resident individual may sue a foreign corporation in the New York courts in an action to sell certain bonds delivered by it as collateral security of its promissory notes.<sup>5</sup> Before a foreign corporation can be enjoined by New York courts from issuing bonds or executing a mortgage on foreign real estate to secure them it must appear that the execution of the mortgage would be an injury or obstruction to rights of the plaintiff-creditor which could be enforced in New York courts.<sup>6</sup> A judgment

<sup>20</sup> *Zeikus v. Florida East Coast Ry. Co.*, 144 A. D. 91, 128 N. Y. Supp. 933 (1911); C. C. P. § 1780.

<sup>1</sup> *Phelps v. New York, New Haven & Hartford R. R. Co.*, 17 A. D. 392, 45 N. Y. Supp. 178 (1897); C. C. P. § 1780.

<sup>2</sup> *Robeson v. Central R. R. Co.*, 76 Hun, 444, 28 N. Y. Supp. 104 (1894); C. C. P. § 1780.

<sup>3</sup> *Travis v. Knox Terpezone Co.*, 215 N. Y. 259, L.R.A.1916A, 542,

109 N. E. 250 (1915). *Quaere* if any different considerations would apply to an original issue of stock.

<sup>4</sup> *Kraft v. Griffon Co.*, 82 A. D. 29, 81 N. Y. Supp. 438 (1903).

<sup>5</sup> *Coffin v. Chicago Northern Pacific Construction Co.*, 67 Barb. 337 (1875); Code, § 427.

<sup>6</sup> *Rogers v. Michigan Southern & Northern Indiana R. R. Co.*, 28 Barb. 539 (1858).

creditor of a foreign corporation may maintain an action in this State to reach sufficient property, belonging to a domestic corporation formed to take over the foreign one and in the hands of persons other than the domestic company, to satisfy its judgment against the foreign company.<sup>7</sup> The courts of this State will not entertain an application by a judgment-creditor of a creditor or of a foreign corporation to have its receiver appointed in its home State appear and be examined so as to make the receiver pay over to the applicant money due the judgment-debtor.<sup>8</sup>

**§ 760. Id.: Attorney-General.**—The Attorney-General may maintain an action against a foreign corporation, either upon his own information or upon the complaint of a private person, if the foreign corporation (1) exercises within New York State any corporate rights, privileges or franchises not granted to it by the law of this State, (2) within this State has violated any provision of law, or, contrary to law, has done or omitted any act, or has exercised a privilege or franchise, not conferred upon it by the law of New York State, when, in a similar case, a domestic corporation would in accordance with the one hundred and thirty-first section of the General Corporation Law be liable to an action to vacate its charter and to annul its existence; or (3) exercises within New York State any corporate rights, privileges or franchises in a manner contrary to the public policy of the State.<sup>9</sup> The statute provides for a jury trial in such an action, and for an injunction and compelling a witness to answer though he incriminate himself, and for final judgment of ouster and exclusion and costs and fine.<sup>10</sup> Such an action must be brought in the name of the People of the State and the proceedings therein are the same as in an action by a private person except as otherwise specially prescribed by statute.<sup>11</sup>

**§ 761. Id.: In What Court and County.**—The Municipal Court has no jurisdiction of an action against a foreign corporation.<sup>12</sup> If a foreign corporation have a place for the regular transaction of business in a certain municipal court district one suing it is entitled to bring his action in that district.<sup>13</sup>

<sup>7</sup> *Clokey v. International Rubber Clothing Co.*, 28 Misc. 326, 59 N. Y. Supp. 878 (1899).

<sup>8</sup> *Smith v. McNamara*, 15 Hun, 447 (1878).

<sup>9</sup> C. C. P. § 1948.

<sup>10</sup> C. C. P. §§ 1950, 1955, 1956.

<sup>11</sup> C. C. P. § 1984.

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<sup>12</sup> *McKenna v. Fireman's Insurance Co.*, 28 Misc. 173, 59 N. Y. Supp. 41 (1899). Decided under old Municipal Court Act.

<sup>13</sup> *Scharmann & Sons v. De Palo*, 66 A. D. 29, 72 N. Y. Supp. 1008 (1901); *Greater N. Y. Charter*, § 1370 (L. 1897, c. 378).

A foreign corporation sued by a non-resident in one county of this State may have the venue of the action changed to another county in which is its office and principal place of business if it does not maintain an office, transact any business or work its railroad in the former county.<sup>14</sup>

**§ 762. Id.: When Barred by Statute of Limitations.**—" . . . it was the general object of the statute of limitations to save the remedy of the creditor in all cases where he was prevented from prosecuting the debtor in our courts, in consequence of the absence of the latter from the State;" and, therefore, a foreign corporation debtor cannot avail itself of the shield of the statute.<sup>15</sup> A foreign corporation which has strictly complied with the provisions of the statute for service of summons upon it by designating a person to be served for it may invoke the defense of the Statute of Limitations to an action against it.<sup>16</sup> While the rule is that time during which a person (natural or corporate) against whom a cause of action has accrued, is absent from the State, is not to be taken as any part of the time limited for the commencement of an action, whether the limitation be prescribed by statute or contract, yet this rule does not prevent a foreign insurance corporation, which has subjected itself to the laws of this State by obtaining a license and filing an appointment of the superintendent of insurance as its attorney on whom process may be served as if it were a domestic corporation, from availing itself of a limitation on the commencement of an action, whether contained in a statute or a contract to which

<sup>14</sup> *Rubel v. Central Railroad Co.* of N. J., 171 A. D. 456, 156 N. Y. Supp. 1094 (1916); C. C. P. § 1780, subd. 4, added L. 1913, c. 60.

<sup>15</sup> *Olcott v. The Tioga R. R. Co.*, 20 N. Y. 210 (1859). "A foreign corporation sued in this State cannot avail itself of the statute of limitations." *Boardman v. Lake Shore & Michigan Southern Ry. Co.*, 84 N. Y. 157 (1881). A foreign corporation, defendant in an action in New York, cannot avail itself of the Statute of Limitations of this State. *Robeson v. Central R. R. Co.*, 76 Hun, 444, 26 N. Y. Supp. 384 (1894). A defendant cannot claim the benefit of the statute of limitations in an action against it for

personal injuries due to its negligence if it be a foreign corporation; even though for more than six years prior to the action it was lessee of a railroad in this State and had property and an agent with an office in this State. *Rathbun v. Northern Central Ry. Co.*, 50 N. Y. 656 (1872). When the foreign corporation has subjected itself to suit in New York State by designating someone on whom process against it may be served and by keeping the designation alive, the reason of the rule no longer exists.

<sup>16</sup> *Wehrenberg v. New York, New Haven and Hartford R. R. Co.*, 124 A. D. 205, 108 N. Y. Supp. 704 (1908); C. C. P. § 432, subd. 2.

it is a party.<sup>17</sup> An action brought in this State against a foreign corporation under a statute of its home State limiting the period within which it may be brought is barred by that time limit.<sup>18</sup> A non-resident individual or corporation who or which is defendant in an action by a non-resident, not involving title or possession of realty in this State, may plead the Statute of Limitations of his or its residence.<sup>19</sup>

**§ 763. Id.: Service of Process, Governing Statutes.**—Personal service upon a foreign corporation of a summons in an action or of any process or other paper whereby a special proceeding is commenced in a court or before an officer (except when the proceeding is to punish for contempt or special provision for service is otherwise made by law) must be made by delivery of a copy of the summons, process or paper to the president, vice-president, treasurer, assistant treasurer, secretary, assistant-secretary; or, if the corporation lacks either of such officers, to the officer performing corresponding functions under another name, or, in any event, to the person designated for the purpose as provided in the sixteenth section of the General Corporation Law; or, if such a designation is not in force, or neither such designee nor any other of the officers heretofore specified can be found with due diligence, to the cashier, director or a managing agent of the corporation within the State, but only to such cashier, director or managing agent if either the foreign corporation has property within New York State or the cause of action arose therein; or upon the Secretary of State if the action be upon any liability incurred within New York State or the corporation has property within New York State and if the person designated as provided in the sixteenth section of the General Corporation Law dies or removes from the place where the corporation has its principal place of business within the State of New York and the corporation does not within thirty days after such death or removal designate in like manner another person upon whom process against it may be served within New York State.<sup>20</sup> The manner of personally serving a summons upon a defendant foreign corporation is prescribed in the statute hereinafter quoted.<sup>1</sup> An order directing

<sup>17</sup> *Comey v. United Surety Co.*, 217 N. Y. 268, 111 N. E. 832 (1916); *Ins. L.* §§ 9 and 30; *C. C. P.* § 401.

<sup>18</sup> *Daily v. New York, Ontario & Western Ry. Co.*, 26 Misc. 539, 57 N. Y. Supp. 485 (1899).

<sup>19</sup> *Smith v. Western Pacific Rail-*

*way Co.*, 154 A. D. 130, 139 N. Y. Supp. 129 (1912); *app. dism'd* 212 N. Y. 596, 106 N. E. 1042; *C. C. P.* § 390.

<sup>20</sup> *C. C. P.* §§ 432, 433.

<sup>1</sup> *C. C. P.* §§ 432-3 and 931a.

the service of a summons upon a defendant foreign corporation by publication may be had; and the procedure is given in the statute hereinafter quoted.<sup>2</sup>

§ 764. **Id.: In General.**—" . . . a corporation has its domicile and residence alone within the bounds of the sovereignty which created it, and . . . is incapable of passing personally beyond that jurisdiction. . . . it is equally true that a foreign corporation is permitted to sue in the courts of this State, and that suits *in personam* may be brought against it by service of process on its officers or agents within the jurisdiction (*citations*). But suits by or against foreign corporations are not maintained on the theory that the corporation litigant is here in person, or that the corporate entity attends its officers in their migrations from one State to another, or that it is itself present wherever its property may be, or its business may be transacted. The jurisdiction . . . rests upon the ground that as a corporation must act by agents, it may through its agents subject itself to the jurisdiction of a foreign tribunal. . . . When a foreign corporation sends its agents into another State, or transacts its business there, availing itself of the protection of the laws of such State, there is no just reason why it should not be deemed to have subjected itself through its agents to the jurisdiction of that State, and be held to respond to an action brought against it therein; upon process served on its representatives."<sup>3</sup> "A foreign corporation can come into this State with its property, establish its business and make and enforce its contracts here only by a natural person;" and it is, therefore, "within the State *in propria persona* for the purpose of the jurisdiction of the courts of the State, and for the purpose of a judgment valid within the territorial limits of the State, if the legislature of the State choose so to enact," and may be served with process in this State on its agent.<sup>4</sup> "The object of all service of process for the commencement of a suit or any other legal proceeding is to give notice to the party proceeded against, and any service which reasonably accomplishes that end answers the requirements of natural justice and fundamental law (*citation*); and what

<sup>2</sup> C. C. P. §§ 438-440.

On exclusiveness of mode of service provided by statute requiring foreign corporations to designate persons upon whom service of process may be made, see note in 5 L.R.A.(N.S.) 298.

<sup>3</sup> *Plimpton v. Bigelow*, 93 N. Y. 592 (1883).

<sup>4</sup> *Gibbs v. Queen Insurance Co.*, 63 N. Y. 114 (1875); Code, § 427.

service shall be deemed sufficient for that purpose is to be determined by the legislative power of the country in which the proceeding is instituted, subject only to the limitation that the service must be such as may reasonably be expected to give the notice aimed at . . . any service which would be sufficient for commencing an action against a domestic corporation could be authorized to commence an action against a foreign corporation.”<sup>5</sup>

“When a foreign corporation comes into this State, the legislature, by virtue of its control over the law of remedies, may define the agents of the corporation on whom process may be served.”<sup>6</sup> The Code provision permitting service of process against a foreign corporation by serving it on its officers within this State is not unconstitutional if the corporation does business here upon the ground that it inseparably provides for service upon foreign corporations not doing business as well as upon those doing business within the State.<sup>7</sup> A foreign hotel corporation is not doing business in New York so as to permit service of process on its agent here because such agent advertises and tries to get custom for it.<sup>8</sup> “No precise rules can be formulated by which to determine in each case whether a foreign corporation is doing business in this State . . . this question must largely be decided by the particular facts in each case. But of course there are certain undisputed general principles which may be applied to the disposition of such a question. The fact that the corporation is conducting the principal part of its business in the State of its incorporation does not prevent it from so prosecuting its business in another State as to bring it within the character of a corporation doing business in the latter State. While it is true that the business which it is conducting in the latter State in order to give the courts thereof jurisdiction over it for the purpose now being discussed [viz. of suit against it] must be part of the business for which it was organized, it cannot be necessary in every case that the transactions in said latter State shall be the performance of those

<sup>5</sup> *Pope v. Terre Haute Car Mfg. Co.*, 87 N. Y. 137 (1881); C. C. P. §§ 432, 1780. Service on the president of a foreign corporation, having no place of, and doing no business in New York, while temporarily in State on own pleasure trip, held sufficient.

<sup>6</sup> *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1917).

<sup>7</sup> *Doller Co. v. Canadian Car and Foundry Co., Ltd.*, 220 N. Y. 270, 115 N. E. 711 (1917); C. C. P. § 432, subd. 1.

<sup>8</sup> *Krakowski v. White Sulphur Springs, Inc.*, 174 A. D. 440, 161 N. Y. Supp. 193 (1916); C. C. P. § 432, subd. 1.

particular acts which constitute the characteristic feature of the business for which the corporation was organized.”<sup>9</sup> Activities insufficient to make out the transaction of business in New York under statutes prohibiting foreign corporations from doing business in this State without license may be sufficient to bring the corporation within the State so as to render it amenable to process.<sup>10</sup> “In order to acquire jurisdiction over a foreign corporation, for the purpose of obtaining a personal judgment against it, it is necessary that the corporation be doing business within the State at the time service is made and that service of process within the State shall be upon an agent of the corporation duly authorized to accept service.”<sup>11</sup> “. . . a foreign corporation which can only do business in this State because of a license or certificate issued to it, after the issuance of such license or certificate, sustains precisely the same relation as do such corporations organized within this State; . . . such license so issued, when accepted, makes such foreign corporation, for all the purposes of serving process for the protection of the rights of its members, practically the same as if it were a State corporation.”<sup>12</sup> A foreign corporation licensed to do business in New York may be served with process here if its certificate is still in force, its president, assistant secretary and treasurer, and freight and passenger agent reside here.<sup>13</sup>

After consolidation of two foreign corporations under a foreign statute reserving to their creditors whatever rights they had against either of such corporations, service in this State of process by such a creditor on the person who was the appropriate officer of one of such corporations at the time of the consolidation is sufficient to give the courts of this State jurisdiction of such corporation.<sup>14</sup> Service of an order for examination in proceedings supplementary to

<sup>9</sup> *Pomeroy v. Hocking Valley Ry. Co.*, 218 N. Y. 530, 113 N. E. 504 (1916); C. C. P. § 432, subd. 1.

<sup>10</sup> *Tauza v. Susequehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1917). Service upon the sales agent in New York of a foreign corporation was held sufficient to subject it to the jurisdiction of the New York courts in a suit by a resident when it had a branch and salesmen in New York; its sales in New York were all subject to confirmation at its home office, etc.

<sup>11</sup> *Johnston v. Mutual Reserve*

*Life Insurance Co.*, 43 Misc. 251, 87 N. Y. Supp. 438 (1904).

<sup>12</sup> *Matter of Wilcox*, 123 A. D. 86, 108 N. Y. Supp. 483 (1908). The Royal Arcanum was held liable to mandamus by an expelled member.

<sup>13</sup> *Burke v. Galveston, Houston & Henderson R. R. Co.*, 173 A. D. 221, 159 N. Y. Supp. 379 (1916); Gen. Corp. L. § 15 (L. 1909, c. 28).

<sup>14</sup> *Buell v. Baltimore & Ohio Southwestern R. R. Co.*, 39 A. D. 236, 57 N. Y. Supp. 111 (1899); C. C. P. § 432, subd. 1. The foreign statute was Ohio R. S. § 3384.

execution against a foreign corporation must be made upon an officer of the corporation, and no one else; and service upon a person designated for the purpose of receiving service of a summons is not sufficient.<sup>15</sup> Service of process upon an officer of the State appointed by a foreign corporation for that purpose may validly be made on a public holiday, in spite of the law making a holiday like Sunday for all purposes as regards the transaction of business in the public offices of the State, because such officer acts as agent of the corporation in accepting service and not as an officer of the State.<sup>16</sup>

An action against a foreign corporation by substituted service is in the nature of an action *in rem*, so that the courts of New York acquire no jurisdiction of the action until there is property of the corporation in the State, and it need not take any notice of the action until a warrant of attachment against such property issues and is levied.<sup>17</sup> "Before you begin your action against a foreign corporation by the service of a summons upon it by delivery of a copy or by publication, either there must be property of it in this State, or the cause of action must have arisen therein; one or the other, and either will suffice."<sup>18</sup> ". . . the requirement of section four hundred and forty-three of the Code of Civil Procedure that when service is made without the State under an order for publication 'a notice must be served with the summons in all respects like the notice required by the last section' is a requirement affecting the jurisdiction of the court, and that a failure to serve such a notice constitutes a jurisdictional defect, and is not a mere irregularity."<sup>19</sup>

**§ 765. Id.: On President, Vice-President, Treasurer, Assistant-Treasurer, Secretary, Assistant-Secretary and Officers with Corresponding Functions, In General.**—Personal service upon a foreign corporation of a summons in an action or of any process or other paper whereby a special proceeding is commenced in a court or before an officer (except when the proceeding is to punish for contempt or special provision for

<sup>15</sup> *Matter of Meyer v. Consolidated Ice Co.*, 196 N. Y. 471, 90 N. E. 54 (1909); *Gen. Corp. L.* § 16; *C. C. P.* §§ 432, 433, 2444, 2452.

<sup>16</sup> *Flynn v. Union Surety & Guaranty Co.*, 170 N. Y. 145, 63 N. E. 61 (1902); *Public Holiday L.* (L. 1897, c. 1897). The officer was the superintendent of insurance.

<sup>17</sup> *Haase v. Michigan Steel Boat*

*Co.*, 148 A. D. 298, 132 N. Y. Supp. 1046 (1911); *app. dismissed* 210 N. Y. 602, 104 N. E. 1131; *C. C. P.* §§ 1217, 638.

<sup>18</sup> *Gibbs v. Queen Insurance Co.*, 63 N. Y. 114 (1875); *Code*, § 427.

<sup>19</sup> *Conklin v. Federal Trust Co.*, 176 A. D. 572, 163 N. Y. Supp. 570 (1917); *C. C. P.* §§ 443, 638, 768.

service is otherwise made by law) may always be made by delivery of a copy of the summons, process or paper to the president, vice-president, treasurer, assistant-treasurer, secretary or assistant secretary.<sup>20</sup> The statutory provision permitting service in this State of summons in an action by a resident as distinguished from a non-resident against a foreign corporation personally on its president, vice-president, treasurer or secretary, violates no provision of the Federal or State Constitutions; and it is not necessary in so serving such an officer that designation of any person to accept service upon the foreign corporation in this State shall have been made by it.<sup>1</sup> Whether or not a corporation incorporated in another State is doing business within this State so as to validate service of process on one of its officers in this State "must largely be decided by the particular facts in each case. But of course there are certain undisputed general principles which may be applied to the disposition of such a question. The fact that the corporation is conducting the principal part of its business in the State of its incorporation does not prevent it from so prosecuting its business in another state as to bring it within the character of a corporation doing business in the latter state. While it is true that the business which it is conducting in the latter state in order to give the courts thereof jurisdiction over it for the purposes now being discussed must be part of the business for which it was organized, it cannot be necessary in every case that the transactions in said latter state shall be the performance of those particular acts which constitute the characteristic feature of the business for which the corporation was organized."<sup>2</sup> Service binds a foreign corporation if made on its president in this State who, with its counsel and all members of the executive committee of its board of directors, resides

<sup>20</sup> C. C. P. §§ 432, 433. But see *Winslow v. Staten Island Rapid Transit R. R. Co.*, 51 Hun, 298, 4 N. Y. Supp. 169 (1889), holding that service of process cannot legally be made on a corporation by delivering it to its assistant treasurer, even though the treasurer be a non-resident and the assistant treasurer, in addition to his ordinary duties, drew cheques payable to the order of another clerk of the corporation.

<sup>1</sup> *Grant v. Cananea Con. Copper Co.*, 189 N. Y. 241, 82 N. E. 191

(1907); C. C. P. § 431, subd. 1, and § 1780.

<sup>2</sup> *Pomeroy v. Hocking Valley Ry. Co.*, 218 N. Y. 530, 113 N. E. 504 (1916); C. C. P. § 432, subd. 1, and § 1780. Meetings of directors and executive committee held in New York; corporation's secretary permanently resided and had his office in New York; dividends were paid from and stock transferred in New York. The corporation was held to be conducting business in New York.

in this State, where it meets; and it has executed a large trust mortgage in New York and deposited bonds with a trustee here under a mortgage binding it to keep an office or agency in New York for payment of the bonds secured; and the services under the contract sued upon were rendered and the contract itself made in this State.<sup>3</sup> Service of process in an action against a foreign corporation upon one acting in this State as its cashier or treasurer is valid.<sup>4</sup>

**§ 766. Id.: On Officer Passing Through or Temporarily in State.**—The common law rule that jurisdiction over a foreign corporation could not be acquired by the service of process upon an officer thereof, outside of the State which gave it existence, is changed by statute so that it may be obtained by service of process on the president of the corporation temporarily in this State.<sup>5</sup> Service of process in an action in this State on an officer of a foreign corporation, resident in a foreign state, while in transit through this State, is good.<sup>7</sup> Service upon a foreign corporation made by delivering the process to its president while he is in this State, not on business or in any official capacity, but solely while passing through with his family to a watering place in another state, is good.<sup>8</sup> Service cannot be made upon an officer of a foreign corporation casually in the State on one business errand so as to give the courts of this State jurisdiction of the corporation when it had had no representative of any kind in this State for over a month before such service or done or solicited any business here during that time, and mighty little at any time.<sup>9</sup> The requirements for due process as the basis of a judgment whereby a defendant is deprived of its property are not satisfied by service upon an officer of a foreign corporation having no business in New York and who is temporarily

<sup>3</sup> *Smith v. Western Pacific Railway Co.*, 138 A. D. 244, 122 N. Y. Supp. 888 (1910).

<sup>4</sup> *Russell v. Washington Life Ins. Co.*, 62 Misc. 403, 115 N. Y. Supp. 950 (1909); C. C. P. § 431.

Validity of service of process upon nonresident officer of foreign corporation while in state in connection with transaction to which the action relates, see note in 43 L.R.A. (N.S.) 1015.

<sup>6</sup> *Barnett v. Chicago & Lake*

*Huron R. R. Co.*, 4 Hun, 114 (1875). The cause of action arose in New York.

<sup>7</sup> *Sadler v. Boston & Bolivia Rubber Co.*, 140 A. D. 367, 125 N. Y. Supp. 407 (1910); *aff'd* 202 N. Y. 547, 95 N. E. 1139; C. C. P. § 432, subd. 1.

<sup>8</sup> *Pope v. Terre Haute Car & Mfg. Co.*, 24 Hun, 238 (1881); *aff'd* 87 N. Y. 137; C. C. P. § 432.

<sup>9</sup> *Berner v. Collier Co.*, 179 A. D. 732, 167 N. Y. Supp. 39 (1917).

within the State for his own purposes.<sup>10</sup> A domestic sales manager of a foreign corporation employed to work at its home office but temporarily in New York cannot be served with process so as to bind it unless it was doing business here.<sup>10a</sup>

**§ 767. Id.: On Officer Who Has Resigned.**—Service of process against a foreign corporation by delivering it to one who had resigned as its president a week before and whose resignation had been accepted by the board of directors is not binding upon the corporation although the resignation was made to prevent such service and the corporation had some three months ago resolved in its home state that it was “dissolved, to take effect upon the sale and transfer of its property, the settling of its business and the division of its capital stock,” if the steps taken pursuant to such resolution are not shown.<sup>11</sup>

**§ 768. Id.: On Officer in State as Witness.**—A non-resident officer of a foreign corporation who comes voluntarily into this State as a witness in an action in the New York courts to which his corporation is a party is entitled to the privilege of not having process against the corporation served upon him while in attendance at the trial and for a reasonable time thereafter to enable him to go home; but this privilege does not hold good after the day on which the giving of testimony ceases to his knowledge if he had nothing to do with the conduct of the trial.<sup>12</sup> The rule exempting a non-resident in this State as a witness from service may be waived, and will be held to be waived so as to make legal service of process in an action relating to the same subject-matter as that in which the witness came to testify upon such witness as an officer of a corporate party if one of the directors present with such officer told the attorney that the witness was such officer and service could be made on him and they both knew what the papers to be served were about.<sup>13</sup>

<sup>10</sup> *Riverside & Dan River Cotton Mills v. Menefee*, 237 U. S. 189, as interpreted by the New York Court of Appeals in *Doller Co. v. Canadian Car and Foundry Co., Ltd.*, 220 N. Y. 270, 115 N. E. 711 (1917).

<sup>10a</sup> *Murray v. Dart Motor Truck Co.*, — Misc. — (1918), N. Y. L. J. April 5, 1918, p. 70.

<sup>11</sup> *Ervin v. Oregon Steam Navigation Co.*, 22 Hun, 598 (1880).

<sup>12</sup> *Sizer v. Hampton & Branchville R. R. Co.*, 57 A. D. 390, 68 N. Y. Supp. 232 (1901).

<sup>13</sup> *Weston v. Citizens National Bank*, 64 A. D. 145, 71 N. Y. Supp. 827 (1901).

On right to serve process in an action against corporation upon non-resident officer who is within state as a witness, see note in 24 L.R.A. (N.S.) 276; 52 L.R.A. (N.S.) 583.

**§ 769. Id.: On Agent Designated for Service of Process.**—Personal service upon a foreign corporation of a summons in an action or of any process or other paper whereby a special proceeding is commenced in a court or before an officer (except when the proceeding is to punish for contempt or special provision for service is otherwise made by law) may be made upon the person designated for the purpose as provided in the sixteenth section of the General Corporation Law.<sup>14</sup> Before a foreign corporation can be granted a certificate authorizing it to do business in New York it must file in the office of the New York Secretary of State a statement under its corporate seal and the signature of its president, vice-president or other acting head designating a person upon whom process against it may be served within New York State, accompanied with the written consent of such person.<sup>15</sup> The person so designated must have an office or place of business at the place where such corporation is to have its principal place of business within the State.<sup>16</sup> Such designation must specify the office or place of business of such person and, if it is within a city, the street and street number if any, or other suitable designation of the particular locality.<sup>17</sup> Such designation, when consented to, continues in force until revoked by an instrument in writing designating in like manner some other person upon whom process against the corporation may be served in this State or until the filing in the Secretary of State's office of a written revocation of his consent executed by the person so designated.<sup>18</sup> The object of a statute requiring a foreign corporation doing business in this State to designate some one in New York on whom process against it may be served is to prevent the necessity of citizens of New York having to go to a foreign jurisdiction to sue a foreign corporation doing business here; and not to prevent the foreign corporation, once sued here, from removing to a Federal court.<sup>19</sup> An action on a transitory cause of action, *e. g.*, a contract to compensate for personal injuries sustained by a resident of this State in another State through the negligence of a foreign corporation, may be brought in this

<sup>14</sup> C. C. P. §§ 432, 433.

<sup>15</sup> Gen. Corp. L. § 16 (L. 1909, c. 28).

<sup>16</sup> Gen. Corp. L. § 16 (L. 1909, c. 28).

<sup>17</sup> Gen. Corp. L. § 16 (L. 1909, c. 28).

<sup>18</sup> Gen. Corp. L. § 16 (L. 1909,

c. 28), or, it may be added, until the corporation voluntarily surrenders its authority to do business in New York, as provided by Gen. Corp. L. § 16-a (L. 1918, c. 193).

<sup>19</sup> *Fisk v. Chicago, Rock Island & Pacific R. R. Co.*, 53 Barb. 472 (1868); L. 1853, c. 466.

State by a resident against a foreign corporation after service of process on the "person upon whom process against the corporation may be served within the State," duly designated by the corporation pursuant to statute, if the foreign corporation is engaged in business in this State. . . . " . . . when a foreign corporation *is* engaged in business in New York and is here represented by an officer, he is its agent to accept service though the cause of action has no relation to the business here transacted."<sup>20</sup> A body which has filed an application for a certificate permitting it to do business in this State wherein it refers to itself as a foreign corporation and secures the certificate cannot by later claiming error in the designation of itself and that it is a foreign copartnership render void service of process upon its agent designated in its application, particularly if the action against it in which service was made would be barred if the service were avoided, and there is no proof of the law of the foreign state establishing that it is not a corporation.<sup>1</sup> Service of a summons in an action in this State's courts against receivers of a railroad appointed by the Federal court is not valid if made either on the corporation's agent in this State designated under § 16 of the General Corporation Law as him on whom process against the corporation might be served or on the general agent of the receivers in this State, if it be not shown that the plaintiff could not in the exercise of due diligence make service on the receivers within this State.<sup>2</sup>

**§ 770. Id.: Upon Secretary of State.**—Personal service of the summons upon a foreign corporation or of any process or other paper whereby a special proceeding is commenced in a court or before an officer (except a proceeding to punish for contempt or when special provision for the service thereof is otherwise made by law) may be made upon the Secretary of State (1) if the person designated as provided in the sixteenth section of the General Corporation Law dies or removes from the place where the corporation has its principal place of business within New York State and (2) if the corporation does not within thirty days after such death or

<sup>20</sup> Bagdon v. Phil. & Reading C. & I. Co., 217 N. Y. 432, L.R.A. 1916F, 407, 111 N. E. 1075 (1916); Gen. Corp. L. § 16. "We are not required to consider how service could be made if the defendant had declined to file a stipulation" (as to person on whom service might be made). "We are to ascertain

the meaning and define the effect of a stipulation which it has filed."

<sup>1</sup> Wolski v. Booth & Flynn, Ltd., 93 Misc. 651, 157 N. Y. Supp. 294 (1916); Gen. Corp. L. § 16.

<sup>2</sup> Gursky v. Blair, 218 N. Y. 41, L.R.A.1916F, 359, 112 N. E. 431 (1916); Gen. Corp. L. § 16, and C. C. P. § 432.

removal designate in like manner another person upon whom process against it may be served within New York State, and (3) if (a) the process in question is in an action upon any liability incurred within this State or (b) the corporation has property within the State, and (4) if the service upon the Secretary of State is made in the interim between the designated agent's death, removal or revocation and the making of another designation.<sup>3</sup> Process against the corporation in an action upon any liability incurred within New York State before revocation of his consent by a person designated by a foreign corporation as one on whom process against it may be served may, after such person files a revocation of his consent or after he dies or removes from the place where the corporation has its principal place of business within New York State, and before another designation is made, be served upon the Secretary of State.<sup>4</sup> Whenever service of process against a foreign corporation, in an action upon a liability incurred in New York before revocation of its certificate to do business in this State, is made upon the Secretary of State, because no qualified agent of the corporation exists upon whom such service may be made, the plaintiff, at the time of such service, must pay to the Secretary of State two dollars, to be included in his taxable costs and disbursements; and the Secretary of State must forthwith mail a copy of such notice to such corporation if its address, or the address of any officer thereof, is known to him.<sup>5</sup> In determining whether service on the Secretary of State is effective to bind a defendant foreign corporation no presumption can be indulged from its having obtained a certificate to do business in the State that it has property in the State.<sup>6</sup> The burden is on a plaintiff suing a foreign corporation to show that the case is one in which the statutes permit service upon the Secretary of State so as to bind the corporation.<sup>7</sup> Service on the Secretary of State of process against a foreign corporation in an action based on a liability arising without the state is futile.<sup>8</sup> The voluntary

<sup>3</sup> C. C. P. §§ 432, 433.

<sup>4</sup> Gen. Corp. L. § 16 (L. 1909, c. 28).

<sup>5</sup> Gen. Corp. L. § 16 (L. 1909, c. 28).

<sup>6</sup> *Eastern Products Corp'n v. Tenn. Coal & Iron R. R. Co.*, 102 Misc. 557 (1918); N. Y. L. J. Feb. 27, Sp. T. N. Y. Co.; Gen. Corp. L. §§ 15, 16; C. C. P. § 432, subd. 4.

<sup>7</sup> *Eastern Products Corp'n v. Tenn. Coal & Iron R. R. Co.*, 102 Misc. 557 (1918); N. Y. L. J. Feb. 27, Sp. T. N. Y. Co.; Gen. Corp. L. §§ 15, 16; C. C. P. § 432, subd. 4.

<sup>8</sup> *Eastern Products Corp'n v. Tenn. Coal & Iron R. R. Co.*, 102 Misc. 557 (1918); N. Y. L. J. Feb. 27, Sp. T. N. Y. Co.; Gen. Corp. L. §§ 15, 16; C. C. P. § 432, subd. 4.

filing by a foreign corporation of a certificate surrendering its authority to do business in New York does not affect any action pending at the time of such surrender, or affect any action in New York State upon any contract made by it before the filing of such certificate of surrender; and process against it in an action upon any liability incurred within New York State before the filing of such certificate of surrender may, after its filing, be served upon the Secretary of State, to whom the plaintiff, at the time of such service, must pay two dollars, to be included in his taxable costs and disbursements, whereupon the Secretary of State must immediately mail a copy of such process to such corporation if its address or the address of any officer thereof is known to him.<sup>8a</sup>

**§ 771. Id.: On Cashier, Director or Managing Agent, In General.**—Personal service of the summons in an action upon a foreign corporation or of any process or other paper whereby a special proceeding is commenced in a court or before an officer (except a proceeding to punish for contempt or when special provision for the service is otherwise made by law) may be made by delivery of a copy thereof to the cashier, a director or a managing agent of the corporation, within New York State, if (1) (a) no designation by the foreign corporation of a person upon whom process against it may be served has been made by it as prescribed by the sixteenth section of the General Corporation Law and is in force; or (b) neither the person so designated nor the president, vice president, treasurer, assistant treasurer, secretary, assistant secretary, or—if the corporation lacks either of these officers—the officer performing corresponding functions under another name, can be found with due diligence; and (2) (a) the corporation has property within New York State or (b) the cause of action arose therein.<sup>9</sup> The “cashier” of a corporation upon whom service may legally be made of process against it is one who has charge of its funds to the exclusion of anyone else—not a clerk receiving money in one of its branches; and the fact that process served on the latter ultimately reaches the desired place does not validate service on him.<sup>10</sup> Service of a process on a foreign corporation through its managing agent is not authorized unless there is a failure to designate a person upon whom

<sup>8a</sup> Gen. Corp. L. § 16-a (L. 1918, c. 193).

<sup>9</sup> C. C. P. §§ 432, 433.

<sup>10</sup> *Eisenhofer v. New Yorker Zei-*

*tung Publishing Co.*, 91 A. D. 94, 86 N. Y. Supp. 438 (1904); C. C. P. § 431.

service can be made or there be neither of its officers specified in the statute who can, by the exercise of due diligence, be found within the State, and the corporation has property within the State, or the cause of action arose therein; and the proofs of these facts are a condition precedent to the validity of the service upon the managing agent.<sup>11</sup> Before service of process can be made upon a foreign corporation through its "managing agent" in this State it must appear affirmatively that plaintiff used due diligence in an attempt to serve some of the corporate officers specified in the statute.<sup>12</sup> Before summons can be served on the managing agent in this State of a foreign corporation it must affirmatively appear that plaintiff used due diligence to serve some of the officers of the corporation specified in the statute as subject to service.<sup>13</sup> "It is the settled law that service of a summons upon the managing agent of a foreign corporation in this State can only be resorted to and made effectual as the commencement of an action against the corporation in a court of this State, after diligent efforts to obtain personal service upon one of such officers therein has been made and failed."<sup>14</sup> Service upon the managing agent of a foreign corporation without proof of prior effort to serve its officers specified in the statute does not give the court jurisdiction of the corporation.<sup>15</sup> It is not necessary for one serving a foreign corporation in an action in this State through its managing agent to show affirmatively, on a motion by it to set aside the service, that no person has been designated by it upon whom service could be made and that the other officers enumerated in the statute as those upon whom process may be served cannot with due diligence be found within this State, if it appears from the papers submitted by the corporation on its motion to set aside the service that such are the facts.<sup>16</sup>

**§ 772. Id.: On Director.**—"Personal service of the summons upon a foreign corporation can be made within the State upon a director thereof only when the president, vice-president, treasurer, assistant treasurer, secretary or assistant

<sup>11</sup> *Vitolo v. Bee Publishing Co.*, 66 A. D. 582, 73 N. Y. Supp. 273 (1901); C. C. P. § 432.

<sup>12</sup> *Karosas v. Susquehanna Coal Co.*, 172 A. D. 873, 158 N. Y. Supp. 1021 (1916); C. C. P. § 432.

<sup>13</sup> *Karosas v. Susquehanna Coal Co.*, 172 A. D. 873, 158 N. Y. Supp. 1021 (1916); C. C. P. § 432.

<sup>14</sup> *Swift v. Matthews Engineering Co.*, 178 A. D. 201, 165 N. Y. Supp. 136 (1917); C. C. P. § 432, subd. 1.

<sup>15</sup> *Birkenwald v. May Co.*, 179 A. D. 658, 166 N. Y. Supp. 1073 (1917); C. C. P. § 432, subd. 1.

<sup>16</sup> *Perrine v. Ransom Gas Machine Co.*, 60 A. D. 32, 69 N. Y. Supp. 698 (1901); C. C. P. § 432.

secretary or officer performing corresponding functions cannot be found with due diligence and no designation of a person to accept service under section sixteen of the General Corporation Law . . . is in force, or, if such a designation is in force, the person so designated cannot likewise be found, and the corporation has property within the State, or the cause of action arose therein.”<sup>17</sup> Service is sufficiently made upon a foreign corporation in an action the cause of which arises in this State by service of summons upon one who is in fact a director thereof.<sup>18</sup> Service of process on a foreign corporation through delivery on a director in this State is insufficient if all its property in New York consist of its own unissued bonds, a map of another state, another of its own line, part of a field map, three or four books, pamphlets and prospectuses.<sup>19</sup> Service of process on a foreign corporation not having any property in this State on a cause of action arising in New York may be made on one of its directors temporarily in the State on business of his own.<sup>20</sup> A foreign corporation may be subjected to the jurisdiction of the courts of this State by service of process on one of its directors “when a cause of action is based upon a scheme by a director and president of a New York corporation by and with the incorporation of two other New York corporations, to despoil the first corporation of its property rights, in performance of which he caused a foreign corporation to be formed, to which he assigned the first corporation’s property rights, so that upon the strength of those rights held by the so formed foreign corporation, it mortgaged those precise rights and property to another New York corporation to secure its bonds, and made another New York corporation its selling agent therefor,” as the cause of action may be said to arise in New York.<sup>1</sup> It is not sufficient to support service on a director of a foreign corporation that it be executor of a will of a decedent against whom the action would have accrued had he lived and that the affidavit of the plaintiff aver the conclusion that it arose in New York.<sup>2</sup> Printing on the letter head

<sup>17</sup> *Donohue v. City Water Power Co.*, 159 A. D. 776, 144 N. Y. Supp. 923 (1913); C. C. P. § 432; Gen. Corp. L. § 16.

<sup>18</sup> *Childs v. Harris Mfg. Co.*, 104 N. Y. 477, 11 N. E. 50 (1887); C. C. P. § 432, subd. 3.

<sup>19</sup> *Barnes v. Mobile & Northwestern R. R. Co.*, 12 Hun, 126 (1877).

<sup>20</sup> *Hiller v. Burlington and Mis-*

*souri River R. R. Co.*, 70 N. Y. 223 (1877); Code, § 134.

<sup>1</sup> *Donohue v. City Water Power Co.*, 159 A. D. 776, 144 N. Y. Supp. 923 (1913); C. C. P. § 432.

<sup>2</sup> *Hansen v. American Security & Trust Co.*, 159 A. D. 801, 144 N. Y. Supp. 839 (1913); C. C. P. §§ 432, 1836a; Gen. Corp. L. § 16.

of a foreign corporation of certain names as those of its directors creates a presumption that the bearers of the names are such directors so as to justify service of process upon them so as to bind the corporation.<sup>2a</sup>

§ 773. **Id.: On Managing Agent, In General.**—"The Code contemplates that before service is made on the managing agent of a foreign corporation diligent efforts should be made to serve the officers of the corporation or its agent designated under the General Corporation Law."<sup>3</sup> A foreign corporation may be served in an action in a court of this State which is not a court of record in a way not permitted in an action in a court of record, *e. g.*, by serving a managing agent in charge of one local store among a string of them stretched throughout New York.<sup>4</sup> In order to make valid service of process on a foreign corporation through its managing agent in this State it is not necessary that it do or transact business in this State.<sup>5</sup> That a foreign corporation is informed by an individual served in this State with process as its alleged "managing agent" of the service does not give the courts of New York jurisdiction of it if the individual was not in fact such managing agent.<sup>6</sup> When the grounds set forth in an application by a foreign corporation to vacate service in this State of process upon it through its alleged "managing agent" here are really objections to the court's jurisdiction of the person acquired through service of process (as distinguished from jurisdiction of the subject-matter of plaintiff's alleged cause of action), the practice is to entertain motions to vacate the attempted service.<sup>7</sup>

§ 774. **Id.: Who is "Managing Agent."**—"It is not necessary that the office of the person to whom the summons is delivered, in a suit against a foreign corporation, should be precisely described as that of 'a managing agent'; because . . . from the language of section 432 of the Code of Civil Procedure, it was intended that any person holding some responsible and representative relation to the company, such

<sup>2a</sup> *Manuet Amusement Corp. v. First Nat. Exhibitors' Circuit, Inc.*, — Misc. — (1918), N. Y. L. J. May 9, 1918, p. 483.

<sup>3</sup> *Gursky v. Blair*, 218 N. Y. 41, L.R.A.1916F, 359, 112 N. E. 431 (1916); C. C. P. § 432.

<sup>4</sup> *Sautter v. Atlantic & Pacific Tea Co.*, 92 Misc. 378, 156 N. Y. Supp. 992 (Co. Ct., 1915); C. C. P. §§ 2879, 432.

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<sup>5</sup> *Jackson v. Schuylkill Silk Mills*, 92 Misc. 442, 156 N. Y. Supp. 219 (App. T. 1915); C. C. P. § 432; Gen. Corp. L. § 16.

<sup>6</sup> *Beck v. North Packing & Provision Co.*, 159 A. D. 418, 144 N. Y. Supp. 602 (1913); C. C. P. § 432.

<sup>7</sup> *Karosas v. Susquehanna Coal Co.*, 172 A. D. 873, 158 N. Y. Supp. 1021 (1916).

as the term 'managing agent' would include, might be served with the summons."<sup>8</sup> It is not necessary in order that service upon a foreign corporation be sufficient that the person served be described as "managing agent," provided he bear a similar relationship to the corporation.<sup>9</sup> A person is a "managing agent" of a foreign corporation so as to be a proper person on whom to make binding service of process against it if he is "of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made"; but it is not necessary that he have charge of the whole business of the corporation.<sup>10</sup> The appointment of a person as an agent (not to accept process) of a foreign corporation in New York carries implied authority to accept service against it.<sup>11</sup> Service of process in an action against a foreign corporation upon one in charge of its office in this State who acts for it is sufficient as being made upon its "managing agent."<sup>12</sup> A "general sales manager" of a foreign corporation, who manages its sales in this State, hires and discharges its traveling salesmen and has general charge of its affairs in New York, is "a managing agent" on whom process may be served to get jurisdiction of the corporation, even though subject to the direction and control of its home office.<sup>13</sup> A metropolitan agent for a foreign corporation is a managing agent on whom process against the company may be served; and the relation of agency is not destroyed so as to make bad service upon him for the corporation by a letter from him to it notifying it of the termination of the agency according to contract and saying he would do all possible to assist his successor when appointed and meanwhile would make daily reports of business in his office.<sup>14</sup> One working in New York for a foreign corporation on a basis of commissions for business done, occupying an office on which is its sign, advertising as its "eastern representative," so referred to

<sup>8</sup> *Coler v. Pittsburgh Bridge Co.*, 146 N. Y. 281, 40 N. E. 779 (1895); C. C. P. § 432. One listed in the Chicago directory as "manager of the Pittsburgh Bridge Co.", in New York temporarily, who said he represented the company, could not be served so as to bind the company.

<sup>9</sup> *Breen v. Northwestern Realty Co.*, 52 Misc. 528, 102 N. Y. Supp. 473 (1907).

<sup>10</sup> *Palmer v. Pennsylvania Co.*, 35 Hun, 369 (1885); *aff'd* 99 N. Y. 679.

<sup>11</sup> *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1917).

<sup>12</sup> *Russell v. Washington Life Ins. Co.*, 62 Misc. 403, 115 N. Y. Supp. 950 (1909); C. C. P. § 431.

<sup>13</sup> *Jackson v. Schuylkill Silk Mills*, 92 Misc. 442, 156 N. Y. Supp. 219 (App. T. 1915); C. C. P. § 432.

<sup>14</sup> *Rath v. Ohio German Fire Insurance Co.*, 132 A. D. 692, 117 N. Y. Supp. 382 (1909); C. C. P. § 432.

by it in correspondence, doing all its business done in this State and under general directions only, is its managing agent on whom process may be served.<sup>15</sup> A solicitor in this State for advertising for a foreign corporation having full power to make binding contracts for advertising in its behalf is not a "managing agent" on whom process against it may be legally served.<sup>16</sup> Service of process on a foreign corporation cannot be made on a representative in this State of the corporation for securing for it contracts for advertising as being its managing agent.<sup>17</sup> Service is not good upon an individual as "managing agent" of a foreign corporation when it appears that he is a member of the New York Produce Exchange, obtains orders and transmits them to the corporation, cannot fix prices or accept an order; that the corporation ships direct to customers such orders as it accepts; that he occasionally buys goods for it and others on the floor of the Exchange under specific orders and maintains an office partly paid for by it in the Exchange building; and that the corporation's name appears in the directories but its telephone number and address are not shown to be the same as his.<sup>18</sup> One served with a summons in an action against a foreign corporation is not to be considered its "managing agent" so as to bind it by such service because he took it while sitting in an office on the door whereof was its name and he had authority from it only to solicit contracts for freight, even though he sent the summons to the corporation and told the process-server he was its representative.<sup>19</sup> An assistant secretary of a corporation whose only duty or service is the signing of some of its scrip certificates is not a managing agent on whom process against it may be served.<sup>20</sup>

<sup>15</sup> *Palmer v. Chicago Evening Post Co.*, 85 Hun, 403, 32 N. Y. Supp. 992 (1895); C. C. P. § 432, subd. 3.

<sup>16</sup> *Fontana v. Post Printing & Publishing Co.*, 87 A. D. 233, 84 N. Y. Supp. 308 (1903); C. C. P. § 432, subd. 3.

<sup>17</sup> *Vitolo v. Bee Publishing Co.*, 66 A. D. 582, 73 N. Y. Supp. 273 (1901). The individual had newspaper advertising agency and solicited advertisements for the foreign corporation, among other publications. He said he was its advertising manager and it by letter said he was its representative. He had

its name on his door and files of its paper in his office, copies of which he would sell.

<sup>18</sup> *Beck v. North Packing & Provision Co.*, 159 A. D. 418, 144 N. Y. Supp. 602 (1913); C. C. P. § 432.

<sup>19</sup> *Joseph v. Kansas City, Mexico & Orient Railway*, 180 A. D. 313, 167 N. Y. Supp. 273 (1917).

<sup>20</sup> *Sterett v. Denver & Rio Grande R. Co.*, 17 Hun, 316 (1879); C. C. P. § 432, subd. 3.

As to who is managing agent of foreign corporation for purpose of service of process, see note in 23 L.R.A. 490; 4 L.R.A.(N.S.) 460.

**§ 775. Id.: Service of Notice of Sale on Foreign Corporate Mortgagor.**—The statute prescribes the method of service upon a foreign corporation mortgagor of notice of sale on foreclosure.<sup>1</sup>

**§ 776. Id.: Pleading; Practice and Evidence; In General.**—If the sole objection to the right of a foreign corporation to interpose a counterclaim be that it has not procured from the Secretary of State for New York a certificate permitting it to do business in this State, the objection will not be upheld.<sup>2</sup> A foreign corporation of a distant state sued by an individual under an alleged employment of him by it as its agent is entitled to a bill of particulars giving the name of its officer or agent or manager who employed such individual, if its two agents or officers who have entire management of its affairs in New York swear they know nothing of such individual's alleged employment.<sup>3</sup> Plaintiffs suing as stockholders of a foreign corporation to prevent the issue of stock which will depreciate their holdings need not plead the statutes of its home state against the issue, as they rest on their common law remedy to protect vested rights.<sup>4</sup> While an order for examination before trial of a defendant corporation is improper if it authorizes the examination of its stated officers instead of the corporation through them, yet it is not necessary to vacate it if it appears it was plaintiff's desire to examine it through them; but the Special Term should, instead, amend the order accordingly.<sup>5</sup> "A proceeding supplementary to execution cannot be sustained upon a foreign judgment or a judgment *in rem*. It must be a judgment by which the person of the judgment debtor is bound."<sup>5a</sup>

**§ 777. Id.: What Law Governs.**—The form of an action brought in this State against a foreign corporation, and the method of procedure are matters of practice which are fixed and governed by the laws of this State.<sup>6</sup>

<sup>1</sup> C. C. P. § 2389.

<sup>2</sup> *Alsing Co. v. New England Quartz Co.*, 66 A. D. 473, 73 N. Y. Supp. 347 (1901); *aff'd* 174 N. Y. 536; 66 N. E. 1110; *Gen. Corp. L.* § 15 (L. 1892, c. 687).

<sup>3</sup> *Fruin-Bambrick Construction Co. v. Marks*, 48 A. D. 51, 62 N. Y. Supp. 621 (1900).

<sup>4</sup> *Ernst v. Elmira Municipal Improvement Co.*, 24 Misc. 583, 54 N. Y. Supp. 116 (1898).

<sup>5</sup> *Kram v. Jewish World Publish-*

*ing Co.*, 176 A. D. 840, 163 N. Y. Supp. 261 (1917).

<sup>5a</sup> *Matter of Maltbie or Lobsitz Mills Co.*, 223 N. Y. 227 (1918); C. C. P. §§ 2458, 435, 2435; *Tax L.* § 299. A foreign corporation had property invested in business in New York and was taxed thereon. It was held that on non-payment of the tax it could not be examined in *supp. pro.*

<sup>6</sup> *Sinnott v. Hanan*, 214 N. Y. 454, 108 N. E. 858 (1915).

**§ 778. Id.: Necessity and Manner of Alleging Corporate Existence, and Plaintiff's Residence.**—In an action brought against a foreign corporation the complaint must state it to be such and the State, country or government by or under the laws of which it was created, but need not set forth or specially refer to any act or proceeding by or under which it was created.<sup>7</sup> The allegation in a complaint against a foreign corporation that plaintiff transacts business in New York is not equivalent to an allegation that he resides in this State and is not, therefore, sufficient to permit him to sue in New York.<sup>8</sup> A complaint in an action in the City Court against a foreign corporation should allege that at its commencement plaintiff was a resident if he could not sue if a non-resident.<sup>9</sup> A complaint against a foreign corporation is not demurrable because it does not allege the residence of the plaintiff in this State.<sup>10</sup> A complaint by an individual in an action in the City Court against a foreign corporation is not demurrable because it does not allege the residency of the plaintiff in this State.<sup>11</sup> Demurrer does not lie to a complaint against a foreign corporation on the ground that it does not allege the plaintiff's residency in the State or the place where the contract sued on was made.<sup>12</sup> Amendment, after the close of a plaintiff's case, of his complaint is proper to have it allege his residence in this State in his action against a foreign corporation which he is suing to recover damages arising from personal injuries sustained while he was a resident of the corporation's home state.<sup>13</sup> It is competent for the court on a trial to allow an amendment of a complaint so as to charge that the defendant is a foreign instead of a domestic corporation, as alleged.<sup>14</sup>

**§ 779. Id.: Necessity and Manner of Denying Corporate Existence.**—In an action or special proceeding brought against a corporation the defendant is deemed to have waived any mistake in the statement of the corporate name unless the misnomer is pleaded in the answer or other pleading in the

<sup>7</sup> C. C. P. § 1775.

<sup>8</sup> *Bogert v. Otto Gas Engine Works*, 28 A. D. 463, 51 N. Y. Supp. 118 (1898); C. C. P. § 1780.

<sup>9</sup> *O'Reilly v. New Brunswick, Albany & N. Y. Steamboat Co.*, 28 Misc. 112, 59 N. Y. Supp. 261 (1899); C. C. P. §§ 315, 1780, 481, 499.

<sup>10</sup> *Herbert v. Montana Diamond Co.*, 81 A. D. 212, 80 N. Y. Supp. 177 (1903); C. C. P. § 1780.

<sup>11</sup> *Campbell v. Texas Central R. R.*

*Co.*, 15 Misc. 442, 37 N. Y. Supp. 213 (1896).

<sup>12</sup> *Carter v. H. Booth King & Bro. Pub. Co.*, 26 Misc. 652, 56 N. Y. Supp. 382 (1899).

<sup>13</sup> *Voshefskey v. Hillside Coal & Iron Co.*, 21 A. D. 168, 47 N. Y. Supp. 386 (1897).

<sup>14</sup> *Stuart v. New York Herald Co.*, 73 A. D. 459, 77 N. Y. Supp. 216 (1902).

defendant's behalf.<sup>15</sup> An answer to a complaint averring that the defendant is a foreign corporation incorporated under the laws of a certain foreign country which "denies, on its information and belief, that at the time mentioned in the complaint, or at any other time, the defendant was a foreign corporation as is alleged in the complaint," raises no issue; because under it the defendant can be either a foreign or domestic corporation, formed in any country except the one stated, and the only issue is one of its nationality, while the statute requires an affirmative denial of the fact that the defendant is a corporation.<sup>16</sup>

**§ 780. Id.: Necessity and Manner of Proving Corporate Existence.**—In an action brought against a corporation the plaintiff need not prove upon the trial the existence of the corporation unless the answer is verified and contains an affirmative allegation that the plaintiff or the defendant, as the case may be, is not a corporation.<sup>17</sup> If a complaint allege that the defendant is a foreign corporation and the answer deny this but do not affirmatively allege that it is not a corporation, the plaintiff need not prove on the trial the existence of the corporation.<sup>18</sup> Whenever by the laws of any other state or territory, or the Dominion of Canada, a copy of the certificate of organization or incorporation or any other certificate, certified or exemplified by any officer or officers in such state or territory or dominion, is or shall be prima facie evidence of the due formation, creation, existence, organization or capacity of any corporation created, organized or located in such state, territory or dominion, or claiming so to be, such certificate or certificates, duly exemplified or a duly exemplified copy thereof, must be received in all actions and proceedings in New York State, in or before all courts and officers, with the same force and effect in all respects as prima facie evidence as aforesaid, as in such other state, territory or dominion.<sup>18a</sup>

**§ 781. Id.: Verification of Pleadings.**—The agent of the attorney for a foreign corporation may verify a pleading by it.<sup>19</sup>

**§ 782. Id.: In Actions To Recover on Evidence of Debt.**—In an action against a foreign corporation to recover damages for the nonpayment of a promissory note or other evidence

<sup>15</sup> C. C. P. § 1777.

<sup>16</sup> *Bengston v. Thingvalla Steamship Co.*, 31 Hun, 96 (1883); C. C. P. § 1776.

<sup>17</sup> C. C. P. § 1776.

<sup>18</sup> *Nickerson v. Canton Marble Co.*,

35 A. D. 111, 54 N. Y. Supp. 706 (1898); C. C. P. § 1776.

<sup>18a</sup> Gen. Corp. L. § 9, para. 1 (L. 1906, c. 28).

<sup>19</sup> C. C. P. § 525.

of debt for the absolute payment of money upon demand or upon a particular time, an order extending the time to answer or demur must not be granted except by the court upon notice to the plaintiff's attorney; and the plaintiff may take judgment as in case of default in pleading, at the expiration of twenty days after service of a copy of the complaint either personally with the summons or upon the defendant's attorney, or at the expiration of twenty days after the service is complete if the service of the summons was otherwise than personal, unless in either case the defendant serves with a copy of his answer or demurrer a copy of an order of a judge directing that the issues presented by the pleadings be tried.<sup>20</sup> There is no distinction between domestic and foreign corporations in the preference given by statute to an action "against a corporation, founded upon a note or other evidence of debt for the absolute payment of money."<sup>21</sup>

**§ 783. Id.: Examination of Books.**—In an action at law against a foreign corporation subject to the jurisdiction of the New York court for breach of a contract executed in this State providing, *inter alia*, for inspection of its books by the plaintiff, the latter is entitled not merely to an examination of the corporation before trial but to an inspection of its books.<sup>2</sup> The Appellate Division has sustained an order for the examination of the books of a foreign corporation invoking the jurisdiction of the New York courts as a plaintiff, and an order for the production of the books of a foreign corporation defendant in an action on a contract made in this State by which plaintiff was entitled to an inspection of such books; but it has not otherwise attempted to exercise its jurisdiction so as to require a foreign corporation not doing business here to bring from without the State and produce within this jurisdiction its books or records — though it might do so.<sup>3</sup>

**§ 784. Id.: Pleading Usury.**—The statute providing that "no corporation shall hereafter interpose the defense of usury in any action" applies to foreign as well as domestic corporations.<sup>4</sup> The subject of usury has been discussed in the three hundred and ninety-sixth section of this work.

<sup>20</sup> C. C. P. § 1778.

<sup>1</sup> *Martin's Bank (Ltd.) v. Amazones Co.*, 98 A. D. 146, 90 N. Y. Supp. 734 (1904); C. C. P. § 791.

<sup>2</sup> *Sullivan v. Ryan-Parker Construction Co.*, No. 1, 148 A. D. 243, 132 N. Y. Supp. 344 (1911).

<sup>3</sup> *Kram v. Jewish World Publishing Co.*, 176 A. D. 840, 163 N. Y. Supp. 261 (1917).

<sup>4</sup> *Southern Life Insurance & Trust Co. v. Packer & Prentice*, 17 N. Y. 51 (1858); L. 1850, c. 172.

**§ 785. Id.: Procedure When Corporation Not Personally Served and Does Not Appear.**—When a defendant is a foreign corporation and has not appeared and the plaintiff applies for judgment when service has not been made personally the statute prescribes the papers plaintiff must produce and file.<sup>5</sup> When summons is not served personally on a defendant foreign corporation and plaintiff applies for judgment for default on failure of such defendant to demand a copy of the complaint or plead, the statute prescribes the procedure which must be followed.<sup>6</sup>

**§ 786. Id.: Attachment, In General.**—A warrant of attachment may be obtained against the property of a defendant foreign corporation in an action to recover a sum of money only as damages (1) for breach of any express or implied contract other than a contract to marry, (2) for wrongful conversion of personal property, (3) for an injury to person or property in consequence of negligence, fraud or other wrongful act, (4) for a wrongful act, neglect or default by which the decedent's death was caused when the action is brought by an executor or administrator and the foreign corporation would have been liable to an action in favor of the decedent by reason thereof if death had not ensued as prescribed by the nineteen hundred and second section of the Code of Civil Procedure.<sup>7</sup> No attachment against a foreign corporation should be allowed when it does not appear that the contract on which the action is brought was made, or that the cause of action arose within this State.<sup>8</sup> “. . . it is held, in respect to a corporation organized under the laws of the United States, whose charter makes no provision for the location of its main office: (1) That its main office is located at the seat of the corporation's government, *i. e.*, at the regular meeting place of the board of directors; (2) that a corporation is located in the State of New York if its principal office or main office is there located; (3) that irrespective of what constitutes its main office, a corporation which holds its stockholders' and directors' meetings, maintains its executive offices and keeps its stock certificate books and corporate records all in the State of New York, is located in the State within the meaning of ” the statute permitting attachment

<sup>5</sup> C. C. P. § 1217.

<sup>6</sup> C. C. P. § 1216.

<sup>7</sup> C. C. P. § 635 *et seq.*

<sup>8</sup> *Smith v. Union Milk Co.*, 70 Hun, 348, 24 N. Y. Supp. 79 (1893); *aff'd* 143 N. Y. 622, 37 N. E. 827.

of its property as that of a foreign corporation.<sup>9</sup> One who has brought an action against a foreign corporation, procured an attachment, and had it levied upon by the sheriff before a receiver in the corporation's home State or an ancillary receiver in this State has been appointed, is entitled to issue execution upon the entry of judgment and to have the sheriff collect and pay over to him the money, upon receipt of the execution, unless the order appointing the receiver contain an injunction against the prosecution of such one's action.<sup>10</sup> It is proper to consider on a motion to vacate a levy under a warrant of attachment the question whether or not there was anything in this State on which the sheriff could levy.<sup>11</sup> A party moving to vacate an attachment against a foreign corporation must show by competent evidence, he not being the defendant itself, that he acquired a lien upon or interest in the defendant's property after it was attached; and the same rule will be applied to his papers for vacation of as will be applied to a creditor's papers on application for the attachment.<sup>12</sup> A bond given by surety to a foreign corporation against which an action has been brought and an attachment had in this State as a condition for discharge of the attachment holds good on reversal by the Appellate Division of a judgment for defendant and direction of judgment absolute for plaintiff, even though no stay of proceedings was obtained when judgment below was entered for defendant.<sup>13</sup>

**§ 787. Id.: What Attachable.**—" . . . the fundamental condition of attachment proceedings, that the *res* must be within the jurisdiction of the court in order to an effectual seizure, is not answered in respect to shares in a foreign

<sup>9</sup> Gould v. Texas & Pacific Ry. Co., 176 A. D. 818, 163 N. Y. Supp. 479 (1917), on the opinion below, C. C. P. § 3343, subd. 18.

<sup>10</sup> Bennett v. Electric Construction Co., 8 A. D. 301, 40 N. Y. Supp. 1139 (1896).

<sup>11</sup> Bridges v. Wade, 113 A. D. 350, 99 N. Y. Supp. 126 (1906); C. C. P. § 1780.

<sup>12</sup> Belmont v. Sigua Iron Co., 12 A. D. 441, 42 N. Y. Supp. 122 (1896). An affidavit of a managing clerk of the attorneys, for the purpose of the motion, of a receiver, which simply states the latter had filed his bond and it had been approved, without showing he was

managing clerk when the order appointing the receiver was made, is insufficient, if such order prohibited the receiver from entering on his duties until such bond had been made and filed.

<sup>13</sup> Youngman v. Fidelity & Deposit Co., 87 Misc. 456, 150 N. Y. Supp. 788 (1914); aff'd 153 N. Y. Supp. 1151; C. C. P. §§ 688, 3343, subd. 12.

On liability of foreign corporation which has complied with conditions of doing business in State to attachment as nonresident, see notes in 31 L.R.A.(N.S.) 278; L.R.A. 1916D, 116.

corporation by the presence here of its officers, or by the fact that the corporation has property and is transacting business here;" so that shares of a non-resident, individual defendant in such a corporation cannot be attached here in an action against him.<sup>14</sup> When the certificates of stock of a foreign corporation belonging to a non-resident of the State are in the possession of a resident of this State, as pledgee the interest of the owner and pledgor can be levied upon under a warrant of attachment against such owner, made by service of a notice on the pledgee in the manner prescribed by subdivision 3 of section 649 of the Code.<sup>15</sup> Certificates of stock in this State in the possession of a corporation with authority to sell, though of a foreign corporation and owned by a non-resident, may be levied upon and attached by the sheriff to satisfy a judgment had against their owner.<sup>16</sup> Bonds of a foreign corporation in the hands of its agent here to be delivered to such persons as should be willing to lend the company money on their security are not property of the company, liable to be seized under attachment or execution.<sup>17</sup> A creditor of a foreign corporation may attach its chattels in this State in spite of a trust mortgage covering them validly executed by it in a foreign State, barring all creditors from any benefit therefrom unless they accepted its terms and agreed to extend the time of payment of their debts until after the mortgage matured; because such an agreement is against the policy of this State.<sup>18</sup> ". . . as a general proposition, it is the law that the debt of a foreign corporation due to a non-resident, cannot be attached in this State;" but if the debt is the result of a contract made in New York and by its terms payable there, a levy thereon will not be vacated on the ground that the *situs* of the debt is outside the State. A levy under a warrant of attachment cannot be made upon a debt due by a foreign corporation at the suit of a non-resident plaintiff, even though the foreign corporation is present in the foreign State only through having its name on a bill

<sup>14</sup> *Plimpton v. Bigelow*, 93 N. Y. 592 (1883); C. C. P. § 647 "must be construed as applying to domestic corporations only."

<sup>15</sup> *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 55 L.R.A. 796, 58 N. E. 896 (1900).

<sup>16</sup> *People ex rel. Wynn v. Grifenhagen*, 167 A. D. 572, 152 N. Y. Supp. 679 (1915); C. C. P. § 644 *et seq.*

<sup>17</sup> *Coddington v. Gilbert*, 17 N. Y. 489 (1858).

<sup>18</sup> *Dearing v. McKinnon Sash Hardware Co.*, 165 N. Y. 78, 5 N. E. 773 (1900).

<sup>19</sup> *Lancaster v. Spotswood*, 4 Misc. 19, 83 N. Y. Supp. 57 (1903); *aff'd* 86 A. D. 627.

board, with hundreds of others, outside the offices of a company organized to comply with the law of that State, to give a legal fiction to a principal office within the State, but the real office of which is in New York where much of its business is done, and which has been licensed to do business in New York and pays taxes in New York.<sup>20</sup> Resident individuals may attach a debt due by a non-resident doing business in this State to a foreign corporation and a resident individual who are debtors of the plaintiffs by serving the warrant on the non-resident debtor of the foreign corporation.<sup>1</sup> A resident individual creditor of a foreign corporation having no office in New York may attach a judgment indebtedness of another foreign corporation, having an office and doing business in this State, to the first foreign corporation, if the money represented by the debt is within the court's jurisdiction.<sup>2</sup> A debt by a resident subscriber to stock of a foreign corporation, in the shape of his unpaid subscription, the property of which corporation has been involuntary put in the hands of a receiver in such foreign State, is subject to attachment in this State by a resident creditor of the corporation.<sup>3</sup> A cause of action against a resident subscriber to stock of a foreign corporation, of which a receiver has involuntarily been appointed in its home State, on his unpaid subscription, is, for the purposes of our attachment law, a debt due and owing the corporation here, and is subject to levy under an attachment for an indebtedness owing by the corporation.<sup>4</sup> A resident creditor of a foreign corporation insured in a foreign corporation cannot attach the indebtedness of the latter to the former for loss sustained by fire if the policy was delivered in a foreign State, as the presence of the thing within this State is essential to attachment.<sup>5</sup>

**§ 788. Id.: Who May Attach.**—"The papers, upon which a foreign corporation, doing business in this State, in relation

<sup>20</sup> *Bridges v. Wade*, 113 A. D. 350, 99 N. Y. Supp. 126 (1906); C. C. P. § 1780.

<sup>1</sup> *Flynn & White*, 122 A. D. 780, 107 N. Y. Supp. 860 (1907).

<sup>2</sup> *India Rubber Co. v. Katz*, 65 A. D. 349, 72 N. Y. Supp. 658 (1901).

<sup>3</sup> *McNelus v. Stillman*, 172 A. D. 307, 158 N. Y. Supp. 428 (1916); C. C. P. §§ 677, 678.

<sup>4</sup> *McNelus v. Stillman*, 172 A. D. 307, 158 N. Y. Supp. 428 (1916);

C. C. P. §§ 677, 678. ". . . with respect to creditors of the corporation pursuing their legal remedies in the courts of this State, effect is not given here to the *involuntary* transfer of the property of the debtor by virtue of a foreign statutory law."

<sup>5</sup> *Straus v. Chicago Glycerine Co.*, 46 Hun, 216 (1887); *aff'd* 108 N. Y. 654, 15 N. E. 444; C. C. P. §§ 641, 644.

to a transaction arising in such State, procures an attachment, must show, for the purposes of the attachment, that the corporation has complied with the provisions of the statute; and if such fact does not appear in the papers, upon which the warrant of attachment was granted, the omission of such allegation therefrom is legal cause for vacating the warrant of attachment."<sup>6</sup> In order to vacate an attachment against a foreign corporation on the ground that it does not appear that the plaintiff-foreign-corporation seeking the attachment has filed the requisite certificate authorizing it to do business in New York it must further appear that the plaintiff is doing business in this State.<sup>7</sup> A foreign corporation seeking an attachment and claiming to come within one of the exceptions of the statute requiring a receipt of payment of its license fee as a condition precedent to suing in New York must show either that it comes within such exception or that it has not been doing business in New York for so long a period as thirteen months prior to the time of the application for the attachment and commencement of the action, and, consequently, that its time has not expired.<sup>8</sup>

**§ 789. Id.: Sufficiency of Moving Papers.**—In order to sustain an attachment against a foreign corporation the plaintiff's affidavit of the elements of damage must not consist of conclusions but of facts.<sup>9</sup> An attachment against a foreign corporation cannot stand unless the complaint, affidavit or other papers on which the attachment is sought, show the essential facts, and, if a necessary allegation is made on information and belief, state the sources of the information and the grounds of the belief.<sup>10</sup> "An affidavit in support of an attachment must contain evidence from which the court can determine that the ultimate facts stated in the pleadings can be substantiated."<sup>11</sup> The rule that an attachment against a foreign corporation will not be granted if the material facts warranting it are plead or verified on information and belief,

<sup>6</sup> *Reedy Elevator Co. v. American Grocery Co.*, 24 Misc. 678, 53 N. Y. Supp. 989 (1898); L. 1896, c. 908, § 181.

<sup>7</sup> *Commercial Wood & Cement Co. v. Northampton Portland Cement Co.*, 41 Misc. 242, 84 N. Y. Supp. 38 (1903); L. 1892, c. 687, § 15.

<sup>8</sup> *Reedy Elevator Co. v. American Grocery Co.*, 24 Misc. 678, 53 N. Y. Supp. 989 (1898); L. 1896, c. 908, § 181.

<sup>9</sup> *Commercial Wood & Cement Co. v. Northampton Portland Cement Co.*, 41 Misc. 242, 83 N. Y. Supp. 609 (1903).

<sup>10</sup> *Slater v. American Palace Car Co.*, 146 A. D. 859, 131 N. Y. Supp. 17 (1911).

<sup>11</sup> *Makepeace v. Dilltown Smokeless Coal Co.*, 179 A. D. 662, 16 N. Y. Supp. 83 (1917).

unless the source of the information and the ground of the belief are given, does not apply to a complaint by a former employee to recover compensation, equivalent to the difference between the price fixed for goods by the corporation and the price at which he sold them, plus a percentage of the fixed price, though the price fixed is alleged on information and belief in the complaint, provided the affidavit supporting it gives an unsworn statement, by one who had been in plaintiff's but at the time of the action was in defendant's employ, of the fixed price.<sup>12</sup> The positive allegation in affidavits in support of a motion for a warrant of attachment against the property of a corporation that it is a foreign corporation, without giving the source of the affiant's knowledge or stating facts indicating that the averment is made upon personal knowledge, is insufficient to confer jurisdiction.<sup>13</sup> An attachment granted on an affidavit that "the defendant is a non-resident . . . being a corporation created . . . under . . . the laws of the United Kingdom of Great Britain and Ireland" will be vacated—at least in the First Judicial Department—as being granted on a mere averment on information, without disclosure of the sources or proof of the facts.<sup>14</sup> A positive averment in a verified complaint or in an affidavit that defendant is a foreign corporation is sufficient to sustain an attachment on the theory that the defendant is a foreign corporation.<sup>15</sup> Papers are sufficient to sustain an attachment against a corporation on the ground that it is incorporated in a foreign jurisdiction if it appears from them that it is named as a corporation existing in a foreign State; that the transaction on which the claim is based took place in such State; and that the statement between it and the original creditor of the settlement of the claim purports to have been made in such State and is signed by the corporate name with the additional words that it is such a foreign corporation.<sup>16</sup> When one foreign corporation seeks to obtain an attachment against another foreign corporation, it must, as a prerequisite to obtaining the attachment, establish affirm-

<sup>12</sup> *Lewis v. Tindel-Morris Co.*, 109 A. D. 509, 96 N. Y. Supp. 576 (1905).

<sup>13</sup> *Dain's Sons Co. v. McNally Co.*, 137 A. D. 857, 122 N. Y. Supp. 964 (1910); C. C. P. §§ 635, 636.

<sup>14</sup> *Wilson v. Puritan Steamship Co., Limited*, 58 Misc. 317, 110 N. Y. Supp. 914 (1908).

<sup>15</sup> *Stiner v. Tennessee Copper Co.*,

176 A. D. 209, 161 N. Y. Supp. 986 (1916); C. C. P. § 1776. "It is somewhat difficult to present hastily for the purposes of obtaining a warrant of attachment *conclusive* evidence that a corporation is a foreign corporation . . ."

<sup>16</sup> *Randolph v. Susquehanna Water Co.*, 12 A. D. 479, 42 N. Y. Supp. 411 (1896).

actively either that the contract sued upon was made, or else that its cause of action thereon arose in this State.<sup>17</sup> “. . . before jurisdiction can be acquired to issue a warrant of attachment against the property of a foreign corporation at the instance of a foreign corporation or a non-resident, it must be first made to appear by affidavit that a cause of action exists in favor of the plaintiff for a breach of a contract ‘made within the State, or relating to property situated within the State at the time of the making thereof.’ ”<sup>18</sup>

**§ 790. Id.: On What and How Sheriff May Levy.**—Under a warrant of attachment against a foreign corporation (other than one created by or under the laws of the United States), the sheriff may levy upon the sum remaining unpaid upon a subscription to the capital stock of the corporation made by a person within the county, or upon one or more shares of stock therein held by such a person or transferred by him for the purpose of avoiding payment thereof.<sup>19</sup> When a defendant who has not appeared is a foreign corporation and the summons was served without the State or by publication pursuant to an order therefor, the judgment can be enforced only against the property which has been levied upon by virtue of the warrant of attachment at the time when the judgment is entered.<sup>20</sup> The way in which the warrant of attachment requires the sheriff to satisfy a judgment against a foreign corporation is prescribed by statute.<sup>1</sup> A warrant of attachment against a defendant foreign corporation need only state that the defendant is a foreign corporation; it need not state that the cause of action arose within this State or that the plaintiff is a resident thereof.<sup>2</sup>

**§ 791. Receivers: Appointment; When New York Courts Will Appoint, In General.**—The appointment in its home State of receivers for a foreign corporation, while it may vest its property in them, does not take away from it title to its assets in this State so as to deprive the New York courts of the right to control such assets for the benefit of local creditors.<sup>3</sup> While the courts of New York cannot exercise the power to wind up

<sup>17</sup> *Shelby Steel Tube Co. v. Burgess Gun Co.*, 8 A. D. 444, 40 N. Y. Supp. 871 (1896); C. C. P. § 1780, subd. 3.

<sup>18</sup> *People v. St. Nicholas Bank*, 44 A. D. 313, 60 N. Y. Supp. 719 (1899); C. C. P. §§ 635, 636, 1780.

<sup>19</sup> C. C. P. § 646.

<sup>20</sup> C. C. P. § 707.

<sup>1</sup> C. C. P. § 1370.

<sup>2</sup> *Maury v. American Motor Co* 25 Misc. 657, 56 N. Y. Supp. 31 (1898); *aff'd* 38 A. D. 623, 57 N. Y. Supp. 1142. The moving papers however, should state plaintiff residency.

<sup>3</sup> *Courtright v. Vreeland*, 64 Misc. 46, 117 N. Y. Supp. 952 (1909).

a foreign corporation at the proceeding of a stockholder which they may over a domestic corporation, they may in equity take charge of a foreign corporation's property and appoint a receiver for the benefit of creditors or stockholders.<sup>4</sup> A New York court will not wind up the affairs of a corporation of a foreign country by appointment of a receiver, etc., though such country has declared the corporation's charter annulled, if the declaration also keeps the company in existence for certain purposes, *e. g.*, of having examination made as to the amount it owes such country and of being collectively responsible for the amount found due.<sup>5</sup> The fact that a stockholder in a foreign corporation is also one of its officers does not prevent him from bringing an action in this State, after proceedings to dissolve it have been begun in its home State in which its officers were prevented from administering its assets, to preserve its assets by sequestration and temporary receivership; because there is no officer empowered to hold such assets.<sup>6</sup> The courts of this State, at the suit of a minority of the officers of a foreign corporation who are stockholders and personally interested in the distribution of a fund of the corporation in the possession of the majority officers who have complete control of the corporation and are all residents of New York, will, though all the stockholders of the corporation are not parties to the suit and it is in process of voluntary dissolution in its home State, appoint a receiver of such fund and apply it first to the corporate creditors and secondly to the stockholders in accordance with such dissolution proceedings, if such resident officers' insolvency puts the fund in jeopardy, they prevent suit by the corporation itself to protect such fund through being all its executive and a majority of its administrative officers and the courts of the corporation's home State have no jurisdiction of them.<sup>7</sup> A receiver of a foreign corporation against which a judgment has been entered and execution thereon returned unsatisfied may be appointed if it submitted to the action by appearance.<sup>8</sup> A receiver may be appointed in this State of an insolvent foreign corporation, with its principal place of business in New York, against which judgments have been recovered, on which

<sup>4</sup>Murray v. Vanderbilt, 39 Barb. 140 (1863).

<sup>5</sup>Hamilton v. Accessory Transit Co., 26 Barb. 46 (1857).

<sup>6</sup>MacNabb v. Porter Air-Lighter Co., 44 A. D. 102, 60 N. Y. Supp.

694 (1899); C. C. P. §§ 1780, 1810, subd. 3.

<sup>7</sup>Redmond v. Hoge, 3 Hun, 171 (1874).

<sup>8</sup>De Bemer v. Drew, 57 Barb. 438 (1870).

executions are unsatisfied, and which has fraudulently disposed of its property in New York to the fraud and damage of the complaining and other judgment creditors.<sup>9</sup> The courts of this State have power at the instance of stockholder and for the protection of domestic creditors to appoint receiver of the assets in this State of a foreign corporation which is insolvent, doing business in New York State, but has no officers in New York.<sup>10</sup> The only purpose and excuse for appointing a receiver in a representative action by a stockholder of a foreign corporation is to preserve assets. “. . . a receiver of the property of an insolvent foreign corporation situated in this State may be appointed to preserve the property *pendente lite* for the protection of the interests of New York creditors.”<sup>12</sup> A resident judgment creditor praying for sequestration and distribution of the property of a debtor foreign corporation, though not entitled to such relief because outside the court's jurisdiction to give may be granted a receivership.<sup>13</sup> A non-resident stockholder in a foreign corporation may sue for the appointment of receiver of its property in this State (though not to set aside an assignment for the benefit of creditors), without previous demand of the corporation for redress and irrespective of it having obtained a license to do business.<sup>14</sup>

**§ 792. Id.: In Supp. Pro.**—Since nineteen hundred and eighty a domestic or foreign corporation is as subject to having receiver appointed in proceedings supplementary to execution as an individual and is only subject to the limitation contained in the twenty-four hundred and sixty-third section of the Code of Civil Procedure.<sup>15</sup>

**§ 793. Id.: Kind of Receivers New York Courts Will Appoint**—The courts of this jurisdiction have power to appoint receiver of the property and assets of a foreign corporation to preserve them from unlawful disposition and waste, though

<sup>9</sup> Dreyfuss v. Seale, 18 Misc. 551, 41 N. Y. Supp. 875 (1896). A receiver of the property of a foreign corporation cannot, however, be appointed to wind up its affairs; nor can its property be sequestered for distribution pursuant to C. C. P. § 1784.

<sup>10</sup> Hall v. Holland House Co., 12 Misc. 55, 33 N. Y. Supp. 50 (1895).

<sup>11</sup> Sedgwick v. Seward Development Co., 144 A. D. 455, 129 N. Y. Supp. 209 (1911).

<sup>12</sup> Horton v. McNally Co., 12 A. D. 322, 140 N. Y. Supp. 3 (1913).

<sup>13</sup> Dreyfuss v. Seale, 18 Misc. 551, 41 N. Y. Supp. 875 (1896); C. C. §§ 1784, 1207.

<sup>14</sup> Walter v. F. E. McAlister (21 Misc. 747, 48 N. Y. Supp. (1897); C. C. P. § 1780, subd. 3.

<sup>15</sup> Rabbe v. Astor Trust Co., Misc. 650, 114 N. Y. Supp. 3 (1909); L. 1908, c. 278, amend. C. C. P. § 2463.

not to appoint a receiver of the foreign corporation itself.<sup>16</sup> In a representative resident stockholder's action in this State against his foreign corporation with valuable and solvent assets, to protect it from a fraudulent conspiracy by two other resident stockholders controlling the board of directors and officers, to denude it of its assets by transfer to other foreign corporations in which such stockholders are interested, the court will not appoint a general receiver of all its property, wherever situated, but only of its property in this State, leaving the general receiver to be appointed, if at all, in the corporation's home State; though the court will try the issue of conspiracy and will, if proper, enjoin the transfer and require an accounting and restoration of corporate property, even though outside its jurisdiction.<sup>17</sup>

**§ 794. Id.: Revocation of Appointment.**—A corporation-creditor which has consented to the appointment in this State of receivers for a foreign corporation-debtor cannot move to set aside the receivership in this State on the ground that the receivers appointed in the debtor's home State have been removed for lack of jurisdiction to appoint them.<sup>18</sup>

**§ 795. Id.: Notice of Appointment.**—The statute requiring notice to the Attorney-General of a proposed order appointing a temporary receiver of a corporation and sequestrating its property applies to domestic corporations only, and not to foreign corporations.<sup>19</sup>

**§ 796. Id.: Powers Of, In General.**—Directors of a foreign corporation who loan their individual funds to it in an effort to tide over its temporary embarrassment and contract with it for security for their loan are entitled to such security as against a receiver appointed of the corporation on its being made manifest that its embarrassment was not temporary.<sup>20</sup>

**§ 797. Id.: When Appointed in Another State.**—"While the laws of a foreign State have no force, as such, in this State, still our courts uphold the title of a foreign assignee or receiver upon the principle of comity. If the title is by virtue of a voluntary conveyance or transfer, it is sustained as against all, including even domestic creditors, but if it

<sup>16</sup> *Rensens v. Manufacturing and Selling Co.*, 99 A. D. 214, 90 N. Y. Supp. 1010 (1904).

<sup>17</sup> *Hallenborg v. Greene*, 66 A. D. 590, 73 N. Y. Supp. 403 (1901).

<sup>18</sup> *Horton v. McNally Co.*, 155 A. D. 322, 140 N. Y. Supp. 357 (1913).

<sup>19</sup> *MacNabb v. Porter Air-Lighter Co.*, 44 A. D. 102, 60 N. Y. Supp. 694 (1899); *L. 1883, c. 378*.

<sup>20</sup> *Converse v. Sharpe*, 37 A. D. 399, 55 N. Y. Supp. 1080 (1899); *aff'd* 161 N. Y. 571, 56 N. E. 69.

depends on a foreign statute or judgment, it is sustained against all except domestic creditors. Subject to their superior rights, the plaintiff can reduce to possession all the property of the defendant in this State, and can bring replevin for that purpose or trover to recover damages for conversion. Notes and accounts may be collected by the unusual proceedings in our courts, which regard a foreign receiver as representing the original owner, and open their doors to him as they do to a domestic receiver."<sup>1</sup> A receiver of a foreign corporation appointed by the courts of the foreign State and living there, having full jurisdiction in a suit for the winding up of the affairs of the corporation, with power, so far as it could be conferred by such appointment, to demand, sue for, collect, receive and take into his possession all the property effects and choses in action of said corporation, cannot maintain an action in the courts of New York against such corporation as sole defendant for the sole purpose of procuring the appointment of an ancillary receiver in New York. "When an action by a foreign receiver to collect assets, under the authority of the court which appointed him, works no detriment to any citizen of this State, and is not repugnant to its policy, it would be a provincial and narrow view for our courts to refuse to extend the usual State comity. . . . While we should keep control of the subject, so as to see that no discrimination is practiced against our citizens, or injustices done them either as to the substance of the liability or the method of procedure, when the same result is attained in practically the same way as, under similar circumstances would be attained in the case of a domestic corporation, there is no reason for withholding that aid which is now afforded by the courts of almost all enlightened countries."<sup>2</sup> When the laws of a foreign State give a receiver of a corporation there appointed the right to enforce its stockholders' liability for corporate debts under its statutes he can sue to recover against a stockholder in this State, even though the latter be the only defendant, was not represented in court in the foreign State on the appointment of the receiver and the foreign statute imposing the liability provided no form of remedy. "Where a receiver of a corporation is duly appointed by .

<sup>1</sup> *Mabon v. Ongley Electric Co.*, 179, 47 L.R.A. 725, 56 N. E. 48 156 N. Y. 196, 50 N. E. 805 (1898). (1900).

<sup>2</sup> *Mabon v. Ongley Electric Co.*, 156 N. Y. 196, 50 N. E. 805 (1898). <sup>4</sup> *Howarth v. Angle*, 162 N. Y. 179, 47 L.R.A. 725, 56 N. E. 48 (1900).

<sup>3</sup> *Howarth v. Angle*, 162 N. Y.

court of a sister State and given authority to continue the business of such corporation and to make purchases for that purpose, such receiver may make such purchases in the State in which he is appointed, or in any other State, without being personally liable therefor, provided only that he discloses the character in which he assumes to act, and the source of such authority.”<sup>5</sup> A domiciliary foreign receiver of a foreign corporation will be permitted to vote the stock of a domestic corporation owned by the foreign corporation in preference to an ancillary receiver appointed in New York of such foreign corporation.<sup>6</sup> Although the rule seems to be thoroughly established that the title of an assignee or receiver under involuntary or bankruptcy proceedings in a foreign State will not be upheld as against an attachment obtained and served by a resident of this State, yet the title which is vested by the statutes of a foreign State in the statutory liquidator of a corporation (insurance) incorporated in that State but doing business in this will be upheld even as to property of such corporation in this State as against one of its creditors resident in this State seeking to attach such property.<sup>7</sup>

**§ 798. Id.: Of Ancillary Receiver Appointed in New York.**—One appointed receiver of a foreign corporation, as ancillary to a receiver appointed in its home State, by an order granting him “the usual powers and duties of receivers according to the laws of this State and the practice of this court,” etc., may settle (as distinguished from compromise) a claim arising under a lease.<sup>8</sup> If an insolvent foreign corporation has conveyed away all its assets to one foreign receiver, so that it owns nothing in this State, there is nothing as to which an ancillary receivership in this State can attach or which the ancillary receiver is entitled to collect.<sup>9</sup>

**§ 799. Id.: Accounting, and Compensation.**—The accounts of one appointed receiver of a foreign corporation in its home State and ancillary receiver thereof in New York will not be surcharged because he accounted in his home State and sought

<sup>5</sup> *Sager Manufacturing Co. v. Smith*, 45 A. D. 358, 60 N. Y. Supp. 849 (1899); *aff'd* 167 N. Y. 600, 60 N. E. 1120.

<sup>6</sup> *American & British Mfg. Co. v. International Power Co.*, 173 A. D. 319, 159 N. Y. Supp. 582 (1916).

<sup>7</sup> *Martyne v. American Union Fire Ins. Co.*, 216 N. Y. 183, 110 N. E. 502 (1916); *Ins. L.* § 63. *Penna.*

*fire insurance corporation in hands of Penna. insurance superintendent as statutory liquidator.*

<sup>8</sup> *Goodrich v. Sanderson*, 35 A. D. 546, 55 N. Y. Supp. 881 (1898); 2 R. S. 41, § 7.

<sup>9</sup> *Chicago Title & Trust Co. v. German Insurance Co.*, 119 A. D. 347, 104 N. Y. Supp. 253 (1907).

no advice from the courts of this State or did not obtain an order from the New York courts authorizing him as ancillary receiver to turn over funds in his hands to himself as principal receiver, if his conduct has otherwise been proper.<sup>10</sup> Ancillary receivers in this State of a foreign corporation appointed without authorization cannot be directed by the court to be paid or reimbursed out of the corporation's property without its consent.<sup>11</sup>

**§ 800. Id.: Actions By and Against; In General.**—A citizen of New York State may invoke the aid of its courts to establish any claim he may have against a receiver of a foreign corporation appointed in a foreign State who brings himself within the jurisdiction of such courts, if the claim be founded upon an agreement entered into with the receiver in his official capacity and arise out of a transaction which occurred within this State; and failure to apply to the court for leave to sue does not deprive it of jurisdiction.<sup>12</sup> An auxiliary receiver in this State for a foreign corporation's assets cannot, unless it be shown he was appointed by judgment, or the powers of a permanent receiver were conferred on him by court order, or he has been specifically authorized by the court to maintain the action, sue to set aside as fraudulent a transfer of assets and recover from the transferee the value thereof.<sup>13</sup> “. . . a foreign trustee, receiver or liquidator may, in a proper case, sue in our courts a stockholder resident here, for his proportionate liability as such stockholder.”<sup>14</sup> Receivers appointed to protect corporate property which has vested in them by decree of the courts of a foreign State but who have neither been substituted in place of the corporation in an action against it nor been made additional parties defendant cannot appeal from a judgment against it.<sup>15</sup>

**§ 801. Id.: Service of Process On.**—Service of process against a foreign corporation in the hands of Federal receivers can-

<sup>10</sup> *Strauss v. Casey, Machine & Supply Co.*, 68 Misc. 474, 124 N. Y. Supp. 32 (1910). The provisions of Art. II of the General Corporation Law regulate the conduct of receivers of domestic and not foreign corporations.

<sup>11</sup> *Moe v. McNally Co.*, 138 A. D. 480, 123 N. Y. Supp. 71 (1910).

<sup>12</sup> *Le Fevre v. Matthews*, 39 A. D. 232, 57 N. Y. Supp. 128 (1899).

<sup>13</sup> *Buckley v. Harrison*, 10 Misc. 683, 31 N. Y. Supp. 999 (1895).

<sup>14</sup> *Royal Trust Co. v. Harding*, 155 A. D. 104, 140 N. Y. Supp. 9 (1913).

<sup>15</sup> *Jones v. Woodin*, 164 A. D. 79, 149 N. Y. Supp. 377 (1914); C. C. P. § 1296.

On rights of receiver as to property outside of the jurisdiction in which he is appointed, see note in 23 L.R.A. 52, 494.

On power of receiver to sue out of jurisdiction of appointment, see note in 4 L.R.A.(N.S.) 824.

not legally be made upon their managing agent if it does not appear that the receivers themselves could not have been served.<sup>16</sup> Service in an action by a resident against receivers appointed by the Federal court of a non-resident corporation may be had on an agent of the receivers if they have not designated a person within this State to receive service and have property in the State.<sup>17</sup>

**§ 802. Id.: Officers, Directors and Stockholders of Foreign Corporations: What Law Governs Contracts of, With Corporation.**—A citizen of this State who becomes a shareholder in a corporation organized under the laws of another State is bound by the interpretation of the extent and obligation of contracts entered into by him with such corporation which the law of the foreign State show, so far as it does not violate a statute or the settled policy of this State; but such law will be presumed the same as the common law of New York if it be not alleged and proven here as a fact.<sup>18</sup>

**§ 803. Id.: When New York Courts Will Entertain Actions By and Against.**—The courts of this State have jurisdiction of a representative action by a stockholder to secure payment of dividends of his foreign-corporation's stock.<sup>19</sup> A cause of action by a resident stockholder of one foreign corporation for its benefit against another foreign corporation will be entertained by the courts of this State if it could have been brought directly by the corporation to be benefited if it were a domestic corporation, although it could not be entertained as a direct action of one foreign corporation against another.<sup>20</sup> A non-resident plaintiff may attach in this State shares of stock owned by a non-resident defendant in a foreign corporation if it has its chief place of business in a city of this State, manufactures goods there, makes its business arrangements there, paid its bills there, carries on its general business there, and has for two of its three directors residents of that city. The courts of this State will restrain a trustee of a

<sup>16</sup> *Gursky v. Blair*, 218 N. Y. 41, L.R.A.1916F, 359, 112 N. E. 431 (1916); C. C. P. § 432.

<sup>17</sup> *Jacobs v. Blair*, 157 A. D. 601, 142 N. Y. Supp. 897 (1913); Judicial Code (36 U. S. Stat. at Large, 1104), § 65; C. C. P. §§ 432, 1780.

For authorities discussing the question of service of process after appointment of foreign receiver upon person designated by statute to receive service for corporation, see note in 47 L.R.A.(N.S.) 179.

<sup>18</sup> *Southworth v. Morgan*, 205 N. Y. 293, 51 L.R.A.(N.S.) 56, 98 N. E. 490 (1912).

<sup>19</sup> *Prouty v. Michigan Southern & Northern Indiana R. R. Co.*, 1 Hun, 655 (1874); Code, § 427, now C. C. P.

<sup>20</sup> *Jacobs v. Mexican Sugar Refining Co., Ltd.*, 104 A. D. 242, 93 N. Y. Supp. 776 (1905); C. C. P. §§ 1779, 1780.

foreign corporation's stock for a purpose which cannot be effectuated, from exercising any of the privileges of a stockholder as such trustee, during the pendency of an action in this State to which the corporation is a party.<sup>1</sup> An assignee for the benefit of creditors of a foreign corporation empowered by the foreign law to maintain any action the corporation might, may bring an action in this State on behalf of all the corporate creditors against all the original stockholders in this State (they being the only ones solvent and liable), after exhausting the legal remedy in the foreign state, and the indebtedness of the corporation after crediting all amounts received from stockholders having been ascertained in the foreign state.<sup>2</sup>

**§ 804. Id.: Testing Title to Office of.**—" . . . the courts of this State will not undertake to set aside the election of officers of a foreign corporation, nor will it restrain their action as such."<sup>3</sup> It seems that the courts of this State will not annul the election of directors by the stockholders of a corporation chartered in another State.<sup>4</sup> A question of whether or not certain individuals are the real officers of a foreign corporation, which depends upon the answer to a further question of whether or not a pivotal director was or was not a stockholder when elected and eligible to be a director, will not be determined by a court of New York State on an application to enjoin those individuals from acting as the corporation's officers; and such an injunction will, therefore, be denied.<sup>5</sup>

**§ 805. Id.: Liabilities of, In General.**—The officers, directors and stockholders of a foreign stock corporation transacting business in New York State (except moneyed and railroad corporations) are liable in the same manner and to the same extent, except as otherwise provided by the statute, as the officers, directors and stockholders of a domestic corporation, for the following acts heretofore discussed in their relation to domestic corporations (to which discussion reference is made): (1) The making of unauthorized dividends;<sup>6</sup> (2)

<sup>1</sup>Butler v. Standard Milk Flour Co., 146 A. D. 735, 131 N. Y. Supp. 451 (1911).

<sup>2</sup>Stoddard v. Lum, 159 N. Y. 265, 45 L.R.A. 551, 53 N. E. 1108 (1899). Illinois corporation.

<sup>3</sup>Butler v. Standard Milk Flour Co., 146 A. D. 735, 131 N. Y. Supp. 451 (1911).

<sup>4</sup>Travis v. Knox Terpezzone Co., 215 N. Y. 259, L.R.A.1916A, 542, 109 N. E. 250 (1916).

<sup>5</sup>Washington Lighting Co. v. Dimmick, 41 A. D. 596, 58 N. Y. Supp. 682 (1899).

<sup>6</sup>St. Corp. L. § 70 (L. 1909, c. 61), and § 289, *supra*.

unlawful loans to stockholders;<sup>7</sup> (3) making false certificates, reports or public notices;<sup>8</sup> (4) an illegal transfer of the stock and property of such corporation, when it is insolvent or its insolvency is threatened;<sup>9</sup> (5) the failure to file an annual report.<sup>10</sup> The liabilities of officers, directors and stockholders of foreign corporations mentioned may be enforced in the courts of New York State in the same manner as similar liabilities imposed by law upon the officers, directors and stockholders of domestic corporations.<sup>11</sup> There is no objection to a resident creditor of a foreign corporation uniting in one action various claims of the corporation against its officers or others which are applicable to the payment of its debts to him.<sup>12</sup>

**§ 806. Id.: Of Directors for Unauthorized Dividends.**—The right to enforce the liability of directors for declaring dividends from capital may be given by the legislature of this State to a foreign corporation itself the capital of which is lessened, even though the laws of the state of its incorporation give such right only to its stockholders, provided that the latter state condemns the practice itself.<sup>13</sup> Directors of a foreign corporation doing business in this State and subjecting itself to the conditions established by the laws of this State may be charged with liability if they declare dividends from capital, if the statute imposing such liability was in force when the corporation came into this State.<sup>14</sup> Directors of a foreign corporation doing business in this State may be held liable in a representative stockholder's action in New York for the amount of its capital dividend among stockholders in the shape of a dividend prohibited by the home state of the corpo-

<sup>7</sup> St. Corp. L. § 70 (L. 1909, c. 61), and § 349, *supra*.

<sup>8</sup> St. Corp. L. § 70 (L. 1909, c. 61), and §§ 351, 352, *supra*.

<sup>9</sup> St. Corp. L. § 70 (L. 1909, c. 61), and § 350, *supra*.

<sup>10</sup> St. Corp. L. § 70 (L. 1909, c. 61), and § 351, *supra*.

<sup>11</sup> St. Corp. L. § 70 (L. 1909, c. 61).

<sup>12</sup> *Atlantic Dredging Co. v. Beard*, 145 A. D. 342, 130 N. Y. Supp. 4 (1911); *aff'd* 203 N. Y. 584, 96 N. E. 415.

On right of State to impose per-

sonal liability on stockholder of foreign corporation, see note in 33 L.R.A.(N.S.) 907.

On partnership liability of stockholders of foreign corporation defectively or illegally incorporated, see note in L.R.A.1916C, 217.

<sup>13</sup> *German-American Coffee Co. v. Diehl*, 216 N. Y. 57, 109 N. E. 875 (1916); St. Corp. L. §§ 28, 70. N. J. corporation.

<sup>14</sup> *German-American Coffee Co. v. Diehl*, 216 N. Y. 57, 109 N. E. 875 (1916); St. Corp. L. § 70. N. J. corporation.

ration.<sup>15</sup> An action may be maintained in New York against a director of a New Jersey corporation to recover the amount of dividends declared in violation of the laws of that State, to the same extent as if he were a director of a domestic corporation.<sup>16</sup> The only right given by the statutes of New York against directors of a foreign stock business corporation for making unauthorized dividends is that given by the statutes of the State chartering the corporation, so that if the statutes of New York give the right for the corporation's benefit while the statutes of the chartering state give it for the benefit of the individual stockholders, an action in New York on the former theory will not be sustained.<sup>17</sup>

**§ 807. Id.: Of Officers and Directors to Account for Injury to or Loss of Corporate Property.**—A foreign is as much subject as a domestic corporation to the statute.<sup>18</sup> A director of a foreign corporation may bring an action in New York to compel its president and one of its directors to account for his conduct as such and repay money and the value of property to the corporation which he has wasted; but the courts of this State will not appoint a receiver for such corporation, though they will enjoin the defendant from disposing of or interfering with the corporate property.<sup>19</sup> The courts of this State have jurisdiction of an action by a resident stockholder of a foreign corporation to compel an accounting and the restoration by stockholders and directors of the corporation within the jurisdiction of the New York courts for an illegal appropriation of its stock by the increase of stock and its subsequent delivery without consideration.<sup>20</sup> A dissolved foreign corporation is not a necessary party defendant to an action by a resident

<sup>15</sup> *Hutchinson v. Stadler*, 85 A. D. 424, 83 N. Y. Supp. 509 (1903); St. Corp. L. § 60 (L. 1897, c. 384, 523) (prior to amendment of L. 1901, c. 354).

<sup>16</sup> *Hutchinson v. Curtiss*, 45 Misc. 484, 92 N. Y. Supp. 70 (1904); St. Corp. L. §§ 23, 60; N. J. Gen. Corp. L. § 30.

<sup>17</sup> *De Raimes v. United States Lithograph Co.*, 161 A. D. 781, 146 N. Y. Supp. 813 (1914); Gen. Corp. L. of N. J., § 30 (L. 1896, c. 185, § 30); Stock Corp. L. of N. Y. §§ 28, 70.

<sup>18</sup> *German-American Coffee Co. v. Diehl*, 86 Misc. 547, 149 N. Y. Supp.

413 (1914); *aff'd* 168 A. D. 913; Gen. Corp. L. § 91-a (L. 1913, c. 633).

<sup>19</sup> *Acker v. Coughlin*, 103 A. D. 1, 92 N. Y. Supp. 700 (1905); C. C. P. § 1781.

<sup>20</sup> *Ernst v. Rutherford & Boiling Springs Gas Co.*, 38 A. D. 388, 56 N. Y. Supp. 403 (1899). It seems that the New York courts would also entertain an action to control the internal management of a foreign corporation if it were illegal and caused injury to individual stockholders resident in this State, though not if it constituted only a public wrong.

creditor to reach its assets in the hands of resident directors applicable to its debts.<sup>1</sup> A domestic creditor of a foreign corporation which has been dissolved need not obtain a judgment against it as a prerequisite to suing domestic directors of the corporation into whose hands the creditor seeks to trace corporate funds applicable to its debts.<sup>2</sup>

**§ 808. Id.: Of Stockholders for Corporate Debts.**—The courts of New York will not entertain jurisdiction of an action against individual stockholders of a foreign corporation to enforce their liability for its debts based on a statute of such foreign state: certainly not if the suit is equitable and seeks an accounting between creditors and stockholders, and neither the corporation nor its creditors are parties.<sup>3</sup> A resident holding bonds of a foreign corporation cannot hold a non-resident stockholder therein for a liability imposed upon him by the foreign statutes in the absence of any judgment in his favor in the foreign state; nor sustain an attachment against the defendant.<sup>4</sup>

**§ 809. Id.; Of Stockholders for Unpaid Subscription** —“ It is doubtless the rule that where a foreign statute which creates the liability of a stockholder also provides a remedy for the enforcement of that liability, such remedy is exclusive and our courts will not intervene to enforce it (*citations*). But it is also obvious that the remedy referred to in these cases is the remedy against the stockholder who is a resident of this and a non-resident of the state which is the domicile of the corporation, for if it were not so no proceeding could be instituted against stockholders residing in the domicile of a corporation without cutting off any right of action against stockholders who reside outside of that domicile; ” so that if the only remedy prescribed by the foreign law is the right of suit against stockholders in other jurisdictions, for all practical purposes the case is no different from one in which it appears that the foreign statute has provided no remedy, and the action against the stockholder in this State will be

<sup>1</sup> *Atlantic Dredging Co. v. Beard*, 145 A. D. 342, 130 N. Y. Supp. 4 (1911); *aff'd* 203 N. Y. 584, 96 N. E. 415.

<sup>2</sup> *Atlantic Dredging Co. v. Beard*, 145 A. D. 342, 130 N. Y. Supp. 4 (1911); *aff'd* 203 N. Y. 584, 96 N. E. 415.

<sup>3</sup> *Cleveland, Lorain & Wheeling Ry. Co. v. Kent*, 87 Hun, 329, 34 N. Y. Supp. 427 (1895).

<sup>4</sup> *Brookman v. Merchants' Savings Bank*, 31 Misc. 191, 65 N. Y. Supp. 54 (1900).

upheld.”<sup>5</sup> It seems that there is no statute of New York State prescribing, as a condition to the exercise therein of the rights derived from a foreign state (New Jersey), as to the liability of a stockholder of a corporation of such foreign state for unpaid subscriptions to his stock, that he shall be liable to the creditors up to the nominal value of his stock; and the principles of the common law therefore apply.<sup>6</sup> An action against a stockholder in a foreign corporation under the statutes of the state of its incorporation to enforce his statutory liability for its debts on its insolvency will not be entertained in this State, especially if brought in a form different from that which a creditor of a domestic corporation may prosecute against a domestic stockholder.<sup>7</sup>

<sup>5</sup> *Shipman v. Treadwell*, 200 N. Y. 472, 93 N. E. 1104 (1911). Suit by receiver of Ohio corporation to enforce statutory liability under Ohio laws of stockholder in New York.

<sup>6</sup> *Southworth v. Morgan*, 205 N. Y. 293, 51 L.R.A.(N.S.) 56, 98 N. E. 490.

<sup>7</sup> *Marshall v. Sherman*, 148 N. Y. 9, 34 L.R.A. 757, 42 N. E. 419

(1895). The action was by a single creditor against a single stockholder instead of a suit by or in behalf of all creditors against all stockholders.

On necessity of exhausting legal remedies against corporation before invoking jurisdiction of equity to enforce liability on unpaid subscription to stock, see note in 46 L.R.A. (N.S.) 447.

# CHARTER.

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## GREATER NEW YORK CHARTER.

§ 71. (L. 1901, c. 466.) The rights of the city in and to its water front, ferries, wharf property, land under water, public landings, wharves, docks, streets, avenues, parks, and all other public places are hereby declared to be inalienable.

§ 72. (L. 1895, c. 629.) Every grant of or relating to a franchise of any character to any person or corporation must, unless otherwise provided in this act, be by ordinance of the board of aldermen or by resolution of the board of estimate and apportionment or a contract executed by or under the authority of the said board of estimate and apportionment, provided that every such ordinance, resolution or contract shall be subject to the provisions of this act with respect to approval by the mayor. But this section shall not apply to any franchise, right or contract authorized by the board of rapid transit railroad commissioners of The City of New York,

§ 73. (L. 1905, c. 629.) After the approval of this act no franchise or right to use the streets, avenues, waters, rivers, parkways or highways of the city shall be granted by any board or officer of The City of New York under the authority of this act to any person or corporation for a longer period than twenty-five years, except as herein provided, but such grant may, at the option of the city, provide for giving to the grantee the right on a fair revaluation or revaluations to renewals not exceeding in the aggregate twenty-five years. Nothing in the foregoing provisions of this section contained shall apply to consents granted to tunnel railroad corporations; nor shall anything in this section or in this title contained apply to grants made pursuant to the rapid transit act, chapter four of the laws of eighteen hundred and ninety-one or the acts amendatory thereof. The board of estimate and apportionment is hereby authorized, in its discretion to grant a franchise or right to any railroad corporation to use any of said streets, avenues, waters, rivers, parkways or highways in The City of New York for the construction and operation of a tunnel railroad underneath the surface thereof for any period not exceeding fifty years, and any such grant may at the option of the city provide for giving to the grantee the right, on a fair revaluation or revaluations, to renewals not exceeding in the aggregate twenty-five years, provided, however, that any grant to construct a tunnel railroad or renewal thereof, shall only be made after an agreement has been entered into by such a tunnel corporation to pay to The City of New York at least three per centum, of the net profits derived from the use of any tunnel which it shall construct, after there shall have been first retained by such company from such net profits a sum equal to five per centum upon the sum expended to construct such tunnel. At the termination of any franchise or right granted by the board of estimate and apportionment all the rights or property of the grantee in the streets, avenues, waters, rivers, parkways and highways shall cease without compensation. Every such grant of a franchise and every contract made by the city in pursuance thereof may provide that upon the termination of the franchise or right granted by the board of estimate and apportionment the plant of the grantee with its appurtenances, shall thereupon be and become the property of the city without further or other compensation to the grantee, or such grant and contract may provide that upon

such termination there shall be a fair valuation of the plant which shall be and become the property of the city on the termination of the contract on paying the grantee such valuation. If by virtue of the grant or contract the plant is to become the city's without money payment therefor, the city shall have the option either to take and operate the said property on its own account, or to lease the same for a term not exceeding twenty years. If the original grant shall provide that the city shall make payment for the plant and property, such payment shall be at a fair valuation of the same as property, excluding any value derived from the franchise; and if the city shall make payment for such plant it shall in that event have the option either to operate the plant and property on its own account or to lease the said plant and property and the right to the use of streets and public places in connection therewith for limited periods, in the same or similar manner as it leases the ferries and docks. Every grant shall make adequate provision by way of forfeiture of the grant, or otherwise, to secure efficiency of public service at reasonable rates and the maintenance of the property in good condition throughout the full term of the grant. The grant or contract shall also specify the mode of determining the valuation and revaluations therein provided for.

§ 74, (L. 1914, c. 467. Before any grant of a franchise or right to use any street, avenue, waterway, parkway, park, bridge, dock, wharf, highway or public ground or water within or belonging to the city shall be made by the board of estimate and apportionment, public hearing shall be held upon the petition therefor, at which citizens shall be entitled to appear and be heard. No such hearing shall be held however, until notice thereof, and the petition in full shall have been published at least ten days in the City Record, and at least twice, at the expense of the petitioner, in two daily newspapers published in the city, to be designated by the mayor. The board of estimate and apportionment shall make inquiry as to the money value of the franchise or right proposed to be granted and the adequacy of the compensation proposed to be paid therefor, and shall embody the result of such inquiry in a form of contract, with all the terms and conditions, including the provisions as to rates, fares and charges. Such proposed contract, together with the form of resolution or resolutions for the granting of the same, shall, but not until after the hearing upon the petition, be entered on the minutes of the board of estimate and apportionment, and such board shall, not less than twenty-seven days after such entry and before authorizing such contract or adopting any such resolution, hold a public hearing thereon at which citizens shall be entitled to appear and be heard. No such hearing shall be held until after notice thereof, and the proposed contract and proposed resolution of consent thereto, in full, shall have been published for at least fifteen days, except Sundays and legal holidays, immediately prior thereto in the City Record, nor until a notice of such hearing, together with the place where copies of the proposed contract and resolution of consent thereto may be obtained by all those interested therein, shall have been published at least twice at the expense of the proposed grantee in the two daily newspapers in which the petition and notice of hearing thereof shall have been published. Every contract or resolution containing or making such grant, shall require the concurrence of members of the board of estimate and apportionment, entitled, as provided by law, to three-fourths of the total number of votes to which all the members of the said board shall be entitled, and the votes shall be shown by the ayes and noes, as recorded in the minutes of the board. The separate and additional approval of the mayor shall be necessary to the validity of every such contract or resolution.

This act shall apply to any renewal or extension of the grant or leasing of the property to the same grantee, or to others. Within five days after the

final execution of any contract made pursuant to any such resolution or any such authorization, a copy of such contract, together with such resolution, duly attested by the secretary of the board of estimate and apportionment, shall be transmitted to each of the following: The comptroller, the corporation counsel, the city clerk and the public service commission for the district having jurisdiction, to be preserved by them in the archives of their departments or offices. All such certified copies shall be deemed to be public records.

§ 75. (L. 1905, c. 629.) The board of aldermen may, from time to time, with respect to any grant which that board shall, under the authority of this act, have the exclusive power to make, pass appropriate ordinances, not inconsistent with the constitution and laws of the state, to carry the provisions of this title into effect, but shall not part with the right and duty at all times to exercise in the interest of the public, full municipal superintendence, regulation and control in respect of all matters connected with such grant, and not inconsistent with the terms thereof,

§ 798. (L. 1915, c. 594.) Any corporation or association created by or organized under the laws of any government other than the states of this Union, and having assets, funds, or capital, not less in amount than one hundred and fifty thousand dollars, invested in this state, shall be liable to taxation upon such assets, funds or invested capital as the same is levied or assessed yearly by law, which tax shall be paid as follows: Such an amount thereof as would be equal to two per centum upon its gross premiums received for insurance upon property, in the city of New York shall, except as otherwise in this title provided, be paid annually to the fire commissioner as treasurer of the fire department, and the residue of said tax requisite to make up the full amount of taxation upon its capital shall be paid to the City of New York, as in the case of ordinary taxation; and the payments so made as aforesaid shall exempt such corporation or association making the same from any and all further taxation upon its premiums, capital or assets; and whenever such capital shall be reduced below said sum of one hundred and fifty thousand dollars, or withdrawn entirely, then, and in either event, such corporation or association shall be liable to pay the tax upon its premiums as heretofore provided in this title.

§ 889. (L. 1911, c. 455). It shall be the duty of the deputy tax commissioners, under the direction of the board of taxes and assessments, to assess all the taxable property in the several districts that may be assigned to them for that purpose by said board, and they shall furnish to the said board, under oath, a detailed statement of all such property, showing that said deputies have personally examined each and every house, building, lot, pier or other assessable property, giving the street, lot, ward, town and map number of such real estate embraced within said district, together with the name of the owner or occupant, if known; also the sum for which, in their judgment, each separately assessed parcel of real estate under ordinary circumstances would sell if it were wholly unimproved; and separately stated, the sum for which under ordinary circumstances, the same parcel of real estate would sell with the improvements, if any, thereon; with such other information in detail relative to personal property or otherwise, as the said board may, from time to time, require. Such deputies shall commence to assess real and personal estate on the first day in April in each and every year not a Sunday or a legal holiday.

§ 889-a. (L. 1913, c. 324.) A building in course of construction, commenced since the preceding first day of October and not ready for occupancy, shall not be assessed.

§ 892. (L. 1911, c. 455.) There shall be kept in the several offices established by the department of taxes and assessments books to be called "the annual

record of the assessed valuation of real and personal estate in the borough of . . . . .," in which shall be entered in detail the assessed valuation of such property within the limits of the several boroughs of the city of New York as established by this act. In such books the assessed value of real estate shall be set down in two columns; in the first column shall be given, opposite each separately assessed parcel of real estate, the sum for which such parcel under ordinary circumstances would sell if wholly unimproved; and in the second column shall be set down the sum for which the said parcel under ordinary circumstances, would sell, with the improvements, if any, thereon. The annual record of the assessed valuation of real property shall be open for public inspection, examination and correction from the first day in October not a Sunday or a legal holiday until the sixteenth day of November in each year, and the annual record of the assessed valuation of personal estate shall be open for public inspection, examination and correction from the first day in October not a Sunday, or a legal holiday until the first day of December in each year, but on the said respective days the same shall be closed to enable the board of taxes and assessments to prepare assessment-rolls of the several boroughs for delivery to the board of aldermen. The said board, previous to and during the time the said books are open as aforesaid for inspection, shall advertise the fact in the City Record and in such other newspaper or newspapers published in the several boroughs created by this act as may be authorized by the board of city record. The taxable status of all persons and property assessable for taxation in the city of New York shall be fixed for each year on the day of October in the preceding year provided by law for the opening of the books of annual record of the assessed valuation of real and personal estate of that year.

§ 892-a. (L. 1911, c. 455.) When prior to the first day of February, any separately assessed parcel of real estate shall have been divided the board of taxes and assessments may apportion the assessment thereof in such manner as they shall deem to be just and equitable and forthwith cause the assessment to be cancelled and new assessments, equal in the aggregate to the canceled assessment, to be made on the proper books or rolls, and within five days thereafter shall cause written notice of the new assessments to be mailed to the owners of record of the real estate so assessed at their last known residence or business address and an affidavit of the mailing of such notice to be filed in the main office. When such notice is mailed after the twenty-fifth day of October such owners of real estate may apply for correction of such assessments within twenty days after the mailing of such notice with the same force and effect as if such application were made on or before the fifteenth day of November in any year.

§ 893. (L. 1901, c. 466.) The department of taxes and assessments shall cause to be prepared and kept in the main office of the department of taxes and assessments a book to be called "the annual record of the assessed valuations of real and personal estate of corporations," and it shall be the duty of the deputy tax commissioners in the several districts in the several boroughs which may be assigned to them for that purpose by the board of taxes and assessments, under oath at their main office, at the time that such statement is filed in any office of the department of taxes and assessments in any borough other than in the main office in the borough of Manhattan, a duplicate detailed statement of the assessable property of corporations, both real and personal, which said statements of said deputy tax commissioners shall be entered upon the books to be kept in the main office of the department of taxes and assessments, to be known as the "Annual record of the assessed valuation of real and personal estate of corporations."

§ 894. (L. 1911, c. 455.) The assessed valuation of all personal property shall be entered by said deputy tax commissioners, or by such other persons as may be assigned to that duty by the department of taxes and assessments in the several offices, in books, or rolls, in alphabetical order, of the names of persons and corporations subject to taxation. No tax or assessment shall be void by reason of the name of the rightful owner or owners, whether individuals or corporations, of real estate in any of the said boroughs not being inscribed in the assessment rolls or lists; but in such case no tax shall be collected except from the real estate so assessed. The assessed valuation of all real and personal property of corporations shall be entered in duplicate in the office in the borough where the same is assessed and in the main office of the department of taxes and assessments in the borough of Manhattan. If, at any time prior to the first day of January in any one year, it shall appear to the tax commissioners that a person assessed for taxation on personal estate on the books or rolls of one borough should have been assessed therefor on the books or rolls of another borough, they shall forthwith cause the assessment to be cancelled and a new assessment to be made on the proper books or rolls, and within five days thereafter shall cause written notice of the new assessment to be mailed to such person at his last known residence or business address within the city of New York, and an affidavit of the mailing of such notice to be filed in the main office. The person so notified may apply for correction of such assessment on or before the twentieth day of January with the same force and effect as if such application were made on or before the thirtieth day of November in any year.

§ 894-a. (L. 1906, c. 207.) So long as the books of annual record of the assessed valuation of real and personal estate of the several boroughs remain open for public inspection, examination and correction, the board of taxes and assessments, after giving at least ten days' prior personal notice to the party in interest, may add to the roll of assessment of such annual record any real estate, or the name of the owner of any personal estate, and also the assessed valuation of any such real or personal estate that may have been omitted from such rolls on the day of the opening of such books.

§ 895. (L. 1913, c. 324.) During the time that books shall be open to public inspection as aforesaid application may be made by any person or corporation claiming to be aggrieved by the assessed valuation of real or personal estate, to have the same corrected. If such application be made in relation to the assessed valuation of real estate, it must be made in writing, stating the ground of objection thereto. The board of taxes and assessments shall examine into the complaint, as herein provided, and if in their judgment the assessment is erroneous they shall cause the same to be corrected. If such application be made in relation to the assessed valuation of personal estate, the applicant shall be examined under oath by a commissioner of taxes and assessments or by an assistant commissioner or assistant to a commissioner, or by a deputy tax commissioner, as herein provided, who are hereby authorized to administer such oath, and if the assessment as hereinafter provided be determined by the board of taxes and assessments to be erroneous, it shall cause the same to be corrected and fix the amount of such assessment as the board of taxes and assessments may believe to be just, and declare its decision upon and (*sic* — any) application within the time and in the manner hereinafter provided. But the commissioners of taxes and assessments may, during the last fifteen days of the month of November and during the months of December and January in any year, act upon applications, examine applicants under oath and take other testimony thereon, for the reduction of assessments upon either real or personal property filed in their offices on or before the fifteenth day of November

preceding as to real estate, and on or before the thirtieth day of November preceding as to personal estate, and cause the amount of any assessment as corrected by the board of taxes and assessments to be entered upon the assessment rolls for the year for which such correction is made.

§ 896. (L. 1911, c. 455.) The board of taxes and assessments may increase at any time before the sixteenth day of November as to real estate, and before the first day of December as to personal estate in each year or may diminish at any time before the first day of December in each year, the assessed valuation for any real or personal estate of any individual or corporation as in its judgment may be just or necessary for the equalization of taxation; but it shall not increase such valuations of the property of any individual or corporation after said books are opened for correction and review, except upon notice given to the individual or corporation affected by such increase at least ten days before the fifteenth day of December in each year.

§ 897. (L. 1915, c. 592.) The board of taxes and assessments is hereby invested with power to remit or reduce where lawful cause therefore is shown. It may remit or reduce if found excessive or erroneous a tax imposed upon real or personal property. It shall require a majority of the commissioners of taxes and assessments to remit or reduce the assessed valuation of personal property, and no tax or personal property shall be remitted, canceled or reduced, except to correct clerical errors, unless the person aggrieved shall satisfy the board of taxes and assessments that illness or absence from the city had prevented the filing of the complaint or making the application to the said board within the time allowed by law for the correction of taxes. Any remission or reduction of taxes upon the real estate of individuals or corporations must be made within one year after the delivery of the books to the receiver of taxes for the collection of such tax. After the expiration of one year from the delivery of the books to the receiver of taxes, the comptroller, with the written approval of the board of taxes and assessments, may correct any erroneous assessment, or tax due to a clerical error, or to an error of description of any parcel of real estate, contained in the annual record of assessed valuations of real estate, and, if the taxes computed on said erroneous assessment have been paid, the comptroller is authorized to refund the difference between the taxes computed on the erroneous and the corrected assessments.

§ 898. (L. 1911, c. 455.) The board of taxes and assessments from the whole number of persons appointed as deputy tax commissioners shall, for each of the boroughs wherein one of the offices of the department of taxes and assessments is established and maintained, designate one or more deputy tax commissioners, who shall, between the first day of October in each year and the sixteenth day of November following as to real estate, and the first day of December following as to personal estate, receive applications for the revision and cancellation of any assessments entered in the books of annual record of the assessed valuation of real and personal estate in that borough, take testimony on such applications and reduce the same to writing, and when so reduced to writing transmit such applications and testimony, with his recommendation, to the board of taxes and assessments at its main office in the borough of Manhattan, or to any office of the department of taxes and assessments in any borough as the board of taxes and assessments may prescribe. Such deputy tax commissioners as may be designated for the purposes and as prescribed in this section are hereby authorized between the first day of October and the first day of December to administer oaths for the purpose of taking testimony upon all applications for the revision or cancellation of assessments, and they are hereby required and directed to transmit the evidence so taken and reduced to writing within ten days after the evidence upon any application is taken, with their recommendation, as hereinbefore described. The board of taxes and

assessments shall hear at its main office all applications of corporations for revision and cancellation of assessments; and as to all other applications, the said board may prescribe the time and place of hearing thereof in the several boroughs and give such public notice thereof in the City Record and in at least one newspaper in each borough as it may designate, and the board may make such rules and regulations as may be appropriate and expedient to the end that the taxpayers of each borough, other than corporations, may have a hearing in the borough in which they reside or in which their property assessed is situated. All testimony taken by the board of taxes and assessments by any commissioner or by deputy tax commissioners, as herein prescribed, shall be reduced to writing and shall constitute part of the record of the proceedings upon any assessment. The decision of the board of taxes and assessments, upon any application for the revision, reduction or cancellation of any assessment and upon the evidence taken thereunder, shall, where the evidence is taken by the board of taxes and assessments, be rendered within thirty days after the hearing upon such application is closed, and in no case later than the first day of February. And where the evidence upon any application is taken by any commissioner or a deputy tax commissioner, the determination of the board of taxes and assessments shall be rendered within thirty days after the application and the testimony thereunder shall have been filed with the board of taxes and assessments at the main office of the department in the borough of Manhattan, and in no case later than the first day of February.

§ 905. (L. 1903, c. 210.) Nothing in this chapter shall affect any existing and valid exemption from taxation heretofore created by law respecting any property, real or personal, within the limits of the city of New York, as constituted by this act, and where by pre-existing laws stocks and bonds of any of the municipalities hereby consolidated were heretofore exempt within such municipalities from local taxation, the said stocks or bonds shall be exempt from all taxation by the said city of New York except for State purposes.

§ 906. (L. 1911, c. 455.) A certiorari to review or correct on the merits any final determination of the board of taxes and assessments shall be allowed by the supreme court or any justice thereof, directed to the commissioners of taxes and assessments on the verified petition of the party aggrieved, but only on the grounds which must be specified in such petition, that the assessment is illegal, and giving the particulars of the alleged illegality, or that it is erroneous by reason of overvaluation, or in case of real estate, that the same is erroneous by reason of irregularity, in that the assessment has been made at a higher proportionate valuation than the assessment of other real estate of like character in the same ward or section or other real estate on the tax-rolls of the city for the same year, specifying the instances in which such irregularity exists, and the extent thereof, and stating that he is or will be injured thereby. Such certiorari and all proceedings thereunder may be had and taken in the judicial district where such real estate is situated, and may be begun at any time before the first day of July following the time when the determination sought to be reviewed or corrected was made.

§ 908. (L. 1901, c. 466.) Whenever any act is required or authorized to be done or any determination or decision made by the board of taxes and assessments, or any other body or board, then in the absence of express provision to the contrary, any such act, if done, or any such determination or decision, if made by a majority of the body or board shall, within the meaning of this act, be held to be the act, determination or decision of the body or board.

§ 913. (L. 1901, c. 466.) The receiver of taxes upon receiving the assessment-rolls and warrants shall immediately cause the assessment-rolls and warrants for each of the several boroughs wherein he shall have an office, to be delivered at and filed in such office, and shall thereafter proceed to collect and receive said

taxes from the several individuals and corporations assessed in the said assessment-rolls in the manner hereinafter prescribed.

§ 914. (L. 1916, c. 17.) The receiver of taxes shall immediately after he shall have received the assessment-rolls give public notice, for at least five days in the City Record and in such newspaper or newspapers published in the several boroughs as may be designated by the board of city record, or in default of any newspapers being published in any borough, in such newspaper or newspapers having a general circulation in such borough as the board of city record shall direct, that said assessment-rolls have been delivered to him and that all taxes shall be due and payable at his office in the said respective boroughs as follows:

All taxes upon personal property and one-half of all taxes upon real estate shall be due and payable on the first day of May and the remaining and final one-half of taxes on real estate shall be due and payable on the first of November. All taxes shall be and become liens on the real estate affected thereby and shall be construed as and deemed to be charges thereon on the respective days when they become due and payable as hereinbefore provided and not earlier and shall remain such liens until paid.

The second half of the tax on real estate which is due as hereinbefore provided on the first day of November following the payment of the first half, may be paid on the first day of May or at any time thereafter, providing the first half shall have been paid or shall be paid at the same time, and on such payments of the second half as may be made in such manner prior to November first a discount shall be allowed from the date of payment to November first at the rate of four per centum per annum.

§ 916. (L. 1911, c. 455.) If any tax on personal estate or the first one-half of any tax on real estate shall remain unpaid on the first day of June, after it shall become due and payable, it shall be the duty of the receiver of taxes to charge, receive and collect upon such tax so remaining unpaid on that day, interest upon the amount thereof, at the rate of seven per centum per annum, to be calculated from the day on which said taxes or such part thereof became due and payable, as provided by section nine hundred and fourteen of this act, to the date of payment; and such increase of percentage shall be paid over and accounted for by such receiver from time to time, as a part of the tax collected by him. If the final half of any tax on real estate shall remain unpaid on the first day of December, after it shall be due and payable, it shall be the duty of the receiver of taxes to charge, receive and collect upon such tax so remaining unpaid on that day, interest upon the amount thereof, at the rate of seven per centum per annum, to be calculated from the day on which said final half of said tax becomes due and payable, as provided by section nine hundred and fourteen of this act, to the date of payment; and such increase of percentage shall be paid over and accounted for by such receiver from time to time, as a part of the tax collected by him.

§ 921. (L. 1901, c. 466.) The said receiver of taxes shall proceed in enforcing the collection and payment of taxes against corporations or associations and their officers and directors, or trustees, in the same manner as against individuals; such taxes shall be paid out of the funds of the company and shall be ratably deducted from the dividends of those stockholders whose stock was taxed, or shall be charged upon such stock, if no dividends be afterward declared.

# CODES

## CODE OF CIVIL PROCEDURE.

§ 73. **Attorney not to buy claim.** An attorney or counsellor shall not, directly or indirectly, buy, or be in any manner interested in buying a bond, promissory note, bill of exchange, book-debt, or other thing in action, with the intent and for the purpose of bringing an action thereon.

§ 74. **Certain loans prohibited.** An attorney or counsellor shall not, by himself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon, or of representing the claimant in the pursuit of any civil remedy for the recovery thereof. But this section does not apply to an agreement between attorneys and counsellors, or either, to divide between themselves the compensation to be received.

§ 75. **Penalty.** An attorney or counsellor, who violates either of the last two sections, is guilty of a misdemeanor; and, on conviction thereof, shall be punished accordingly, and must be removed from office by the supreme court.

§ 76. **Limitation of preceding sections.** The last three sections do not prohibit the receipt, by an attorney or counsellor, of a bond, promissory note, bill of exchange, book-debt, or other thing in action, in payment for property sold, or for services actually rendered, or for a debt antecedently contracted; or from buying, or receiving a bill of exchange, draft, or other thing in action for the purposes of remittance, and without intent to violate either of those sections.

§ 77. **Same rule when party prosecutes in person, or when certain corporations prosecute.** The last four sections apply to a person prosecuting an action in person and to a corporation engaged in the business of conducting litigation and providing counsel therefor, who or which does an act which an attorney or counsellor is therein forbidden to do.

§ 190. **The jurisdiction of the Court of Appeals in civil actions.** From and after the 31st day of May, 1917, the jurisdiction of the court of appeals shall, in civil actions and proceedings, be confined to the review upon appeal of an actual determination made by an appellate division of the supreme court in either of the following cases, and no others:

1. An appeal may be taken as of right to said court from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding where is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

2. An appeal may also be taken as of right to said court from an order of the appellate division granting a new trial on exceptions, where the appellants stipulate that, upon affirmance, judgment absolute shall be rendered against them.

3. An appeal may also be taken from a determination of the appellate division of the supreme court in any department, other than from a judgment or order which finally determines an action or special proceeding, where the appellate division allows the same, and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, in which case the appeal brings up for review the question or questions so certified,

and no other; and the court of appeals shall certify to the appellate division its determination upon such questions.

4. An appeal may also be taken from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding, but which is not appealable as of right under subdivision one of this section, where the appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals, or where, in case of the refusal so to certify, an appeal is allowed by the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.

The provisions of this section shall not apply to an appeal taken to the court of appeals prior to the first day of June, 1917, but an appeal so taken shall be heard and determined under existing provisions of law.

§ 315. **Jurisdiction.** The jurisdiction of the city court of the city of New York, extends to the following cases:

1. An action against a natural person, or against a foreign or domestic corporation, wherein the complaint demands judgment for a sum of money only, or to recover one or more chattels, with or without damages for the taking or detention thereof.

2. An action to foreclose or enforce a lien upon real property in the city of New York, created as prescribed by statute, in favor of a person, who has performed labor upon, or furnished materials to be used in the construction, alteration or repair of a building, vault, wharf, fence, or other structure; or who has graded, filled in, or otherwise improved, a lot of land, or the sidewalk or street in front of or adjoining a lot of land.

3. An action to foreclose or enforce a lien, for a sum not exceeding five thousand dollars, exclusive of interest, upon one or more chattels.

4. The taking and entry of a judgment, upon the confession of one or more defendants, where the sum, for which judgment is confessed, does not exceed five thousand dollars, exclusive of interest from the time of making the statement, upon which the judgment is entered.

§ 316. **The last section limited.** The jurisdiction conferred by the last section is subject to the following limitations and regulations:

1. In an action wherein the complaint demands judgment for a sum of money only, the sum, for which judgment is rendered in favor of the plaintiff cannot exceed five thousand dollars, exclusive of interest, and costs as taxed; except where it is brought upon a bond or undertaking given in an action or special proceeding in the same court, or before a justice thereof; or to recover damages for a breach of promise of marriage; or where it is a marine cause, as that expression is defined in the next section. Where the action is brought upon a bond or other contract, the judgment must be for the sum actually due, without regard to a penalty therein contained; and where the money is payable in instalments, successive actions may be brought for the instalments, as they become due.

2. In an action to recover one or more chattels, a judgment cannot be rendered in favor of the plaintiff, for a chattel or chattels, the aggregate value of which exceeds five thousand dollars.

§ 341. **Domestic corporation, etc., when deemed resident, etc.** For the purpose of determining the jurisdiction of a county court, in either of the cases specified in the last section, a domestic corporation or joint-stock association, whose principal place of business is established, by or pursuant to a statute, or by its articles of association, or whose principal place of business or any part of its plant or plants, shops, factories or offices is actually located within the county, or in case of a railroad corporation where any portion of the road operated by it is within the county, it is deemed a resident of the county; and personal service of a summons, made within the county, as prescribed in this act,

or personal service of a mandate, whereby a special proceeding is commenced, made within the county, as prescribed in this act for personal service of a summons, is sufficient service thereof upon a domestic corporation wherever it is located. Provided, however, that a city which shall include within its boundaries more than one county shall not for the purpose of conferring jurisdiction on a county court be deemed a domestic corporation resident of any county so included.

§ 370. **Adverse possession under written instrument or judgment; what constitutes it.** For the purpose of constituting an adverse possession, by a person claiming a title, founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases:

1. Where it has been usually cultivated or improved.
2. Where it has been protected by a substantial inclosure.
3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber, either for the purposes of husbandry, or for the ordinary use of the occupant.

Where a known farm or a single lot has been partly improved the portion of the farm or lot that has been left not cleared, or not inclosed, according to the usual course and custom of the adjoining country, is deemed to have been occupied for the same length of time, as the part improved and cultivated.

§ 382. **Within six years.** Within six years:

1. An action upon a contract obligation or liability, express or implied; except a judgment or sealed instrument.
2. An action to recover upon a liability created by statute; except a penalty or forfeiture.
3. An action to recover damages for an injury to property, or a personal injury; except in a case where a different period is expressly prescribed in this chapter.
4. An action to recover a chattel.
5. An action to procure a judgment, other than for a sum of money, on the ground of fraud, in a case which, on the thirty-first day of December, 1846, was cognizable by the court of chancery. The cause of action, in such a case, is not deemed to have accrued, until the discovery, by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.
6. An action to establish a will. Where the will has been lost, concealed, or destroyed, the cause of action is not deemed to have accrued, until the discovery, by the plaintiff, or the person under whom he claims, of the facts upon which its validity depends.
7. An action upon a judgment or decree, rendered in a court not of record, except where a transcript shall be filed, pursuant to section 3017 of this act, and, also, except a decree heretofore rendered in a surrogate's court of the State. The cause of action, in such a case, is deemed to have accrued when final judgment was rendered.

§ 388. **Actions not before provided for.** An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues.

§ 390. **Action against a non-resident upon a demand barred by the law of his residence.** Where a cause of action, which does not involve the title to or possession of real property within the State, accrues against a person, who is not then a resident of the State, an action cannot be brought thereon in a court of the State, against him or his personal representative, after the expiration of the time, limited by the laws of his residence, for bringing a like action, provided that if the limitation of the time fixed by the laws of his residence for bringing such action be less than the time fixed by the laws of this State for a like action, the limitation fixed by the laws of this State shall apply. This section shall not

apply to a case in which a person is entitled, when this section as amended takes effect, to commence such action, where he commences the same before the expiration of six months after this section as amended takes effect; in which case the provisions of law applicable thereto immediately before this section as amended takes effect shall continue to be so applicable, notwithstanding the repeal thereof.

§ 393. **No limitation of action on bank notes, etc.** This chapter does not affect an action to enforce the payment of a bill, note, or other evidence of debt issued by a moneyed corporation, or issued or put in circulation as money.

§ 394. **Action against directors, etc., of banks.** This chapter does not affect an action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, to enforce a liability created by the common law or by statute; but such an action must be brought within three years after the cause of action has accrued.

§ 399. **Attempt to commence action in a court of record.** An attempt to commence an action, in a court of record, is equivalent to the commencement thereof against each defendant, within the meaning of each provision of this act which limits the time for commencing an action, when the summons is delivered, with the intent that it shall be actually served, to the sheriff, or, where the sheriff is a party, to a coroner of the county, in which that defendant, or one of two or more co-defendants, who are joint contractors, or otherwise united in interest with him, resides or last resided; or, if the defendant is a corporation, to a like officer of the county, in which it is established by law, or wherein its general business is or was last transacted, or wherein its keeps, or has kept, an office for the transaction of business. But in order to entitle a plaintiff to the benefit of this section, the delivery of the summons to an officer must be followed, within sixty days after the expiration of the time limited for the actual commencement of the action, by personal service thereof upon the defendant sought to be charged, or by the first publication of the summons, as against that defendant, pursuant to an order for service upon him in that manner.

§ 400. **Id.; in a court not of record.** The last section, excluding the provision requiring a publication or service of the summons within sixty days, applies to an attempt to commence an action in a court not of record, where the summons is delivered to an officer authorized to serve the same, within the city or town, wherein the person resides or the corporation is located, as specified in that section; provided that actual service thereof is made with due diligence.

§ 401. **Exception, when defendant is without the State.** If, when the cause of action accrues against a person, he is without the state, the action may be commenced within the time limited therefor, after his return into the state. If, after a cause of action has accrued against a person, he departs from the state, and remains continuously absent therefrom for the space of one year or more, or if, without the knowledge of the person entitled to maintain the action, he resides within the state under a false name, the time of his absence or of such residence within the state under such false name is not a part of the time, limited for the commencement of the action. But this section does not apply while a designation, made as prescribed in section 430 or in subdivision second of section 432 of this act remains in force.

§ 431. **How personal service of summons made upon a domestic corporation.** Personal service of the summons upon a defendant, being a domestic corporation, must be made by delivering a copy thereof, within the State, as follows:

1. If the action is against the mayor, aldermen, and commonalty of the city of New York, to the mayor, comptroller, or counsel to the corporation.

2. If the action is against any other city, to the mayor, treasurer, counsel, attorney, or clerk; or, if the city lacks either of those officers, to the officer performing corresponding functions, under another name.

3. In any other case, to the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer, or a director or managing agent.

§ 432. *Id.*; upon a foreign corporation. Personal service of the summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the State, as follows:

1. To the president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary; or, if the corporation lacks either of those officers, to the officer performing corresponding functions, under another name.

2. To a person designated for the purpose as provided in section 16 of the General Corporation Law.

3. If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision first of this section, can be found with due diligence, and the corporation has property within the State, or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation, within the State.

4. If the person designated as provided in section 16 of the General Corporation Law dies or removes from the place where the corporation has its principal place of business within the State and the corporation does not within thirty days after such death or removal designate in like manner another person upon whom process against it may be served within the State, process, against the corporation in an action upon any liability incurred within this State or if the corporation has property within the State may after such death, removal or revocation and before another designation is made be served upon the secretary of State.

§ 433. *Service of process, etc., to commence a special proceeding.* The provisions of this article, relating to the mode of service of a summons, apply likewise to the service of any process or other paper, whereby a special proceeding is commenced in a court or before an officer except a proceeding to punish for contempt, and except where special provision for the service thereof is otherwise made by law.

§ 435. *Order for service of summons from court of record, when defendant not found, etc.* Where a summons is issued in any court of record, an order for the service thereof upon a defendant, whether a domestic corporation, other than a municipal corporation, a joint-stock or other unincorporated association or a natural person, residing within the state may be made by the court, or a judge thereof, or the county judge of the county where the action is triable upon satisfactory proof, by the affidavit of a person, not a party to the action, or by the return of the sheriff of the county where such defendant resides, or has its principal office or place of business, that proper and diligent effort has been made to serve the summons upon the defendant and that none of the persons mentioned in subdivision three of section 431, nor the president or treasurer of such association, can be found, or if the defendant is a natural person, that the place of his sojourn cannot be ascertained, or if he is within the state, that he avoids service, so that personal service cannot be made.

§ 436. *How service must be made.* The order must direct that the service of the summons be made, by leaving a copy thereof, and of the order, if the defendant is a domestic corporation or joint-stock or other unincorporated association at its principal office or place of business, or if a natural person at the residence of the defendant, with a person of proper age, if upon reasonable application, admittance can be obtained, and such person found who will receive it; or, if admittance cannot be so obtained, nor such a person found, by affixing the same to the outer or other door of the defendant's said place of business or office, or of his residence, and by depositing another copy thereof, properly enclosed in a postpaid wrapper, addressed to the defendant at its said principal office or place of business, or to him at his place of residence,

in the post-office at the place where he resides, or where said office, place of business or residence is located, or upon proof being made by affidavit that no such residence can be found, service of the summons may be made in such manner as the court may direct.

§ 438. **Cases in which service of summons by publication, etc., may be ordered.** An order directing the service of a summons upon a defendant, by publication, may be made in either of the following cases:

1. Where the defendant to be served is a foreign corporation; or, is an unincorporated association consisting of seven or more persons, having a president and treasurer, neither of whom is a resident of this state; or, being a domestic corporation, where after diligent effort, service cannot be made within the state upon the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer or a director or managing agent; or, being a natural person, is not a resident of the state; or where, after diligent inquiry, the defendant remains unknown to the plaintiff, or the plaintiff is unable to ascertain whether the defendant is or is not a resident of the state.

2. Where the defendant, being a resident of the state, has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons; or keeps himself concealed therein, with like intent.

3. Where the defendant, being an adult, and a resident of the state, has been continuously without the state of New York more than six months next before the granting of the order, and has not made a designation of a person, upon whom to serve a summons in his behalf, as prescribed in section 430 of this act; or a designation so made no longer remains in force; or service upon the person so designated cannot be made within the state, after diligent effort.

4. Where the complaint demands judgment annulling a marriage, or for a divorce, or a separation.

5. Where the complaint demands judgment, that the defendant be excluded from a vested or contingent interest in or lien upon, specific real or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined, or limited; or otherwise affecting the title to such property.

6. Where the defendant is a resident of the state or a domestic corporation; and an attempt was made to commence the action against the defendant, as required in chapter fourth of this act, before the expiration of the limitation applicable thereto as fixed in that chapter; and the limitation would have expired, within sixty days next preceding the application, if time had not been extended by the attempt to commence the action.

7. Where the action is against the stockholders of a corporation, or joint-stock company, and is authorized by a law of the state, and the defendant is a stockholder thereof.

When a copy of the summons is required by subdivision first or subdivision second of section 426 of this act, or by section 429 of this act, to be delivered to a person other than the defendant, an order directing the service upon such person by publication, may be made as prescribed in this section, as if such person was the defendant in the action, and upon a verified complaint and the same proof with respect to such person, as is required in the next succeeding section with respect to a defendant. And sections 440 to 444, both inclusive, apply to the proceedings in like manner as if such person was a defendant.

§ 439. **Papers upon which order for publication may be made.** The order must be founded upon a verified complaint, showing a sufficient cause of action against the defendant to be served, and proof by affidavit of the additional facts required by the last section; and also, where the application is made upon

the ground that the defendant is a foreign corporation, or not a resident of the State, or in a case specified in subdivision fourth, fifth, or seventh of the last section, that the plaintiff has been or will be unable, with due diligence, to make personal service of the summons.

§ 440. **By whom order may be made; contents of order.** The order may be made by the court or by a judge thereof or the county judge of the county where the action is triable. It must direct that service of the summons, upon the defendant named or described in the order, be made by publication thereof in two newspapers, designated in the order as most likely to give notice to the defendant, for a specified time, which the judge deems reasonable, not less than once a week for six successive weeks. It must also contain, either a direction that, on or before the day of the first publication, the plaintiff deposit in a post-office, branch post-office or post-office station, one or more sets of copies of the summons, complaint and order, each contained in a securely closed post-paid wrapper, directed to the defendant, at a place specified in the order, or a statement that the court or judge, being satisfied, by the affidavits upon which the order was granted, that the plaintiff cannot, with reasonable diligence, ascertain a place or places, where the defendant would probably receive matter transmitted through the post-office, dispenses with the deposit of any papers therein.

§ 443. **Service without the State.**

1. Where service is made without the State under an order for publication of the summons, the papers specified in the last section must be previously filed; and a notice must be served with the summons, in all respects like the notice required by the last section, except that the words, "without the State of New York," must be substituted for the words, "by publication."

2. In all cases when publication is ordered, personal service of a copy of the summons and complaint and such notice, out of the State, is equivalent to publication and deposit in the post-office.

3. In the cases specified in subdivision five of section 438 the summons may be served without an order, upon a defendant without the State in the same manner as if such service were made within the State, except that a copy of the complaint shall be annexed to and served with the summons.

4. Service without the State is complete ten days after proof thereof is filed.

5. When the summons is served personally without the state the affidavit of service must show that the person making it is a resident or citizen of the state of New York, or a sheriff, or under sheriff, deputy sheriff, constable of the county or other political subdivision in which the service is made, or an officer authorized by the laws of this state to take acknowledgments of deeds to be recorded in this state, an attorney and counsellor at law duly qualified to practice in the state where such service is made or by a United States marshal.

When such affidavit is made by a resident or citizen of the state of New York, his place of residence, and street number, if any, shall be stated therein. The affidavit of service made without the state shall contain the official designation of the person making it and shall have annexed thereto a certificate of the proper official showing that the person before whom the affidavit was sworn to was, at the time of administering the oath, qualified to act.

6. A judgment shall be conclusive upon a defendant on whom the summons is personally served without the State, with respect to the property which is the subject of the action, or which is attached therein, to the same extent as if the service upon him were made within the State.

§ 446. **Who may be joined as plaintiffs.** All persons having an interest in the subject of the action, and in obtaining the judgment demanded, may be joined as plaintiffs, except as otherwise expressly prescribed in this act.

§ 447. **Who may be joined as defendants.** Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff or who is a necessary party defendant for the complete determination or settlement of a question involved therein, except as otherwise expressly prescribed in this act. In any action brought affecting real estate upon which the people of the State of New York have a claim to have a lien under the transfer tax act, the said people of the state of New York may be made a party defendant in the same manner as a private person, but where the people of the state of New York are made a party defendant, as herein provided, the complaint shall set forth, in addition to the matters required to be set forth by the code of civil procedure, the name or names of the decedent or decedents against whose estate there is an unpaid transfer tax, the place of residence of decedent at the time of death, the heirs at law and next of kin of decedent and if decedent left none that fact shall be stated, whether decedent died testate or intestate, and whether the estate of decedent has been administered, and if so where; and if not administered, such facts shall be stated; and also that the people of the state of New York are made a party defendant for no other reason than the lien of said transfer tax. Upon failure to state such facts, the complaint shall be dismissed as to the people of the state of New York. In such a case the summons must be served on the attorney-general, who may appear in behalf of the people.

§ 448. **Parties united in interest, when to be joined; when one or more may sue or defend for the whole.** Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants, except as otherwise expressly prescribed in this act. But if the consent of any one, who ought to be joined as a plaintiff, cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint. And where the question is one of a common or general interest of many persons; or where the persons, who might be made parties, are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

§ 449. **Party in interest to sue. Trustee, etc., may sue alone.** Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A person, with whom or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section.

§ 452. **When court to decide controversy, or to order other parties to be brought in.** The court may determine the controversy, as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in. And where a person, not a party to the action, has an interest in the subject thereof, or in real property, the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment.

§ 481. **Complaint; what to contain.** The complaint must contain:

1. The title of the action, specifying the name of the court in which it is brought; if it is brought in the supreme court, the name of the county, which the plaintiff designates as the place of trial; and the names of all the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts constituting each cause of action without unnecessary repetition.

3. A demand of the judgment to which the plaintiff supposes himself entitled.

§ 484. **What causes of action may be joined in the same complaint.** The plaintiff may unite in the same complaint, two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover, as follows:

1. Upon contract, express or implied.
2. For personal injuries except libel, slander, criminal conversation or seduction.
3. For libel or slander.
4. For injuries to real property.
5. Real property, in ejectment, with or without damages for the withholding thereof.
6. For injuries to personal property.
7. Chattels, with or without damages for the taking or detention thereof.
8. Upon claims against a trustee, by virtue of a contract, or by operation of law.
9. Upon claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.
10. For penalties incurred under the forest, fish and game law.
11. For penalties incurred under the agricultural law.
12. For penalties incurred under the public health law.

But it must appear, on the face of the complaint, that all the causes of action, so united, belong to one of the foregoing subdivisions of this section; that they are consistent with each other; and, except as otherwise prescribed by law, that they affect all the parties to the action; and it must appear upon the face of the complaint, that they do not require different places of trial.

§ 488. **When he may demur.** The defendant may demur to the complaint, where one or more of the following objections thereto appear upon the face thereof:

1. That the court has not jurisdiction of the person of the defendant.
2. That the court has not jurisdiction of the subject of the action.
3. That the plaintiff has not legal capacity to sue.
4. That there is another action pending between the same parties, for the same cause.
5. That there is a misjoinder of parties plaintiff.
6. That there is a defect of parties, plaintiff or defendant.
7. That causes of action have been improperly united.
8. That the complaint does not state facts sufficient to constitute a cause of action.

§ 498. **When objection may be taken by answer.**—Where any of the matters enumerated in section 488 of this act as grounds of demurrer, do not appear on the face of the complaint, the objection may be taken by answer.

§ 499. **Objection; when deemed waived.** If such an objection is not taken, either by demurrer or answer, the defendant is deemed to have waived it; except the objection to the jurisdiction of the court, or the objection that the complaint does not state facts sufficient to constitute a cause of action.

§ 507. **Defendant may interpose several defences or counterclaims; rules relating thereto.** A defendant may set forth, in his answer, as many defences or counterclaims, or both, as he has, whether they are such as were formerly denominated legal or equitable. Each defence or counterclaim must be separately stated, and numbered. Unless it is interposed as an answer to the entire complaint, it must distinctly refer to the cause of action which it is intended to answer.

§ 516. **Cases where the court may require a reply.** Where an answer contains new matter, constituting a defence by way of avoidance, the court may, in its discretion, on the defendant's application, direct the plaintiff to reply to the new

matter. In that case, the reply, and the proceedings upon failure to reply, are subject to the same rules as in the cases of a counterclaim.

§ 525. **Verification; how and by whom made.** The verification must be made by the affidavit of the party, or, if there are two or more parties united in interest, and pleading together, by at least one of them, who is acquainted with the facts, except as follows:

1. Where the party is a domestic corporation, the verification must be made by an officer thereof.

2. Where the people of the State are, or a public officer, in their behalf, is the party, the verification may be made by any person acquainted with the facts.

3. Where the party is a foreign corporation; or where the party is not within the county where the attorney resides, or if the latter is not a resident of the State, the county where he has his office, and capable of making the affidavit; or if there are two or more parties united in interest, and pleading together, where neither of them, acquainted with the facts is within the county, and capable of making the affidavit; or where the action or defence is founded upon a written instrument for the payment of money only, which is in the possession of the agent or the attorney; or where all the material allegations of the pleading are within the personal knowledge of the agent or the attorney; in either case the verification may be made by the agent or the attorney for the party.

§ 526. **Form of affidavit of verification.** The affidavit of verification must be to the effect that the pleading is true to the knowledge of the deponent except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. Where it is made by a person, other than the party, he must set forth, in the affidavit, the grounds of his belief, as to all matters not stated upon his knowledge, and the reason why it is not made by the party.

§ 533. **Conditions precedent; how pleaded.** In pleading the performance of a condition precedent in a contract, it is not necessary to state the facts constituting performance; but the party may state, generally, that he, or the person whom he represents, duly performed all the conditions on his part. If that allegation is controverted, he must, on the trial, establish performance.

§ 549. **When the right to arrest depends upon the nature of the action.** A defendant may be arrested in an action, as prescribed in this title, where the action is brought for either of the following causes:

1. To recover a fine or penalty.

2. To recover damages for a personal injury; an injury to property, including the wrongful taking, detention or conversion of personal property; breach of a promise to marry; misconduct or neglect in office, or in a professional employment; fraud, or deceit; or to recover a chattel where it is alleged in the complaint that the chattel or a part thereof has been concealed, removed or disposed of so that it cannot be found or taken by the sheriff and, with intent that it should not be so found or taken, or to deprive the plaintiff of the benefit thereof; or to recover for money received, or to recover property or damages for the conversion or misapplication of property where it is alleged in the complaint that the money was received or the property was embezzled or fraudulently misapplied by a public officer or by an attorney, solicitor or counsellor, or by an officer or agent of a corporation or banking association in the course of his employment, or by a factor, agent, broker, or other person in a fiduciary capacity. Where such allegation is made, the plaintiff cannot recover unless he proves the same on the trial of the action; and a judgment for the defendant is not a bar to the new action to recover the money or chattel.

3. To recover moneys, funds, or property held or owned by the State, or held or owned officially or otherwise for or in behalf of a public or governmental interest by a municipal or other public corporation, board, officer, custodian,

agency, or agent, of the State or of a city, county, town, village, or other division, subdivision, department, or portion of the State, which the defendant has, without right, obtained, received, converted, or disposed of; or to recover damages for so obtaining, receiving, paying, converting, or disposing of the same.

4. In an action upon contract, express or implied, other than a promise to marry, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability, or that he has, since the making of the contract, or in contemplation of making of the same, removed or disposed of his property with intent to defraud his creditors, or is about to remove or dispose of the same with like intent; but where such allegation is made, the plaintiff cannot recover unless he proves the fraud on the trial of the action; and a judgment for the defendant is not a bar to a new action to recover upon the contract only.

§ 603. **Injunction, when the right thereto depends upon the nature of the action.** Where it appears, from the complaint, that the plaintiff demands and is entitled to a judgment against the defendant, restraining the commission or continuance of an act, the commission or continuance of which, during the pendency of the action, would produce injury to the plaintiff, an injunction order may be granted to restrain it. The case, provided for in this section, is described in this act, as a case, where the right to an injunction depends upon the nature of the action.

§ 604. **Id.; when the right thereto depends upon extrinsic facts.** In either of the following cases, an injunction order may also be granted in an action:

1. Where it appears, by affidavit, that the defendant, during the pendency of the action, is doing, or procuring, or suffering to be done, or threatens, or is about to do, to procure, or suffer to be done, an act, in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, an injunction order may be granted to restrain him therefrom.

2. Where it appears, by affidavit, that the defendant, during the pendency of the action, threatens, or is about to remove, or to dispose of his property, with intent to defraud the plaintiff, an injunction order may be granted, to restrain the removal or disposition.

§ 610. **Order must recite grounds; service of order.** The injunction order must briefly recite the grounds for the injunction. Where it is granted by the court, it must be served by delivering a certified copy thereof; where it is granted by a judge, it must be served by showing the original order, and delivering a copy thereof. Service of the order, upon a corporation, may be made as prescribed in this act, for making personal service of a summons upon a corporation. Copies of the papers, upon which the order was granted, must be delivered with the copy of the order.

§ 624. **Damages sustained by a third person.** Where the defendant enjoined was an officer of a corporation, or joint-stock association, or a bailee, agent, trustee, or other representative of another, and the damages, sustained by him, are less than the sum specified in the undertaking, the court or the referee may also separately ascertain and determine the damages sustained, by reason of the injunction, by the corporation, association, or person, whom the defendant represents, to an amount not exceeding the surplus of the sum specified in the undertaking; and those damages may be recovered in a separate action, brought as prescribed in the next section.

§ 635. **In what actions.** A warrant of attachment against the property of one or more defendants in an action, may be granted upon the application of the plaintiff, as specified in the next section, whether the action is to recover a sum of money only, as damages for one or more of the following causes:

1. Breach of contract, express or implied, other than a contract to marry.
2. Wrongful conversion of personal property.

3. An injury to person or property, in consequence of negligence, fraud or other wrongful act.

4. A wrongful act, neglect or default by which the decedent's death was caused, when the cause of action arose in this state before or after the passage of this act and the action is brought by an executor or administrator against a natural person who, or a corporation which would have been liable to an action in favor of the decedent by reason thereof if death had not ensued as prescribed by section 1902 of this act.

§ 636. **What must be shown to procure the warrant.** To entitle the plaintiff to such a warrant, he must show, by affidavit, to the satisfaction of the judge granting the same, as follows:

1. That one of the causes of action specified in the last section exists against the defendant. If the action is to recover damages for breach of contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him.

2. That the defendant is either a foreign corporation or not a resident of the state; or if he is a natural person and a resident of the state, that he has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or, if the defendant is a natural person or a domestic corporation, that he or it has removed, or is about to remove, property from the state, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of or secrete property with the like intent; or where, for the purpose of procuring credit, or the extension of credit, the defendant has made a false statement in writing, under his own hand or signature, or under the hand or signature of a duly authorized agent, made with his knowledge and acquiescence as to his financial responsibility or standing, or, where the defendant, being an adult and a resident of the state, has been continuously without the state of New York for more than six months next before the granting of the order of publication of the summons against him, and has not made a designation of a person upon whom to serve a summons in his behalf, as prescribed in section 430 of this act; or a designation so made no longer remains in force; or service upon the person so designated cannot be made within the state, after diligent effort.

§ 638. **When and by whom the warrant may be granted.** The warrant may be granted by a judge of the court, or by any county judge, to accompany the summons, or at any time after the commencement of the action, and before final judgment therein. Personal service of the summons must be made upon the defendant, against whose property the warrant is granted, within thirty days after the granting thereof; or else, before the expiration of the same time, service of the summons by publication must be commenced, or service thereof must be made without the State, pursuant to an order obtained therefor, as prescribed in this act; and if publication has been, or is thereafter commenced, the service must be made complete, by the continuance thereof.

§ 641. **Contents of warrant; to whom directed.** The warrant must be subscribed by the judge and the plaintiff's attorney, and must briefly recite the ground of the attachment. It may be directed, either to the sheriff of a particular county, or, generally to the sheriff of any county. It must require the sheriff to attach and safely keep, so much of the property, within his county, which the defendant has, or which he may have, at any time before final judgment in the action, as will satisfy the plaintiff's demand, with costs and expenses. The amount of the plaintiff's demand must be specified in the warrant, as stated in the affidavit. Warrants may be issued at the same time, to sheriffs of different counties.

§ 644. **Sheriff must attach property of defendant.** The sheriff must immediately execute the warrant, by levying upon so much of the personal and real prop-

erty of the defendant, within his county, not exempt from levy and sale by virtue of an execution, as will satisfy the plaintiff's demand, with the costs and expenses. He must take into his custody all books of account, vouchers, and other papers, relating to the personal property attached, and all evidences of the defendant's title to the real property attached, which he must safely keep, to be disposed of, as prescribed in this title. The sheriff, to whom a warrant of attachment is delivered, may levy, from time to time, and as often as is necessary, until the amount, for which it was issued, has been secured, or final judgment has been rendered in the action, notwithstanding the expiration of his term of office.

§ 646. **Attachment of unpaid subscription to foreign corporation.** Under a warrant of attachment against a foreign corporation, other than a corporation created by or under the laws of the United States, the sheriff may levy upon the sum remaining unpaid upon a subscription to the capital stock of the corporation, made by a person within the county; or upon one or more shares of stock therein, held by such a person, or transferred by him, for the purpose of avoiding payment thereof.

§ 647. **Id.; interest in shares or bonds.** The rights or shares which the defendant has in the stock of an association or corporation, or in a bond negotiable or otherwise, together with the interest and profits thereon, may be levied upon; and the sheriff's certificate of the sale thereof entitles the purchaser to the same rights and privileges, with respect thereto, which the defendant had when they were so attached.

§ 648. **Id; bond, note, etc.** The attachment may also be levied upon a cause of action arising upon contract; including a bond, promissory note or other instrument for the payment of money only, negotiable or otherwise, whether past due, or yet to become due, executed by a foreign or domestic government, state, county, public officer, association, municipal or other corporation, or by a private person, either within or without the state; which belongs to the defendant, and is found within the county. The levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of, the debt represented thereby. The attachment may also be levied upon a right or interest, present or future, to any of the property or estate of a deceased person which may belong to the defendant and which could be legally assigned by him as legatee or distributee, whether the same exists by reason of the provisions of a last will and testament admitted to probate at the time the attachment is granted, or by operation of the law in case of the intestacy of the deceased. Levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of, the rights and interests of the defendant at the time of such levy, subject to the rights of the executor, administrator or trustee or such state to administer the same according to law.

§ 649. **How property to be attached.** A levy under a warrant of attachment must be made as follows:

1. Upon real property, by filing with the clerk of the county, where it is situated a notice of the attachment, stating the names of the parties to the action, the amount of the plaintiff's claim, as stated in the warrant, and a description of the particular property levied upon. The notice must be subscribed by the plaintiff's attorney, adding the office address; and must be recorded and indexed by the clerk, in the same book, in like manner, and with like effect, as a notice of the pendency of an action.

2. Upon the personal property, capable of manual delivery, including a bond, promissory note, or other instrument for the payment of money, by taking the same into the sheriff's actual custody. He must thereupon, without delay, deliver to the person from whose possession the property is taken, if any, a copy of the warrant, and of the affidavits upon which it was granted.

3. Upon other personal property, by leaving a certified copy of the warrant, and a notice showing the property attached, with the person holding the same; or, if

it consists of a demand, other than as specified in the last subdivision, with the person against whom it exists; or, if it consists of a right or share in the stock of an association or corporation, or interests or profits thereon, with the president, or other head of the association or corporation, or the secretary, cashier, or managing agent thereof, or if it consists of a right or interest in an estate of a deceased person arising under the provisions of a will or under the provisions of law in case of intestacy, with the executor or trustee under the will, or the administrator of the estate.

4. Upon property discovered in any action brought as prescribed in subdivision two of section 655 of this act, by entering in the proper clerk's office, the judgment rendered in said action, and thereafter levying on said property in the manner prescribed in subdivision one, two and three of this section.

§ 650. **Certificate of defendant's interest to be furnished.** Upon the application of a sheriff, holding a warrant of attachment, the president or other head of an association or corporation, or the secretary, cashier, or managing agent thereof, or a debtor of the defendant, or a person holding property, including a bond, promissory note, or other instrument for the payment of money, belonging to the defendant, must furnish to the sheriff a certificate, under his hand, specifying the rights or number of shares of the defendant, in the stock of the association or corporation, with all dividends declared or incumbrances thereon; or the amount, nature, and description of the property, held for the benefit of the defendant, or to the defendant's interest in property so held, or of the debt of demand owing to the defendant, as the case requires.

§ 651. **Person refusing certificate may be examined.** If a person, to whom application is made, as prescribed in the last section, refuses to give such a certificate; or if it is made to appear, by affidavit, to the satisfaction of the court, or a judge thereof, or the county judge of the county to which the warrant is issued, that there is reason to suspect that a certificate given by him is untrue, or that it fails fully to set forth the facts required to be shown thereby; the court or judge may make an order, directing him to attend, at a specified time, and at a place within the county to which the warrant is issued, and submit to an examination under oath, concerning the same. The order may, in the discretion of the court or judge, direct an appearance before a referee named therein.

§ 677. **Plaintiff may bring action in name of himself and the sheriff.** The plaintiff, by leave of the court or judge, procured as prescribed in the next section, may bring and maintain, in the name of himself and the sheriff jointly, by his own attorney, and at his own expense, any action which, by the provisions of this title, may be brought by the sheriff, to recover property attached, or the value thereof, or a demand attached, or upon an undertaking given as prescribed in this title, by a person other than the plaintiff; but the plaintiff, in his own name and the sheriff's jointly, may also bring and maintain any action which, by the provisions of subdivision two of section 655 of article second of this title, may be brought by the sheriff. The sheriff must receive the proceeds of such action, but he is not liable for the costs or expenses thereof. Costs may be awarded, in such an action, against the plaintiff in the warrant, but not against the sheriff.

§ 678. **How leave to bring such action procured.** The court or judge must grant leave to bring such an action, where it appears, that due notice of the application therefor has been given to the sheriff; but, before doing so, the court or judge may require that notice of the application be given to the plaintiff, in any other warrant against the same defendant. And such terms, conditions, and regulations may be imposed, in the order granting leave, as the court or judge thinks proper, for the due protection of the rights and interests of all persons, interested in the disposition of the proceeds of the action.

§ 688. **Undertaking to be given.** Upon such an application, the defendant must give an undertaking, with at least two sufficient sureties, to the effect that

he will, on demand, pay to the plaintiff the amount of any judgment which may be recovered in the action against him, not exceeding a sum specified in the undertaking, with interest. The sum so specified must be, at least equal to the amount of the plaintiff's demand, as specified in his affidavit; or, at the option of the defendant, equal to the appraised value, according to the inventory, of the property attached; or, if the application is to discharge the attachment, as to a part only of the property attached, to the appraised value of that portion. Upon such application being made after final judgment, the defendant must give the security required to perfect an appeal to the court of appeals from a final judgment, of the same amount or to the same effect, and to stay the execution hereof.

§ 707. When judgment enforceable only against attached property. Where a defendant, who has not appeared, is a non-resident of the State, or a foreign corporation, and the summons was served without the State, or by publication, pursuant to an order obtained for that purpose, as prescribed in chapter fifth of this act, the judgment can be enforced only against the property which has been levied upon, by virtue of the warrant of attachment, at the time when the judgment is entered. But this section does not declare the effect of such a judgment, with respect to the application of any statute of limitation.

§ 708. Judgment in the principal action; how satisfied. Where an execution against property is issued upon a judgment for the plaintiff, in an action in which a warrant of attachment has been levied, the sheriff must satisfy it, as follows:

1. He must pay over to the plaintiff all money attached by him, and the proceeds of all sales of perishable property, or of any vessel or share of interest therein, or animals, sold by him, or of any debts, or other things in action collected or sold by him; or so much thereof as is necessary to satisfy the judgment.

2. If any balance remains due, he must sell, under the execution, the other personal property attached, or so much thereof as is necessary; including rights or shares in the stock of an association or corporation, or a bond or other instrument for the payment of money, executed and issued, with the interest coupons annexed, if any, by a government, state, county, public officer, or municipal or other corporation, which is in terms negotiable, or otherwise, whether past due, or yet to become due; but not including any other debt or thing in action. If the proceeds of that property are insufficient to satisfy the judgment, and the execution requires him to satisfy it out of any other personal property of the defendant, he must sell the personal property, upon which he has levied by virtue of the execution. If the proceeds of the personal property, applicable to the execution, are insufficient to satisfy the judgment, the sheriff must sell, under the execution, all the right, title, and interest, which the defendant had in the real property attached, at the time when the notice was filed, or at any time afterwards, before resorting to any other real property.

3. If personal property attached, belonging to the defendant, has passed out of the hands of the sheriff, without having been sold or converted into money, and the attachment has not been discharged as to that property, he must, if practicable, regain possession thereof; and, for that purpose, he has all the authority which he had, to seize the same under the warrant. A person, who wilfully conceals or withholds such property from him, is liable to double damages, at the suit of the party aggrieved.

4. Until the judgment is paid, he may collect the debts and other things in action attached, and prosecute any undertaking, which he has taken in the course of the proceedings, and apply the proceeds thereof to the payment of the judgment.

5. At any time after levying the attachment, the court, upon the petition

of the plaintiff, accompanied with an affidavit, specifying fully all the proceedings of the sheriff, since the levy under the warrant, the property attached, and the disposition thereof; and the affidavit of the sheriff, showing that he has used diligence, in endeavoring to collect the debts and other things in action attached, and that a portion thereof remains uncollected; may direct the sheriff to sell the remaining portion, upon such terms, and in such manner, as it thinks proper. Notice of the application must be given to the defendant's attorney, if the defendant appeared in the action. If the summons was not personally served on the defendant, and he did not appear, the court may make such order as to the service of notice, as it thinks proper; or may grant the application without notice.

§ 713. **Receiver; when appointed.** In addition to the cases, where the appointment of a receiver is specially provided for by law, a receiver of property, which is the subject of an action, in the supreme court or a county court, may be appointed by the court, in either of the following cases:

1. Before final judgment, on the application of a party who establishes an apparent right to, or interest in, the property, where it is in the possession of an adverse party, and there is danger that it will be removed beyond the jurisdiction of the court, or lost, materially injured, or destroyed.
2. By or after the final judgment, to carry the judgment into effect, or to dispose of the property, according to its directions.
3. After final judgment, to preserve the property, during the pendency of an appeal.

The word, "property," as used in this section, includes the rents, profits, or other income, and the increase, of real or personal property.

§ 715. **Security.** A receiver, appointed in an action or special proceeding, must, before entering upon his duties, execute and file with the proper clerk, a bond to the people, with at least two sufficient sureties, in a penalty fixed by the court, judge, or referee, making the appointment, conditioned for the faithful discharge of his duties as receiver; and the execution of any such bond by any fidelity or surety company authorized by the laws of this state to transact business, shall be equivalent to the execution of said bond by two sureties. And the court, or where the order was made out of court, the judge making the order, by or pursuant to which the receiver was appointed, or his successor in office, may at any time, remove the receiver, or direct him to give a new bond, with new sureties, with the like condition. But the foregoing provisions of this section do not apply to a case where special provision is made by law, for the security to be given by a receiver, or for increasing the same, or for removing a receiver. A receiver who, having executed and filed a bond as provided for in this section, before presenting his accounts as receiver, must give notice to the surety or sureties on his official bond, of his intention to present his accounts, not less than eight days before the day set for the hearing on said accounting. The same notice must be given to such surety or sureties where the accounting is ordered on the petition of a person or persons other than the receiver, and in no case shall the receiver's accounts be passed, settled or allowed, unless the said notice provided for in this section shall have first been given to the surety or sureties on the official bond of such receiver.

§ 723. **Amendments by the court; disregarding immaterial errors, etc.** The court may, upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any process, pleading, or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting an allegation material to the case; or, where the amendment does not change substantially the claim or

defence, by conforming the pleading or other proceedings to the facts proved. And, in every stage of the action, the court must disregard an error or defect, in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party. When amending a pleading or permitting the service of an amended or supplemental pleading in a case which is on the general calendar of issues of fact, the court may direct that the case retain the place upon such calendar which it occupied before the amendment or new pleading was allowed, and that the proceedings had upon the amended or supplemental pleadings shall not affect the place of the case upon such calendar, or render necessary the service of a new notice of trial.

§ 755. **Action; when not to abate.** An action does not abate by any event, if the cause of action survives or continues. A special proceeding does not abate by any event, if the right to the relief sought in such special proceeding survives or continues, but this provision as to a special proceeding applies only to cases where a party dies after this act takes effect.

§ 756. **Proceedings upon transfer of interest, or devolution of liability.** In case of a transfer of interest, or devolution of liability, the action may be continued, by or against the original party; unless the court directs the person, to whom the interest is transferred, or upon whom the liability is devolved, to be substituted in the action, or joined with the original party, as the case requires.

§ 757. **Id.; when sole party dies and action survives.** In case of the death of a sole plaintiff or a sole defendant, if the cause of action survives or continues, the court must, upon a motion, allow or compel the action to be continued, by or against his representative or successor in interest. In case of the death of a sole party to a special proceeding after this act takes effect, if the right to the relief sought in such proceeding survives or continues, the court must, upon a motion, allow or compel such proceeding to be continued by or against his representative or successor in interest. This provision as to a special proceeding does not apply where provision for such continuance has been otherwise made by law.

§ 768. **Id.; of a motion.** An application for an order is a motion. Such application or motion must be made to a court, or to a judge or justice thereof. When the defendants have made default in appearing in an action or proceeding, any application or motion therein may be made to the court or to a judge or justice thereof out of court. Where any of the defendants in an action or proceedings have appeared all motions or applications thereafter made in such action, or proceedings, except a motion made for an extension of time on two days' notice under rule twenty-four of the general rules of practice which may be made to a judge, and except where it is otherwise authorized by law, must be made to the court, unless such defendants consent to the making of such motion or application to a judge or justice out of court. Except in the first judicial department an order which is authorized by statute to be made at chambers may be made by the court. Any proceeding which is required by statute to be instituted by petition may also be instituted by an affidavit setting forth the matter which it is required that the petition shall contain, accompanying a notice of an application for the relief which would properly be prayed for in the petition; and in like manner a proceeding which is required by statute to be instituted by affidavit may be instituted by petition. The party making a motion may, in the notice thereof, specify one or more kinds of relief in the alternative or otherwise, and the adverse party must, where at least eight days' notice of the motion shall be given, at least one day prior to the time at which the motion is noticed to be heard, serve upon the attorney for the moving party copies of the affidavits and papers which he expects to read in opposition to the motion; he may, at least three

days prior to the time at which the motion is noticed to be heard, serve upon the attorney for the moving party a notice, with or without affidavits or other papers in support thereof, specifying any kind or kinds of relief in the alternative or otherwise to which he claims to be entitled in the action whether the relief so asked for be responsive or not to the relief asked for by the moving party. Upon the hearing of a motion relief shall not be denied to any party because of defects or insufficiencies in the moving papers which can be cured upon the hearing or before the entry of the order thereon, but the court or judge shall direct that such defects or insufficiencies be cured or supplied forthwith, and shall proceed to hear and consider the motion, or may direct the motion to stand over to be heard at a subsequent time or place. In either case it may award against the party in whose moving papers or application such defect or insufficiency appears, costs in favor of the adverse party. Whenever a motion is made to set aside or vacate an order, judgment or decree or any paper filed or proceeding taken, because of technical defects therein, or because of defects or insufficiencies in the papers or proceedings upon which it was made or entered and such defects or insufficiencies can, without prejudice to intervening rights be cured or supplied, it shall be the duty of the court to direct upon the hearing of such motion, that such defects or insufficiencies in the order, judgment or decree, or in the papers or proceedings, be cured or supplied *nunc pro tunc*, awarding against the party in whose order, judgment or decree, or in whose papers or proceedings such defects or insufficiencies appear, costs in favor of the adverse party. The pleadings in an action shall at all times when a motion is made therein be deemed to be before the court although not specifically referred to in the notice of motion.

§ 803. **Court may direct discovery of books, etc.** A court of record, other than a justices court in a city, has power to compel a party to an action pending therein, to produce and discover, or to give to the other party, an inspection and copy, or permission to take a copy or photograph, of a book, document, or other paper, or to make discovery of any article or property, in his possession or under his control, relating to the merits of the action, or of the defence therein.

§ 804. **Rules to prescribe the cases, etc.** The general rules of practice must prescribe the cases in which a discovery or inspection may be so compelled, and the proceedings for that purpose, where the same are not prescribed in this act.

§ 805. **Petition for discovery, and order thereupon.** To entitle a party to procure such a discovery or inspection, he must present a petition, praying therefor, and verified by affidavit, to the court, or to a judge, authorized to make an order in the action; upon which an order may be made, directing the party, against whom the discovery or inspection is sought, to allow it, or, in default thereof, to show cause before the court at a time and place, and upon a notice, therein specified, why the prayer of the petition should not be granted; and, if necessary or proper, that his proceedings be stayed until the hearing of the application, although the stay exceeds twenty days.

§ 806 **Order, when and by whom vacated.** An order, made as prescribed in the last section, may be vacated, by the judge who granted it, or by the court, upon satisfactory proof, by affidavit:

1. That it ought not to have been granted, or that it has been complied with; or
2. That the party required to make the discovery, or permit the inspection, has not the possession or control of the book, document, or other paper, directed to be produced or inspected.

§ 807. **Proceedings upon the return of the order.** Upon the return of the order to show cause, the court may make such an order, with respect to the discovery or inspection prayed for, as justice requires. Where either is directed, a referee may be appointed by the order, to direct and superintend it; whose certificate, unless set aside by the court, is presumptive, and except in proceedings for contempt, conclusive evidence of compliance or non-compliance with the terms of the order. A fixed sum, not exceeding twenty dollars, may be added to the costs of the motion, for the fees of the referee.

§ 808. **Penalty for disobedience.** Where an order, made as prescribed in the last section, directs a discovery or inspection, the party in whose behalf it was made, may, upon proof, by affidavit, that the adverse party has failed to obey it, and upon notice to him, apply to the court, for an order to punish him for the failure. Upon the hearing of the application, the court may, upon the payment of such a sum, for the expenses of the applicant, as the court fixes, and upon compliance with such other terms, as it deems just to impose, permit the party in default to comply with the order for a discovery and inspection; and, for that purpose, it may direct that the application to punish him stand over to a future time. Upon the final hearing of the application to punish the party in default, the court, in a proper case, may direct that his complaint be dismissed, or his answer or reply be stricken out, and that judgment be rendered accordingly; or it may make an order, striking out one or more causes of action, defences, counterclaims or replies, interposed by him; or that he be debarred from maintaining a particular claim or defence, in relation to which the discovery or inspection was sought. Where the party has failed to obey an order, allowing an inspection by the adverse party, and requiring him to furnish a copy, or permit a copy to be taken, the court may also direct that the book, document, or other paper, be excluded from being given in evidence; or it may punish the party for a contempt; or both.

§ 809. **Effect of papers, etc., produced.** A book, document, or other paper, produced under an order made as prescribed in this article, has the same effect, when used by the party requiring it, as if it was produced upon notice, according to the practice of the court.

§ 820. **Interpleader by order in certain cases.** A defendant against whom an action to recover upon a contract, or an action of ejectment, or an action to recover a chattel is pending, may, at any time before answer, upon proof, by affidavit, that a person, not a party to the action, makes a demand against him, for the same debt or property, without collusion with him, apply to the court, upon notice to that person and the adverse party, for an order to substitute that person in his place, and to discharge him from liability to either, on his paying into court the amount of the debt, or delivering the possession of the property, or its value, to such person as the court directs; or upon it appearing that the defendant disputes, in whole or in part, the liability as asserted against him by different claimants, or that he has some interest in the subject-matter of the controversy which he desires to assert, his application may be for an order joining the other claimant or claimants as co-defendants with him in the action. The court may, in its discretion, make such order, upon such terms as to costs and payments into court of the amount of the debt, or part thereof, or delivery of the possession of the property, or its value or part thereof, as may be just, and thereupon the entire controversy may be determined in the action.

§ 820a. **Interpleader in actions on contract.** When any sum of money shall be due and payable under or on account of a contract, and the whole, or any part thereof, exceeding fifty dollars in amount, shall be claimed or demanded by adverse claimants thereto, the debtor may bring suit in any court having jurisdiction thereof, and of the parties, demanding judgment of interpleader,

and that the debtor be permitted to pay the amount of the debt into court, and that such debtor upon such payment into court be discharged from any further liability to any of the parties to the action. When service of the summons and complaint shall have been made upon all such claimants, the plaintiff may make application, by petition or upon affidavits for an order permitting and directing the plaintiff to pay the amount of the debt into court, and that the plaintiff, upon the payment into court of the amount of the debt as required by the order, be discharged from any further liability to any of the defendants in such action, and the court, upon satisfactory proof by affidavit or otherwise, as the court may require, of the facts alleged in the complaint, and that the whole or part of the debt is claimed adversely by the defendants without any collusion on the part of the plaintiff, and that the amount thereof is not in dispute may make such an order, upon such terms as to costs and disbursements payable out of the money so adversely claimed as to the court may seem just, and upon the payment into court of the amount of such debt, and complying with the terms of such order, the plaintiff shall stand discharged from any further liability to any of the defendants in said action upon account of such debt and contract. Notice of such application, together with copies of the papers upon which the same is made, shall be personally served on each of the defendants, at least five, and not more than fifteen days before the return day thereof.

§ 837. **When witness not excused from testifying.** A competent witness shall not be excused from answering a relevant question, on the ground only that the answer may tend to establish the fact, that he owes a debt, or is otherwise subject to a civil suit. But this provision does not require a witness to give an answer, which will tend to accuse himself of a crime or misdemeanor or to expose him to a penalty or forfeiture; nor does it vary any other rule, respecting the examination of a witness.

§ 839. **Admission by member of corporation.** The admission of a member of an aggregate corporation, who is not a party, shall not be received as evidence against the corporation unless it was made concerning and while engaged in a transaction in which he was the authorized agent of the corporation; or unless it was made while a member of such corporation and testifying as a witness concerning a transaction of the corporation, when the official record of such testimony shall be received.

§ 868 **Books, etc., of corporation, how produced.** The production, upon a trial, of a book or paper, belonging to or under the control of a corporation, may be compelled, in like manner as if it was in the hands, or under the control, of a natural person. For that purpose a subpoena duces tecum, or an order, made as prescribed in the last section, as the case requires, must be directed to the president, or other head of the corporation, or to the officer thereof, in whose custody the book or paper is.

§ 869. **When personal attendance not required by subpoena duces tecum.** In a case specified in the last section, or where a subpoena duces tecum, or an order, made as prescribed in section 866 or section 867 of this act requires a public officer to attend, and bring a book or paper under his control, the subpoena or order is deemed to be sufficiently obeyed, if the book or paper is produced by a subordinate officer or employee of the corporation, or in the public office, who possesses the requisite knowledge to identify it, and to testify respecting the purposes for which it is used. If the personal attendance of a particular officer of the corporation or public officer is required, a subpoena, without a duces tecum clause, must also be served upon him.

§ 870. **Deposition of a party, etc.** The deposition of a party to an action pending in a court of record, or of a person who expects to be a party to an action about to be brought in such a court, may be taken at his own instance or at the instance of an adverse party, or by a co-plaintiff or co-defendant at any time before or during the trial as prescribed in this article.

§ 871. **Deposition of a witness not a party.** The deposition of a person not a party, whose testimony is material and necessary to a party to an action, pending in a court of record, or to a person who expects to be a party to an action, about to be brought in such a court, by a person other than the person to be examined, may also be taken, as prescribed in this article.

§ 872. **Application; contents of affidavit.** The person desiring to take a deposition as prescribed in this article, may present to a judge of the court in which the action is pending; or, if it is pending in the supreme court, to a county judge; or, if an action is not pending, but is expected to be brought, to a judge of the supreme court, or to a county judge; an affidavit, setting forth as follows:

1. The names and residences of all the parties to the action, and whether or not they have appeared, and if either of them has appeared by attorney, the name, and the residence or office address of the attorney; or, if no action is pending, the names and residences of the expected parties thereto.

2. If an action is pending, the nature of the action, and the substance of the judgment demanded, and the application is made by the defendant before answer, or by either party after answer, the nature of the defense.

3. If no action is pending, the nature of the controversy which is expected to be the subject thereof.

4. The name and residence of the person to be examined, and that the testimony of such person is material and necessary for the party making such application or the prosecution or defence of such action, and if the action is to recover damages for personal injuries, that the defendant is ignorant of the nature and extent of such personal injuries; and, at the option of the applicant, the place where he is sojourning, or where he regularly transacts business.

5. If an action is pending, that the person to be examined is about to depart from the State, or that he is so sick or infirm as to afford reasonable ground to believe that he will not be able to attend the trial; or that any other special circumstances exist which render it proper that he should be examined as prescribed in this article. But this subdivision does not apply to a case where the person to be examined is a party to the action.

6. If no action is pending, that the person expected to be the adverse party is of full age and a resident of the State, or sojourning within the State; or that he has an office within the State where he regularly transacts business in person, specifying the place, and if it is in a city, the street and street number or other designation of the particular locality; or, if two or more persons are expected to be adverse parties, that each is of full age and so resident or sojourning or has an office; also the circumstances which render it necessary for the protection of the applicant's rights, that the witness's testimony should be perpetuated.

7. Any other fact necessary to show that the case comes within one of the two last sections. And if the party sought to be examined is a corporation, joint-stock or other unincorporated association, the affidavit shall state the name of the officers, directors, or managing agents thereof, or any of them whose testimony is necessary and material, or the books and papers as to the contents of which an examination or inspection is desired, and the order to be made in respect thereto shall direct the examination of such persons and the production of such books and papers, and on such examination the books or papers, or any part or parts thereof may be offered and received in evidence in addition to the use thereof by the witness to refresh his memory.

§ 873. **Order for examination.** The judge to whom such an affidavit is presented must grant an order for the examination, if an action is pending. If no action is pending he must grant it if there be reasonable ground to believe that an action will be brought, as stated in the affidavit and that the application

is made in good faith to preserve the expected testimony; otherwise he must dismiss the application. Where the person to be examined is a party to a pending action, or is expected to be a party to an action to be brought, the order may, in the discretion of the judge, designate and limit the particular matters as to which he shall be examined. In every action to recover damages for personal injuries, the court or judge, in granting an order for the examination of the plaintiff before trial may, if the defendant apply therefor, direct that the plaintiff submit to a physical examination by one or more physicians or surgeons, to be designated by the court or judge, and such examination shall be had and made under such restrictions and directions as to the court or judge shall seem proper. In any action brought to recover damages for personal injuries, where the defendant shall present to the court or judge satisfactory evidence that he is ignorant of the nature and extent of the injuries complained of, the court or judge shall order that such physical examination be made; and if the party to be examined shall be a female she shall be entitled to have such examination before physicians or surgeons of her own sex. The order must require the party or persons to be examined to appear before the judge, or before a referee named in the order, for the purpose of taking the examination, at a time and place therein specified. The order must also direct the time of service of a copy thereof; which must be made within the State, not more than twenty, nor less than five days, before the time fixed for the examination, unless special circumstances, making a different time of service necessary, are shown in the affidavit, and that fact is recited in the order.

§ 875. **Service of order, etc.** A copy of the order, and of the affidavit upon which it was granted, must be served upon the attorney for each party to the action, in like manner as a paper in the action; or, if a party has not appeared in the action, they must be served upon him, as directed by the order. If no action is pending, they must be personally served upon each of the persons, named therein as expected adverse parties.

§ 914. **In what cases deposition may be taken.** A party to an action, suit, or special proceeding, civil or criminal, pending in a court without the State, either in the United States, or in a foreign country, may obtain, by the special proceeding prescribed in this article, the testimony of a witness, and, in connection therewith, the production of books and papers, within the State, to be used in the action, suit or special proceeding.

§ 915. **Proceedings to obtain testimony.** Where a commission to take testimony, within the State, has been issued from the court in which the action, suit, or special proceeding is pending; or where a notice has been given, or any other proceeding has been taken, for the purpose of taking the testimony, within the State, pursuant to the laws of the state or country, wherein the court is located, or pursuant to the laws of the United States, if it is a court of the United States, the supreme court, or the county court, or a judge of either court, shall, in a proper case, on the presentation of a verified petition issue a subpoena to the witness, commanding him to appear before the commissioner, named in the commission; or before a commissioner, within the State, for the state, territory, or foreign country, in which the notice was given, or the proceeding taken; or before the officer designated in the commission, notice, or other paper, by his title of office; at a time and place specified in the subpoena, to testify, in the action, suit, or special proceeding. If the witness shall fail to obey the subpoena, or refuse to have an oath administered, or to testify, or to produce a book or paper pursuant to a subpoena, or to subscribe his deposition, the court or judge issuing the subpoena shall, if it is determined that a contempt has been committed, prescribe the punishment as in the case of a recalcitrant witness in the supreme court. The general rules of practice must prescribe rules for such proceedings.

§ 929. **Book of foreign corporation; when evidence.** Where a party wishes to prove an act or transaction of a foreign corporation, the book or books of the corporation may be used for that purpose, as presumptive evidence, whether any or all of the parties are or are not members of the corporation.

§ 930. **When a copy thereof is evidence.** If an original book is not produced at the trial, as prescribed in the last section, a copy thereof, or of an entry therein, verified as prescribed in the next section, may be used, with like effect as the original book; provided that the party, intending to use the copy, gives the adverse party at least ten days' notice of his intention, specifying briefly the nature of the evidence proposed to be given. But this and the next section do not apply, where the foreign corporation is a party to the action, and seeks to prove its own act or transaction, in its own behalf.

§ 931. **How copy to be verified.** The copy must be verified by the deposition, taken as prescribed by law, or the oral testimony, taken at the trial, of the person who made it, or of a person who has examined and compared it with the original book, or the entry therein. The witness must testify that the copy produced is correct; that he made it, or compared it with the original; and that he then knew that the original book so copied, or containing the entry, was the book of the corporation; or that it was then acknowledged to him to be such, by an officer or receiver of the corporation, or a person having the custody thereof, naming the person who made the acknowledgment; and he must specify where, and in whose custody, the original was then kept.

§ 931a. **Copy of designation of person upon whom to make service, as evidence.** An exemplified copy of a designation of a person upon whom to make service filed by a foreign corporation as provided in section 16 of the General Corporation Law accompanied with a certificate that it has not been revoked, is a presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it.

§ 984. **Other actions, according to the residence of the parties.** An action, not specified in the last two sections, must be tried in the county, in which one of the parties resided, at the commencement thereof. If neither of the parties then resided in the State, it may be tried in any county, which the plaintiff designates, for that purpose, in the title of the complaint.

§ 987. **When court may change the place of trial.** The court may, by order, change the place of trial, in either of the following cases:

1. Where the county, designated for that purpose in the complaint, is not the proper county.

2. Where there is reason to believe, that an impartial trial cannot be had in the proper county.

3. Where the convenience of witnesses, and the ends of justice, will be promoted by the change.

§ 1012. **Qualification of the last section.** But a reference shall not be made, of course, upon the consent of the parties, in an action to annul the marriage, or for a divorce or a separation; or an action against a corporation, to obtain a dissolution thereof, the appointment of a receiver of its property, or the distribution of its property, unless it is brought by the attorney general; or an action wherein a defendant, to be affected by the result of the trial, is an infant. In a case specified in this section, where the parties consent to a reference, the court may, in its discretion, grant or refuse a reference; and, where a reference is granted, the court must designate the referee. If the referee, thus designated, refuses to serve, or if a new trial of an action tried by a referee, so designated, is granted, the court must, upon the application of either party, appoint another referee.

§ 1013. **Compulsory reference for the trial of issues; in what cases it may be made.** The court may, of its own motion, or upon the application of either

party, without the consent of the other, direct a trial of the issues of fact, by a referee, where the trial will require the examination of a long account, on either side, and will not require the decision of difficult questions of law. In an action, triable by the court, without a jury, a reference may be made, as prescribed in this section, to decide the whole issue, or any of the issues; or to report the referee's finding, upon one or more specific questions of fact, involved in the issue.

§ 1015. **Compulsory reference upon questions incidentally arising.** The court may likewise, of its own motion, or upon the application of either party, without the consent of the other, direct a reference to take an account, and report to the court thereon, either with or without the testimony, after interlocutory or final judgment, or where it is necessary to do so, for the information of the court; and also to determine and report upon a question of fact arising in any stage or the action, upon a motion, or otherwise, except upon the pleadings.

§ 1185. **When verdict to be taken, subject to the opinion of the court.** Where, upon the trial of an issue by a jury, the case presents only questions of law, the judge may direct the jury to render a verdict, subject to the opinion of the court. Notwithstanding that such a verdict has been rendered, the judge holding the trial term may, at the same term, set aside the verdict, and direct judgment to be entered for either party, with like effect and in like manner, as if such a direction had been given at the trial. An exception to such a direction may be taken as prescribed in section 994 of this act.

§ 1207. **When judgment for plaintiff not to exceed judgment demanded.** Where there is no answer, the judgment shall not be more favorable to the plaintiff, than that demanded in the complaint. Where there is an answer, the court may permit the plaintiff to take any judgment, consistent with the case made by the complaint, and embraced within the issue.

§ 1216. **Application for judgment in case of service by publication.** Where the summons was served upon the defendant without the state, or otherwise than personally, if the defendant does not demand a copy of the complaint, or plead, as the case requires, within twenty days after the service is complete, the plaintiff may apply to the court, or a judge or justice thereof, for the judgment demanded in the complaint. Upon such an application, he must file proof that the service is complete, and proof, by affidavit, of the defendant's default. The court, or a judge or justice thereof, must require proof of the cause of action, set forth in the complaint, to be made, either before such court, or such judge or justice, or before a referee appointed for that purpose; except that where the action is brought to recover damages for a personal injury, or an injury to property, the damages must be ascertained by means of a writ of inquiry as prescribed in the last section. If the defendant is a non-resident, or a foreign corporation, the court, or a judge or justice to whom such application is made, must require the plaintiff, or his agent or attorney, to be examined on oath, respecting any payments to the plaintiff, or to any one for his use, on account of his demand, and must render the judgment to which the plaintiff is entitled. But before rendering judgment, the court, or a judge or justice thereof, to whom the application is made, may, in any case, in its, or their, discretion, require the plaintiff to file an undertaking, to abide the order of the court touching the restitution of any estate or effects which may be directed by the judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of the judgment, in case the defendant or his representative applies and is admitted to defend the action, and succeeds in his defense.

§ 1217. **Attachment and undertaking for restitution, required in certain actions.** A judgment shall not be rendered for a sum of money only, upon an application made pursuant to the last section, except in an action specified

in section 635 of this act. Where the defendant is a non-resident, or a foreign corporation, and has not appeared, the plaintiff, upon the application for judgment in such an action, must produce and file the following papers:

1. Proof, by affidavit, that a warrant of attachment, granted in the action, has been levied upon property of the defendant.

2. A description of the property, so attached, verified by affidavit; with a statement of the value thereof according to the inventory.

3. The undertaking mentioned in section 1216, if one has been required.

§ 1294. **When party may appeal.** A party aggrieved may appeal, in a case prescribed in this chapter, except where the judgment or order, of which he complains, was rendered or made upon his default.

§ 1296. **When a person entitled to become a party may appeal.** A person aggrieved, who is not a party, but is entitled by law to be substituted, in place of a party; or who has acquired, since the making of the order, or the rendering of the judgment appealed from, an interest, which would have entitled him to be so substituted, if it had been previously acquired, may also appeal, as prescribed in this chapter, for an appeal by a party. But the appeal cannot be heard, until he has been substituted in place of the party; and if he unreasonably neglects to procure an order of substitution, the appeal may be dismissed, upon motion of the respondent.

§ 1370. **Requisites of execution for the collection of money; where a warrant of attachment has been levied by sheriff.** Where a warrant of attachment, issued in the action, has been levied by the sheriff, the execution must substantially require the sheriff to satisfy the judgment, as follows:

1. Where the judgment debtor is a non-resident, or a foreign corporation, and the summons was served upon him or it, without the State, or otherwise than personally, pursuant to an order obtained for that purpose, as prescribed in chapter fifth of this act, and the judgment debtor has not appeared in the action; out of the personal property attached, and, if that is insufficient, out of the real property attached.

2. In any other case, out of the personal property attached; and, if that is insufficient, out of the other personal property of the judgment debtor; if both are insufficient, out of the real property attached; and, if that is insufficient, out of the real property, belonging to him, at the time when the judgment was docketed in the clerk's office of the county, or at any time thereafter.

§ 1405. **Personal property bound by execution.** The goods and chattels of a judgment debtor, not exempt, by express provision of law, from levy and sale by virtue of an execution, and his other personal property, which is expressly declared by law, to be subject to levy by virtue of an execution, are, when situated within the jurisdiction of the officer, to whom an execution against property is delivered, bound by the execution, from the time of the delivery thereof to the proper officer, to be executed; but not before.

§ 1502. **Against whom action to be brought.** Where the complaint demands judgment for the immediate possession of the property, if the property is actually occupied, the occupant thereof must be made defendant in the action. If it is not so occupied, the action must be brought against some person exercising acts of ownership thereupon, or claiming title thereto, or an interest therein, at the time of the commencement of the action.

§ 1650. **This article applies to corporations.** An action may be maintained, as prescribed in this article, by or against a corporation, or by or against an unincorporated association, as if was a natural person, or such an action may be maintained by or against the receiver or other successor of any such corporation or association.

§ 1775. **Complaint in actions by or against corporations.** In an action brought by or against a corporation, the complaint must aver that the plaintiff, or the

defendant, as the case may be, is a corporation; must state whether it is a domestic corporation or a foreign corporation; and, if the latter, the state, country, or government, by or under whose laws it was created. But the plaintiff need not set forth, or specially refer to, any act or proceeding, by or under which the corporation was created.

§ 1776. **When proof of corporate existence unnecessary.** In an action, brought by or against a corporation, the plaintiff need not prove, upon the trial, the existence of the corporation, unless the answer is verified, and contains an affirmative allegation that the plaintiff, or the defendant, as the case may be, is not a corporation.

§ 1777. **Misnomer, when waived.** In an action or special proceeding, brought by or against a corporation, the defendant is deemed to have waived any mistake in the statement of the corporate name, unless the misnomer is pleaded in the answer, or other pleadings in the defendant's behalf.

§ 1778. **Action against a corporation upon a note, etc.** In an action against a foreign or domestic corporation, to recover damages for the non-payment of a promissory note, or other evidence of debt, for the absolute payment of money, upon demand, or at a particular time, an order, extending the time to answer or demur, shall not be granted, except by the court, upon notice to the plaintiff's attorney. In such an action, unless the defendant serves, with a copy of his answer of demurrer, a copy of an order of a judge, directing that the issues presented by the pleadings be tried, the plaintiff may take judgment, as in case of default in pleading, at the expiration of twenty days after service of a copy of the complaint, either personally with the summons, or upon the defendant's attorney, pursuant to his demand therefor; or, if the service of the summons was otherwise than personal, at the expiration of twenty days after the service is complete.

§ 1779. **When foreign corporation may sue.** An action may be maintained by a foreign corporation, in like manner, and subject to the same regulations, as where the action is brought by a domestic corporation, except as otherwise specially prescribed by law. But a foreign corporation cannot maintain an action, founded upon an act, or upon a liability or obligation, express or implied, arising out of, or made and entered into in consideration of, an act, which the laws of the State forbid a corporation or association of individuals to do, without express authority of law. This section does not affect the validity of a meeting of the stockholders or directors of a foreign corporation, held within the State, where such a meeting is authorized by the laws of the state, country, or government by or under which the corporation is created; or of an act, done at such a meeting, which is not in conflict with the same laws, or the laws of the State.

§ 1780. **When foreign corporation may be sued.** An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract, made within the State, or relating to property situated within the State, at the time of the making thereof.
2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.
3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State.
4. Where a foreign corporation is doing business within this State.

§ 1781. See Gen. Corp. L., § 90, *infra*.

§ 1784. See Gen. Corp. L., § 100, *infra*.

§ 1785. See Gen. Corp. L., § 101, *infra*.

- § 1786. See Gen. Corp. L., § 102, *infra*.  
§ 1787. See Gen. Corp. L., § 103, *infra*.  
§ 1788. See Gen. Corp. L., §§ 104, 106, *infra*.  
§ 1789. See Gen. Corp. L., § 105, *infra*.  
§ 1790. See Gen. Corp. L., § 109, *infra*.  
§ 1791. See Gen. Corp. L., § 110, *infra*.  
§ 1792. See Gen. Corp. L., § 111, *infra*.  
§ 1793. See Gen. Corp. L., § 112, *infra*.  
§ 1794. See Gen. Corp. L., § 113, *infra*.  
§ 1795. See Gen. Corp. L., § 114, *infra*.  
§ 1796. See Gen. Corp. L., § 115, *infra*.  
§ 1810. See Gen. Corp. L., § 306, *infra*.  
§ 1811. See Gen. Corp. L., § 307, *infra*.

§ 1812. **Application of certain provisions to joint-stock associations.** Section 1809 of the Code of Civil Procedure and sections 306 and 307 of the General Corporation Law apply to an action or special proceeding, against a joint-stock association created by or under the laws of the State, or a trustee, director, or other officer thereof; or against a joint-stock association created by or under the laws of another state, government, or country, or a trustee, director, or other officer thereof, where the association does business within the State, or has, within the State, a business agency or a fiscal agency or an agency for the transfer of its stock.

§ 1836-a. **Actions by or against foreign executors or administrators.** An executor or administrator duly appointed in any other state, territory or district of the United States or in any foreign country may sue or be sued in any court in this state in his capacity of executor or administrator in like manner and under like restrictions as a nonresident may sue or be sued, if, within twenty days after any such executor or administrator shall commence, or appear in, any action or proceeding in any court in this state or within twenty days after he shall be required or directed by summons or otherwise to appear therein, there shall be filed in the office of the clerk of the court, in which such action or proceeding shall be brought or be pending, a copy of the letters testamentary or letters of administration issued to such executor or administrator duly authenticated as prescribed by section 2704 of the code of civil procedure; in default whereof all proceedings in such action or proceeding may be stayed until such duly authenticated copy of such letters shall be so filed.

§ 1879. **Application of this article; what property cannot be reached.** This article does not apply to a case, where the judgment debtor is a corporation, created by or under the laws of the State. Nor does it authorize the discovery or seizure of, or other interference with, and property, which is expressly exempted by law from levy and sale, by virtue of an execution; or any money, thing in action, or other property, held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor; or the earnings of the judgment debtor for his personal services, rendered within sixty days next before the commencement of the action, where it is made to appear, by his oath or otherwise, that those earnings are necessary for the use of a family, wholly or partly supported by his labor.

§ 1902. **Action for causing death by negligence, etc.** The executor or administrator duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, of a decedent, who has left, him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death

had not ensued. Such an action must be commenced within two years after the decedent's death. When the husband, wife or next of kin do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit.

§ 1910. **What claims or demands may be transferred.** Any claim or demand can be transferred, except in one of the following cases:

1. Where it is to recover damages for a personal injury, or for a breach of promise to marry.

2. Where it is founded upon a grant, which is made void by a statute of the State; or upon a claim to or interest in real property, a grant of which, by the transferor, would be void by such a statute.

3. Where a transfer thereof is expressly forbidden by a statute of the State, or of the United States, or would contravene public policy.

§ 1919 **Actions, etc., by or against associations of seven or more persons.** An action or special proceedings may be maintained, by the president or treasurer of an unincorporated association, consisting of seven or more persons, to recover any property, or upon any cause of action, for or upon which all the associates may maintain such an action or special proceeding, by reason of their interest or ownership therein, either jointly or in common. An action may likewise be maintained by such president or treasurer to recover from one or more members of such association his or their proportionate share of any moneys lawfully expended by such association for the benefit of such associates, or to enforce any lawful claim of such association against such member or members. An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally. Any partnership, or other company of persons, which has a president or treasurer, is deemed an association within the meaning of this section.

§ 1948. **Attorney-general may maintain action.** The attorney-general may maintain an action, upon his own information, or upon the complaint of a private person, in either of the following cases:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises within the State, a franchise or a public office, civil or military, or an office in a domestic corporation.

2. Against a public officer, civil or military, who has done or suffered an act, which by law works a forfeiture of his office.

3. Against one or more persons who act as a corporation, within the State, without being duly incorporated; or exercises within the State, any corporate rights, privileges or franchises, not granted to them by the law of the State.

4. Against a foreign corporation which exercises within the state any corporate rights, privileges or franchises, not granted to it by law of this state; or which within the state, has violated any provision of law, or, contrary to law, has done or omitted any act, or has exercised a privilege or franchise, not conferred upon it by the law of this state, where, in a similar case, a domestic corporation would, in accordance with section 131 of the General Corporation Law, be liable to an action to vacate its charter and to annual its existence; or where exercises within the state any corporate rights, privileges or franchises in a manner contrary to the public policy of the state.

§ 1949. **Proceedings when complaint names rightful incumbent.** In an action brought as prescribed in the last section, for usurping, intruding into, unlawfully holding, or exercising an office, the attorney-general, besides stating the

cause of action in the complaint, may, in his discretion, set forth therein the name of the person rightfully entitled to the office, and the facts showing his right thereto; and thereupon, and upon proof, by affidavit, that the defendant, by means of his usurpation or intrusion, has received any fees or emoluments belonging to the office, an order to arrest the defendant may be granted by the court, or a judge. The provisions of title first of chapter seventh of this act apply to such an order, and the proceedings thereupon and subsequent thereto, except where special provision is otherwise made in this title. For that purpose, the order is deemed to have been made as prescribed in section 549 of this act. Judgment may be rendered upon the right of the defendant, and of the party so alleged to be entitled; or only upon the right of the defendant, as justice requires.

§ 1950. **Action triable by jury.** An action, brought as prescribed in this article, is triable, of course and of right, by a jury, in like manner as if it was an action specified in section 968 of this act, and without procuring an order, as prescribed in section 970 of this act.

§ 1951. **Assumption of office by person entitled.** Where final judgment is rendered, upon the right and in favor of the person so alleged to be entitled, he may, after taking the oath of office, and giving an official bond, as prescribed by law, take upon himself the execution of the office. He must, immediately thereafter, demand of the defendant in the action, delivery of all the books and papers in the custody, or under the control, of the defendant, belonging to the office from which the defendant has been so excluded.

§ 1952. **Proceedings to obtain books and papers.** If the defendant refuses or neglects to deliver any of the books or papers, demanded as prescribed in the last section, he is guilty of a misdemeanor; and the same proceedings must be taken to compel the delivery thereof, as are now or shall hereafter be prescribed by law, where a person, who has held an office, refuses or neglects to deliver the official books or papers to his successor.

§ 1952. **Damages; how recovered.** Where final judgment has been rendered, upon the right and in favor of the person so alleged to be entitled, he may recover, by action, against the defendant, the damages which he has sustained, in consequence of the defendant's usurpation, intrusion into, unlawful holding, or exercise of the office.

§ 1954. **One action against several persons.** Where two or more persons claim to be entitled to the same office or franchise, the attorney-general may bring the action against all, to determine their respective rights thereto.

§ 1955. **When injunction may be granted.** In an action, brought as prescribed in subdivision third or fourth of section 1948 of this act, the final judgment, in favor of the plaintiff, must perpetually restrain the defendant or defendants from the commission or continuance of the act or acts complained of. A temporary injunction to restrain the commission or continuance thereof may be granted, upon proof, by affidavit, that the defendant or defendants have violated any of the provisions of either of the said subdivisions third or fourth of section 1948 of this act. The provisions of title second of chapter seventh of this act apply to such a temporary injunction, and the proceedings thereupon, except where provision is otherwise made in this title. For the purpose, the injunction order is deemed to have been granted as prescribed in section 603 of this act. In the trial of an action brought as prescribed in subdivision third or fourth of section 1948 of this act, a party or a witness is not excused from answering a question on the ground that such answer will tend to incriminate him; but such answer cannot be used as evidence against the person so answering, in a criminal action or criminal proceeding.

§ 1956. **Final judgment in action for usurping office, etc.** In any other action brought as prescribed in this article, where a defendant is adjudged to be guilty

of usurping or intruding into, or unlawfully holding or exercising, an office, franchise, or privilege, final judgment must be rendered, ousting and excluding him therefrom, and in favor of the people or the relator, as the case requires, for the costs of the action. As a part of the final judgment, the court may, in its discretion, also award, that the defendant, or, where there are two or more defendants, that one or more of them, pay to the people a fine, not exceeding two thousand dollars. The judgment for the fine may be docketed, and execution may be issued thereupon, in favor of the people, as if it had been rendered in an action to recover the fine. The fine, when collected, must be paid into the treasury of the State.

§ 1975. **Ultimate disposition of proceeds of actions, in court of the State; upon petition of corporation, etc., aggrieved.** Any corporation, board, officer, custodian, agency, or agent, may, in behalf of any city, county, town, village, or other division, subdivision, department, or portion of the State, which was not a party to an action, brought as prescribed in this article, and which claims to be entitled to the custody or disposition of any of the money, funds, damages, credits, or other property, recovered by, or awarded to the plaintiff, by the final judgment in the action, or any of the proceeds thereof, and not disposed of as prescribed in the last section, present, at any time after the actual collection of the money, and its payment into the State treasury, or the actual receipts of the property by the people, to the supreme court, at a special term thereof held in the county of Albany, a verified petition, setting forth the facts, and praying for the relief to which he or it is entitled. Notice of the application and a copy of the petition must be served upon the attorney-general. Upon the hearing the court may make such a final order, as justice requires, for the disposition of the money or other property, as prescribed in the last section.

§ 1984. **Actions to be brought in the name of the people.** An action, brought as prescribed in this title, except an action to recover a penalty or forfeiture, expressly given by law to a particular officer, must be brought in the name of the people of the State; and the proceedings therein are the same, as in an action by a private person, except as otherwise specially prescribed in this title.

§ 1986. **Relator; when to be joined as plaintiff.** Where an action is brought by the attorney-general, as prescribed in this title, on the relation or information of a person, having an interest in the question, the complaint must allege, and the title of the action show, that the action is brought upon the relation of that person. In such case, the attorney-general must, as a condition of bringing the action, require the relator to give satisfactory security to indemnify the people, against the costs and expenses thereof. Where security is so given all costs and disbursements taxed in favor of the plaintiff shall be payable to the relator. (Effective Sept. 1, 1918.)

§ 1987. **Costs; how collected against corporation and usurpers of franchise.** Where final judgment in an action, brought as prescribed in this title, is rendered against a corporation, or persons claiming to be a corporation, the court may direct the costs to be collected by execution against any of the persons claiming to be a corporation; or by warrant of attachment, or other process, against the person of any director or other officer of the corporation.

§ 2068. **When writ granted at special term.** Except where special provision therefor is otherwise made in this article, a writ of mandamus can be granted only at a special term of the supreme court held within the judicial district embracing the county, wherein an issue of fact, joined upon an alternative writ of mandamus is triable, as prescribed in this article.

§ 2070. **When peremptory mandamus to issue in first instance.** A peremptory writ of mandamus may be issued, in the first instance, where the applicant's right to the mandamus depends only upon questions of law, and notice of the application has been given to a judge of the court, or to the corporation,

board, or other body, officer, or other person, to which or to whom it is directed. The notice must be served, at least eight days before the application is heard; unless a shorter time is prescribed by an order to show cause, made, where the application is to the special term, by the court, or a judge thereof; or where the application is to the appellate division, by the appellate division, or a justice of the appellate division of that judicial department. In such a case the application must be founded upon affidavits, or other written proofs, a copy of which must be served with the notice, or order to show cause. Where the court, board or other body to be served, consists of three or more members, the notice or order to show cause, and the papers upon which the application is to be made, may be served, as prescribed in the next section for service of an alternative writ of mandamus. Except as prescribed in this section, or by special provision of law, a peremptory mandamus cannot be issued, until an alternative mandamus has been issued and duly served, and the return day thereof has elapsed.

§ 2071. **Alternative writ; how served.** An alternative writ of mandamus must be served, by showing the original writ, and delivering a copy thereof, to the person to be served. Where it is directed to a court, or to the judge or judges of a court, it must be served, either in term time or in vacation, upon the judge or judges of the court; except that, where the court consists of three or more judges, service upon a majority of them is sufficient. Where it is to be served upon a board or body, other than a corporation, service must be made upon a majority of the members thereof, unless the board or body was created by law, and has a chairman of other presiding officer, appointed pursuant to law; in which case, service upon him is sufficient. Where the writ is to be served upon a corporation, service thereof may be made upon any officer, upon whom a summons, issued out of the supreme court, may be served. Where one or more of the persons, upon whom to make service, as prescribed in this section, cannot, after due diligence, be found, the exhibition of the original writ may be dispensed with, and service may be made upon him or them, as prescribed by law for the service of a summons, issued out of the supreme court.

§ 2084. **Issue of fact; where triable.** An issue of fact, joined upon an alternative writ of mandamus, granted at a special term of the supreme court, is triable in the county, wherein it is alleged in the writ, that the material facts took place, unless the court directs it to be tried elsewhere. An issue of fact, joined upon an alternative writ of mandamus, granted at a term of the appellate division of the supreme court, is triable in the county, which determines the judicial department wherein the application for the writ must be made; unless the appellate division directs it to be tried in another county of the same judicial department. Upon the trial of an issue of fact, joined upon an alternative writ of mandamus, the verdict, report or decision must be returned to, and the final order thereupon must be made by, the appellate division or the special term, as the case requires.

§ 2120. **Cases where writ may issue.** The writ of certiorari regulated in this article, except the writ specified in section 2124 of this act, is issued to review the determination of a body or officer. It can be issued in one of the following cases only:

1. Where the right to the writ is expressly conferred, or the issue thereof is expressly authorized by a statute.

2. Where the writ may be issued at common law, by a court of general jurisdiction, and the right to the writ, or the power of the court to issue it, is not expressly taken away by a statute.

§ 2121. **Cases where it cannot issue.** A writ of certiorari cannot be issued, to review a determination, made, after this article takes effect, in a civil action or special proceeding, by a court of record, or a judge of a court of record.

§ 2122. **The same.** Except as otherwise expressly prescribed by a statute, a writ of certiorari cannot be issued, in either of the following cases:

1. To review a determination which does not finally determine the rights of the parties, with respect to the matter to be reviewed.

2. Where the determination can be adequately reviewed, by an appeal to a court, or to some other body or officer.

3. Where the body or officer, making the determination, is expressly authorized, by statute, to rehear the matter, upon the relator's application; unless the determination to be reviewed was made upon a rehearing, or the time within which the relator can procure a hearing has elapsed.

§ 2123. **When issued from supreme court.** A writ of certiorari can be issued only out of the supreme court, except in a case where another court is expressly authorized by statute to issue it.

§ 2124. **When from another court.** Any court of record, exercising jurisdiction of an appellate nature, may issue a writ of certiorari, requiring the body or officer whose proceedings are under review, to make a return to the court issuing the writ, at a time and place, fixed by the court, and designated in the writ, for the purpose of supplying any diminution, variance, or other defect, in the record or other papers, before the court issuing the writ, in any case where justice requires that the defect should be supplied, and adequate relief cannot be obtained by means of an order.

§ 2125. **Limitation of time for review.** Subject to the provisions of the next section, a writ of certiorari to review a determination must be granted and served, within four calendar months after the determination to be reviewed becomes final and binding, upon the relator, or the person whom he represents, either in law or in fact.

§ 2126. **Id.; in case of disability.** The appellate division of the supreme court may grant the writ, at any time within twenty months after the expiration of the time limited in the last section, where the relator, or the person whom he represents, was at the time when the determination to be reviewed became final and binding upon him, either

1. Within the age of twenty-one years; or

2. Insane; or

3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term less than for life.

§ 2127. **Application for writ; where and how made.** An application for the writ must be made by, or in behalf of, a person aggrieved by the determination to be reviewed; must be founded upon affidavit, or a verified petition, which may be accompanied by other written proof; and must show a proper case for the issuing of the writ. It can be granted only at a term of the appellate division of the supreme court or at special term; and the granting or refusal thereof is discretionary with the court.

§ 2128. **When notice necessary; service thereof.** Until provision is made, in the general rules of practice, for requiring, or dispensing with notice of the application for the writ, the court, to which the application for the writ is made, may, in its discretion, require or dispense with notice. A notice, when it is necessary, must be served, with copies of the papers upon which the application is to be made, upon the body or officer, whose determination is to be reviewed, or upon such other person as the court directs, as prescribed in this article for the service of a writ of certiorari. The service must be made, at least eight days before the application, unless the court, by an order to show cause, prescribes a shorter time. Where notice is given, the person served may produce affidavits or other written proofs, upon the merits, in opposition to the application.

§ 2129. **To whom writ directed.** The writ must be directed to the body or officer, whose determination is to be reviewed; or to any other person having the custody of the record or other papers to be certified; or to both if necessary. Where it is brought to review the determination of a board or body, other than a court, if an action would lie against the board or body, in its associate or official name, it must be directed to the board or body, by that name; otherwise it must be directed to the members thereof, by their names.

§ 2130. **Mode of service.** A writ of certiorari must be served as follows, except where different directions, respecting the mode of service thereof, are given by the court granting it:

1. Where it is directed to a person or persons by name, or by his or their official title or titles, or to a municipal corporation, it must be served, upon each officer or other person, to whom it is so directed, or upon the corporation, in the same manner as a summons in an action brought in the supreme court, except as prescribed in the next two subdivisions of this section.

2. Where it is directed to a court, or to the judges of a court, having a clerk appointed pursuant to law, service upon the court, or the judges thereof, may be made by filing the writ with the clerk.

3. Where it is to be served upon any other board or body, or upon the members thereof, it may be served as prescribed in section 2071 of this act, for service, upon a like board or body, of an alternative writ of mandamus.

§ 2131. **Stay of proceedings.** Except as prescribed in this section, a writ of certiorari does not stay the execution of the determination to be reviewed, or affect the power of the body or officer, to which or to whom it is addressed. The court, which grants the writ, may, in its discretion, and upon such terms, as to security or otherwise, as justice requires, direct, by a clause in the writ, or by a separate order, that the execution of the determination be stayed, pending the certiorari, and until the further direction of the court. A bond, undertaking, or other security, given to procure such a stay, is valid and effectual, according to its terms, in favor of a person beneficially interested in upholding the determination to be reviewed, who is admitted as a party to the special proceeding, as prescribed in section 2137 of this act.

§ 2132. **When and where writ returnable.** A writ of certiorari must be made returnable, within twenty days after the service thereof, at the office of the clerk of the court. If it was issued from the supreme court, it must be made returnable at the office of the clerk of the county, designated therein, wherein the determination to be reviewed was made; and, if the county, designated in the writ, is not the proper county, the court, upon motion, may amend the writ accordingly. Thereupon all papers on file must be transferred to the clerk of the county, where the writ is made returnable by the amendment.

§ 2133. **Subsequent proceedings as in an action.** After a writ of certiorari has been issued, the time to make a return thereto may be enlarged, or any other order may be made, or proceeding taken, in the cause, in relation to any matter not provided for in this article, as a similar proceeding may be taken in an action, brought in the same court, and triable in the county where the writ is returnable.

§ 2134. **Return; when and how made.** The clerk, with whom a writ of certiorari is filed, and each person, upon whom a writ of certiorari is served, as prescribed in section 2130 of this act, must make and annex to the writ, or to the copy thereof served upon him, a return, with a transcript annexed, and certified by him, of the record or proceedings, and a statement of the other matters, specified in and required by the writ. The return must be filed in the office where the writ is returnable, according to the command thereof.

§ 2135. **Id.; how compelled; fees for making.** If a return is defective, the court may direct a further return. An omission to make a return, as required

by a writ of certiorari, or by an order for a further return, may be punished, as a contempt of the court. But a judge or clerk shall not be thus punished, unless the relator, before the time when the return is required, pays him, for his return, the sum of two dollars, and, in addition, ten cents for each folio of the copies of papers required to be returned.

§ 2136. **Id.; after term of office expired.** A writ of certiorari may be issued to, and a return to a writ of certiorari may be made by, an officer, whose term of office has expired. Such an officer may be punished for a failure to make a return to the writ, as required thereby; or to make a further return, as required by an order for that purpose.

§ 2137. **When third person may be brought in.** Upon the application of a person, specially and beneficially interested in upholding or annulling the determination to be reviewed, the court may, in its discretion, admit him as a party in the special proceedings, upon such terms as justice requires. And a term of the appellate division of the supreme court, at which the cause is noticed for hearing, and is placed upon the calendar, may, in a proper case, direct that notice of the pendency of the special proceeding be given to any person, in such a manner as it thinks proper; and may suspend the hearing until notice is given accordingly.

§ 2138. **Hearing upon return.** The cause must be heard at a term of the appellate division of the supreme court, held within the judicial department, embracing the county where the writ was returnable. Either party may notice it for hearing, at any time after the return is complete. Except as prescribed in the next section, it must be heard upon the writ and return, and the papers upon which the writ was granted.

§ 2139. **Id.; upon affidavits.** If the officer or other person, whose duty it is to make a return, dies, absconds, removes from the State, or becomes insane, after the writ is issued, and before making a return, or after making an insufficient return; and it appears that there is no other officer or person, from whom a sufficient return can be procured by means of a new certiorari, the court may, in its discretion, permit affidavits, or other written proofs, relating to the matters not sufficiently returned, to be produced, and may hear the cause accordingly. The court may also, in its discretion, permit either party to produce affidavits, or other written proofs, relating to any alleged error of fact, or any other question of fact, which is essential to the jurisdiction of the body or officer, to make the determination to be reviewed, where the facts, in relation thereto, are not sufficiently stated in the return, and the court is satisfied that they cannot be made to appear, by means of an order for a further return.

§ 2140. **Questions to be determined.** The questions, involving the merits, to be determined by the court upon the hearing, are the following, only:

1. Whether the body or officer had jurisdiction of the subject-matter of the determination under review.
2. Whether the authority, conferred upon the body or officer, in relation to that subject-matter, has been pursued in the mode required by law, in order to authorize it or him to make the determination.
3. Whether, in making the determination, any rule of law, affecting the rights of the parties thereto, has been violated, to the prejudice of the relator.
4. Whether there was any competent proof of all the facts, necessary to be proved, in order to authorize the making of the determination.
5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence of any of those facts, that the verdict of a jury, affirming the existence thereof, rendered in an action in the supreme court, triable by a jury, would be set aside by the court, as against the weight of evidence.

§ 2141. **Final order upon the hearing.** The court, upon the hearing, may make a final order, annulling or confirming, wholly or partly, or modifying, the determination reviewed, as to any or all of the parties.

§ 2142. **Restitution may be awarded.** Where the determination reviewed is annulled or modified, the court may order and enforce restitution, in like manner, with like effect and subject to the same conditions, as where a judgment is reversed upon appeal.

§ 2143. **Costs.** Costs, not exceeding fifty dollars and disbursements, may be awarded by the final order, in favor of or against either party, in the discretion of the court.

§ 2144. **Entry and enrollment of final order.** The final order of the court upon the certiorari must be entered in the office of the clerk where the writ was returnable. But before it can be enforced, an enrollment thereof must be filed. For that purpose, the clerk must attach together, and file in his office, the papers upon which the cause was heard; a certified copy of the final order; and a certified copy of each order, which in any way involves the merits, or necessarily affects the final order.

§ 2145. **Effect thereof.** The filing of the enrollment in the office of the clerk where the final order is entered, as prescribed in the last section, is a sufficient authority for any proceeding, by or before the body which, or the officer who, made the determination reviewed, which the final order of the court directs or permits. But where the execution of the final order is stayed by an appeal to the court of appeals, the proceedings below are stayed in like manner.

§ 2146. **"Body or officer;" "determination;" what they include.** The expression, "body or officer," as used in this article, includes every court, tribunal, board, corporation, or other person, or aggregation of persons, whose determination may be reviewed by a writ of certiorari; and the word, "determination," as used in this article, includes every judgment, order, decision, adjudication, or other act of such body or officer, which is subject to be so reviewed.

§ 2147. **Application of this article to certain special cases.** Where the right to a writ of certiorari is expressly conferred, or the issuing thereof is expressly authorized, by a statute, passed before, and remaining in force after, this article takes effect, this article does not vary, or affect in any manner, any provision of the former statute, which expressly prescribes a different regulation, with respect to any of the proceedings upon the certiorari to be issued thereunder.

§ 2148. **Id.; to civil cases only.** This article is not applicable to a writ of certiorari, brought to review a determination made in any criminal matter, except a criminal contempt of court.

§ 2148a. **Substitution by amendment of remedy by mandamus for that by certiorari and vice versa.** Whenever a writ of certiorari shall be applied for or granted under this article, and it shall appear at any stage of the proceedings, or upon appeal, that the appropriate remedy upon the facts pleaded or proved is mandamus, the proceedings may be amended upon such terms as may be just, and may be continued and determined by the court and at the term where then pending, or remitted to the proper term or court to be disposed of, in order that the relief may be finally granted which is appropriate to the facts, to the same extent as if the application had been in the first instance for a writ of mandamus under article four of this title; and likewise, if a writ of mandamus is applied for or issued under article four of this title, and it shall appear, at any stage of the proceedings, or upon appeal, that certiorari under this article is the appropriate remedy, the proceedings may be amended accordingly upon such terms as are just, and continued and determined by the court and at the term where then pending, or be remitted to the proper term or court to be disposed of; and such relief may be finally ordered as might

have been granted if such writ of certiorari had been issued or applied for in the first instance. And in either case, the court may correct by amendment all defects and irregularities in matters of form, or procedure, and may bring in all parties necessary to completely determine the matter and award the appropriate relief upon the facts established.

§ 2240. **Precept; how served.** The precept must be served as follows:

1. By delivering, to the person to whom it is directed, or, if it is directed to a corporation, to an officer of the corporation, upon whom a summons, issued out of the supreme court, in an action against the corporation, might be served, a copy of the precept, together with a copy of the petition, and at the same time showing him the original precept.

2. If the person, to whom the precept is directed, resides in the city or town in which the property is situated, but is absent from his dwelling-house, service may be made by delivering a copy thereof, together with a copy of the petition, at his dwelling-house, to a person of suitable age and discretion, who resides there; or, if no such person can with reasonable diligence, be found there, upon whom to make service, then by delivering a copy of the precept and petition, at the property sought to be recovered, either to some person of suitable age and discretion residing there, or if no such person can be found there, to any person of suitable age and discretion employed there.

3. Where service cannot, with reasonable diligence, be made, as prescribed in either of the foregoing subdivisions of this section, by affixing a copy of the precept and petition upon a conspicuous part of the property.

If the precept is returnable on the day on which it is issued, it must be served at least two hours before the hour at which it is returnable; in every other case, it must be served at least two days before the day on which it is returnable.

§ 2284. **Amount of fine.** If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section.

§ 2389. **Notice of sale; how served.** Service of notice of the sale, as prescribed in subdivision fourth of the last section, must be made as follows:

1. Upon the mortgagor, his wife, widow, executor, or administrator, or a subsequent grantee of the property, whose conveyance is upon record, or his wife or widow; by delivering a copy of the notice, as prescribed in article first of title first of chapter fifth of this act, for delivery of a copy of a summons, in order to make personal service thereof upon the person to be served; or by leaving such a copy, addressed to the person to be served, at his dwelling-house, with a person of suitable age and discretion, at least fourteen days before the day of sale. If said mortgagor is a foreign corporation, or being a natural person, he, or his wife, widow, executor or administrator, or a subsequent grantee, of the property whose conveyance is upon record, or his wife or widow, is not a resident of or within the State, then service thereof may be made upon them in like manner without the State, at least twenty-eight days prior to the day of sale.

2. Upon any other person, either in the same method, or by depositing a copy of the notice in the post-office, properly inclosed in a postpaid wrapper, directed to the person to be served, at his place of residence, at least twenty-eight days before the day of sale.

§ 2419. See Gen. Corp. L., § 170, *infra*.

§ 2423. See Gen. Corp. L., §§ 176, 178, 181, 182, 184, *infra*.

§ 2429. See Gen. Corp. L., §§ 191, 192, 194, *infra*.

§ 2441. **Order to examine person having property, etc., of judgment debtor.** Upon proof, by affidavit, or other competent written evidence, to the satisfaction of the judge, that an execution against property has been issued, as prescribed in section 2458 of this act, and either that it has been returned wholly or partly unsatisfied, or that it has not been returned; and also that any person or corporation has personal property of the judgment debtor, exceeding ten dollars in value, or is indebted to him in a sum exceeding ten dollars; the judgment creditor is entitled to an order, requiring that person or corporation to attend and be examined concerning the debt, or other property, at a time and place, specified in the order. The judge may, in his discretion, require notice of the subsequent proceedings to be given to the judgment debtor, in such a manner as he deems just. But a receiver shall not be appointed without such a notice; except as otherwise prescribed in article second of this title.

§ 2444. **Proceedings upon examination; adjournment.** Upon an examination under this article, each answer of a party or witness examined must be under oath. A corporation must attend by, and answer under the oath of, an officer thereof; and the judge may, in his discretion, specify the officer. Either party may be examined as a witness, in his own behalf, and may produce and examine other witnesses, as upon the trial of an action. The judge or referee may adjourn any proceedings, under this article, from time to time, as he thinks proper.

§ 2446. **Order permitting person indebted to pay debt to sheriff.** At any time after the commencement of a special proceeding, authorized by this article, and before the appointment of a receiver therein, or the extension of a receivership thereto, the judge, by whom the order or warrant was granted, or to whom it is returnable, may, in his discretion, upon proof, by affidavit, to his satisfaction, that a person or corporation is indebted to the judgment debtor, and upon such a notice, given to such persons, as he deems just, or without notice, make an order, permitting the person or corporation, to pay to a sheriff, designated in the order, a sum, on account of the alleged indebtedness, not exceeding the sum which will satisfy the execution. A payment thus made is, to the extent thereof, a discharge of the indebtedness, except as against a transferee from the judgment debtor, in good faith and for a valuable consideration, of whose rights the person or corporation had actual or constructive notice, when the payment was made.

§ 2447. **Order requiring delivery of money or property to sheriff or receiver.** Where it appears, from the examination or testimony taken in a special proceeding authorized by this article, that the judgment debtor has, in his possession or under his control, money or other personal property, belonging to him; or that one or more articles of personal property, capable of delivery, his right to the possession whereof is not substantially disputed are in the possession or under the control of another person; the judge, by whom the order or warrant was granted, or to whom it is returnable, may, in his discretion, and upon such a notice, given to such persons, as he deems just, or without notice, make an order, directing the judgment debtor, or other person, immediately to pay the money, or deliver the articles of personal property, to a sheriff, designated in the order, unless a receiver has been appointed, or a receivership has been extended to the special proceeding, and in that case to the receiver.

§ 2452. **Mode of service of certain orders.** An injunction order, or an order requiring a person to attend and be examined, made as prescribed in this article, must be served as follows:

1. The original order, under the hand of the judge making it, must be exhibited to the person to be served.
2. A copy thereof, and of the affidavit upon which it was made, must be delivered to him.

Service upon a corporation is sufficient, if made upon an officer, to whom a copy of a summons must be delivered, where a summons is personally served upon the corporation; unless the officer is specially designated by the judge, as prescribed in section 2444 of this act.

§ 2458. **Upon what judgment and to what county the execution must have issued.** In order to entitle a judgment-creditor to maintain either of the special proceedings authorized by this article, the judgment must have been rendered upon the judgment debtor's appearance or personal service of the summons upon him, for a sum not less than twenty-five dollars or substituted service of the summons upon him in accordance with section 436 of the code of civil procedure; and the execution must have been issued out of a court of record; and either:

1. To the sheriff of the county where the judgment debtor has, at the time of the commencement of the special proceedings, a place for the regular transaction of business in person; or,
2. If the judgment debtor is then a resident of the state, to the sheriff of the county where he resides; or,
3. If he is not then a resident of the state, to the sheriff of the county where the judgment-roll is filed unless the execution was issued out of a court other than that in which the judgment was rendered, and, in that case, to the sheriff of the county where the transcript of the judgment is filed.

§ 2459. **In what county judgment debtor, his bailee, etc., must attend.** If the judgment debtor, or other person, required to attend and be examined, as prescribed in this article, or the officer of a corporation, required to attend in its behalf, is, at the time of the service of the order upon him, a resident of the State, or then has an office, within the State, for the regular transaction of business in person, he cannot be compelled to attend, pursuant to the order, or to any adjournment, at a place without the county wherein his residence or place of business is situated.

§ 2463. **Cases where this chapter is not applicable; what property cannot be reached.** This article does not authorize the seizure of, or other interference with, any property, which is expressly exempt by law from levy and sale by virtue of an execution; or any money, thing in action, or other property, held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from a person, other than the judgment debtor; or the earnings of the judgment debtor for his personal services, rendered within sixty days, next before the institution of the special proceeding; when it is made to appear, by his oath or otherwise, that those earnings are necessary for the use of a family, wholly or partly supported by his labor.

§ 2517. **Jurisdiction, how affected by locality of debts.** For the purpose of conferring jurisdiction upon a surrogate's court, a debt owing to a decedent by a resident of the state is regarded as personal property situated within the county where the debtor, or either of two or more joint debtors, resides; and a debt owing to him by a domestic corporation is regarded as personal property situated within the county where the principal office of the corporation is situated. But the foregoing provision does not apply to a debt evidenced by a bond, promissory note, or other instrument for the payment of money only, in terms negotiable, or payable to the bearer or holder. Such a debt, whether the debtor

is a resident or a non-resident of the state, or a foreign or a domestic government, state, county, public officer, association, or corporation is, for the purpose of so conferring jurisdiction, regarded as personal property at the place where the bond, note or other instrument is, either within or without the state.

§ 2525. **Citation; how served within state.** Personal service of a citation within the state shall be made as follows:

Upon an adult person, or upon an infant of the age of fourteen years or upwards, by delivering a copy thereof to the person to be served.

Upon an infant under the age of fourteen years, by delivering a copy thereof to the infant in person, and to his father, mother or guardian; or if there be none within the state, or if the infant does not reside with a parent, to the person having the care and control of him, or with whom he resides, or in whose service he is employed.

Upon a person judicially declared to be incompetent to manage his affairs by reason of lunacy, idiocy, or habitual drunkenness, or upon a corporation by delivering a copy thereof in the manner prescribed for personal service of a summons upon such a person, or upon a corporation in article first of title first of chapter fifth of this act. Upon a public officer by delivering a copy thereof to such officer, or to one of his duly constituted deputies.

Where it appears, by affidavit, to the satisfaction of the surrogate from whose court a citation is issued, that proper and diligent effort has been made to serve it as hereinbefore prescribed in this section upon a resident of the state whose place of residence or place of business is known, and that the person to be served cannot be found at his residence or place of business, and cannot be elsewhere served within the state within a reasonable time, or, if found, that he evades service, so that it cannot be made; the surrogate may make an order directing that service thereof be made, as prescribed in section 436 of this act; and the provisions of that section and of section 437 of this act, relating to the service of a summons, apply to the service of a citation, pursuant to an order made as prescribed in this section.

Where it is necessary in any special proceeding to cite known creditors, and it appears that the number of creditors or persons claiming to be creditors, residing within the state of New York, upon whom citation is required to be served, exceeds fifty, service thereof may be made upon them by publication thereof in such newspaper or newspapers and for such a length of time as shall be fixed by the surrogate, and by the mailing of a copy of such citation to each of them by deposit of a copy thereof in the post-office, properly enclosed in a postpaid sealed wrapper addressed to each of them at his last known post-office address as stated in the order, at least twenty days prior to the return day thereof.

§ 2526. **Service personally without the state, or by publication; when ordered.** The surrogate from whose court a citation is issued may make an order directing the service thereof personally without the state, or by publication, in either of the following cases:

1. Where it is to be served upon a foreign corporation, or upon a person who is not a resident of the state.

2. Where the person to be served is a resident of the state, and substituted service upon him cannot be authorized as provided in section 2525 of this chapter.

3. Where it is to be served upon a party, or a person required to be made a party, whose name, or residence, cannot be ascertained.

4. Where it is to be served upon one or more unknown creditors, next of kin, heirs, legatees or other persons, either individually or included in a class, to whom a citation has been directed, designating them by a general description, as prescribed in this chapter.

· § 2588 **Who entitled to letters of administration.** Administration in case of intestacy must be granted to the persons entitled to take or share in the per-

sonal property, who are competent and will accept the same, in the following order:

1. To the surviving husband or wife.
2. To the children.
3. To the grandchildren.
4. To the father.
5. To the mother.
6. To the brothers.
7. To the sisters.

8. To any other next of kin entitled to share in the distribution of the estate, preference being given to the person entitled to take the largest share in the estate, except as hereinafter provided.

If a person entitled to take all the personal estate is an infant, or an incompetent, or has died, his guardian, committee or legal representative, as the case may be, shall have a prior right to letters in his place and stead.

If all the persons entitled to take the personal estate are infants, or adjudged incompetents, or, if no adult or competent person entitled to take or share in the estate will accept the same, letters may be granted to the general guardian of an infant or to the committee of an incompetent, in the place of such infant or incompetent.

If no person entitled to take or share in the estate will accept the same or an appointment is not made by consent as hereinafter provided, then administration shall be granted as follows:

a. To the public administrator.

b. To the county treasurer of the county, or to the petitioner, in the discretion of the surrogate.

c. To any other person or persons.

If several persons have an equal right to administration, they must be preferred in the following order: First, men to women; second, relatives of the whole blood to those of the half blood; third, unmarried women to married. If there are several persons equally entitled to administration, the surrogate may grant letters to one or more of such persons. Administration may be granted to one or more competent persons, jointly with, and upon the application of, a person entitled; or to a competent person or persons not entitled, upon the consent of all of the persons entitled to take or share in the estate who are within this state and competent, which consent must be in writing, and filed in the office of the surrogate. For the purposes of this section a trust company or other corporation authorized to act as administrator shall be included in the word "person."

§ 2603. **Letters of administration with will annexed; when and to whom granted.** If no person is named as executor in the will, or selected by virtue of a power contained therein; or if, at any time there is no executor, or administrator with the will annexed, qualified to act; the surrogate must, upon the application of a creditor of the decedent, or a person interested in the estate of the decedent, or having a lien upon any real property upon which the decedent's estate has a lien, and upon such notice to the other creditors and persons interested in the estate as the surrogate deems proper, issue letters of administration with the will annexed, as follows:

1. To an executor or administrator of a sole legatee and devisee named in a will or to the executor or administrator of a sole residuary legatee and devisee named in a will.

2. To one or more of the residuary legatees, who are qualified to act as administrators. A corporation which is a residuary legatee shall be qualified to act as such administrator, although not specially authorized by its charter or any provision of law.

3. If there is no such residuary legatee or none who will accept, then to one or more of the principal or specified legatees so qualified.

4. If there is no such legatee or none who will accept, then to the husband, or wife, or to one or more of the next of kin, or to one or more of the heirs or devisees, so qualified.

If any of the above persons who would otherwise be entitled to letters is an infant or an adjudged incompetent, administration may be granted to his guardian or committee as the case may be, unless there is an adult or competent person equally entitled who will accept the same.

5. If there is no qualified person, entitled under the foregoing subdivisions, who will accept, then to the public administrator, and if there be none for the county, to the treasurer of the county or to the petitioner in the discretion of the surrogate, and if neither will accept, to any creditor or competent person designated by the surrogate.

Except as to the right of priority as provided in this section, the provisions of section 2588 of this chapter apply to an application for letters of administration with the will annexed.

§ 2865. **Actions by and against officers, etc.; and by executors, etc.** An action, cognizable by a justice of the peace, may be brought by or against a corporation; by or against a natural person in his own right; by or against a town or county officer in his official character; or by an executor or administrator, trustee of an express trust, or a receiver in supplementary proceedings.

§ 2879. **Service of summons upon a corporation.** Where the defendant to be served is a corporation, or person, company or partnership doing business in another county than that in which he or it resides, the summons may be personally served upon it or him by delivering a copy thereof to an officer, managing agent or person to whom a copy of the summons in an action brought against the corporation in the supreme court might be delivered as prescribed in sections 431 and 432 of this act, or, to any director, managing agent or trustee of the corporation, person, partnership or company by whatever official title he or it is called.

§ 2906. **What must be shown to procure a warrant.** To entitle the plaintiff to such a warrant, he must show, by affidavit, to the satisfaction of the justice as follows:

1. That a sufficient cause of action exists against the defendant, to recover damages for one or more of the causes specified in the last section. If the action is upon a judgment, or to recover for breach of a contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him.

2. That the defendant is either a foreign corporation; or not a resident of the State; or, if the defendant is a natural person, and a resident of the State, that he has departed, or is about to depart, from the county where he last resided, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed, with the like intent; or if the defendant is a natural person, or a domestic corporation, that he or it has removed, or is about to remove, property from the county where the defendant, being a natural person, last resided, or, being a corporation, last kept its principal office, or from the county in which the action is brought, with intent to defraud his or its creditors, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property, with the like intent; or that the defendant, being a natural person of full age, and a resident of the State, has been continuously without the United States for the space of six months or more, immediately before the application, and either that he has not made a designation of a person, upon whom to serve a summons in his behalf, as prescribed in section 430 of this act, or that service upon the person so designated cannot

be made, with due diligence, in the county where the person making the designation resides. The affidavit must be filed with the justice, when the warrant is granted.

§ 3169. **Proof necessary to obtain warrant of attachment.** In order to entitle the plaintiff to a warrant of attachment against property, he must show by affidavit, to the satisfaction of the justice granting it, that a sufficient cause of action exists against the defendant, to recover damages for one or more causes specified in section 635 of this act, to an amount stated in the affidavit, which, if the action is to recover damages for breach of contract, must be stated over and above all counterclaims known to the plaintiff; and also that the case is within one of the following subdivisions:

1. That the defendant is a foreign corporation, or being a natural person is not a resident of the State.

2. That the defendant, being an adult and a resident of the borough of Manhattan in the city of New York, has departed from the State, with intent to defraud his creditors, or to avoid service of the summons, or keeps himself concealed therein, with like intent; or that, after proper and diligent effort to ascertain the place of the sojourn of such a resident adult defendant, the same cannot be ascertained.

3. That the defendant, being an adult, has removed, or is about to remove, property from the State, with intent to defraud his creditors, or that he has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete property with the like intent.

4. That the defendant, being an adult and a resident of that borough has been continuously without the United States more than six months next before the granting of the warrant, and has not made a designation of a person upon whom to serve a summons in his behalf, as prescribed in section 430 of this act; or a designation so made no longer remains in force.

§ 3170. **Service of summons without the city, or by publication.** An order, directing the service of a summons, either without the city of New-York, or by publication, may be granted by the court, or by a justice thereof; but only in a case, where a warrant of attachment has been issued, as prescribed in the last section, and personal service of the summons cannot be made, with due diligence, within that city. The plaintiff, when he applies for such an order, must show by affidavit, to the satisfaction of the court or justice, that the case is within this section. Where an order is granted, as prescribed in this section, service of the summons without that city may be made, as directed in the order, either within or without the State. Sections 440 to 445, both inclusive, and sections 638, 707, and 708 of this act apply to the service or publication, pursuant to such an order, and to the proceedings relating to the same, and subsequent thereto; substituting the words, "the city of New-York", in place of the words, "the State", wherever the latter words occur. If the defendant is a resident of the city of New-York, the order must also direct that a copy of the summons, complaint, and order be left at his residence, specifying it, with a person of suitable age and discretion, if, upon reasonable application, admittance can be obtained, and such a person found who will receive it; or, if admittance cannot be so obtained, nor such a person found, by affixing the same to the outer door of the residence so specified.

§ 3203. **Jurisdiction in civil actions.** The jurisdiction of the city court of Yonkers extends to the following civil actions only:

1. An action against a natural person, or against a foreign or domestic corporation, wherein the complaint demands judgment for a sum of money only, or to recover one or more chattels, with or without damages for the taking, withholding, or detention thereof,

2. An action to foreclose or enforce a lien, upon real property in the city

of Yonkers, created, as prescribed by statute, in favor of a person who has performed labor, or furnished materials to be used, in erecting, altering, or repairing a building, building lot, or appurtenance thereto, including fences, sidewalks, paving, well, fountains, fish-ponds, ornamental and fruit trees, and every other improvement to a building or building lot.

3. An action to foreclose or enforce a lien, for a sum not exceeding one thousand dollars, exclusive of interest, upon one or more chattels.

§ 3242. **Costs where action brought by people, on relation of private person.** Where an action is brought, in the name of the people of the State, upon the relation of a private corporation or individual, as prescribed in section 1986 of this act, a judgment, awarding costs to the defendant, must award them, against the relator, in the first instance; and against the people, only in case an execution, issued thereupon against the property of the relator, is returned unsatisfied.

§ 3268. **When defendant may require security for costs.** The defendant, in an action brought in a court of record, may require security for costs to be given, as prescribed in this title, where the plaintiff was, when the action was commenced, either

1. A person residing without the state; or, if the action is brought in a county court, except in the counties of Albany, Kings, Queens, Rensselaer and Richmond, or in the city court of the city of New York, the city court of Yonkers, or the city court of Albany, residing without the city or county, as the case may be, wherein the court is located; or

2. A foreign corporation; or

3. A person imprisoned under execution for a crime; or

4. The official assignee of a person so imprisoned; the official assignee or official trustee of a debtor; or an assignee in bankruptcy; where the action is brought upon a cause of action, arising before the assignment, the appointment of the trustee, or the adjudication in bankruptcy.,

§ 3270. **The last two sections qualified.** In a case specified in either of the last two sections, if there are two or more plaintiffs, the defendant cannot require security for costs to be given, unless he is entitled to require it of all the plaintiffs.

§ 3304. **Fees of county clerks generally.** A county clerk is entitled, for the services specified in this section, except where another fee is allowed therefor by special statutory provision, to the following fees, to be paid in advance:

For searching and certifying the title to, and incumbrances upon real property, for each year for which the search is made, for each name, and each kind of conveyance or lien, five cents.

For a copy of an order, record, or other paper, entered or filed in his office, eight cents for each folio.

For filing a transcript, and making an entry as prescribed in section 1258 of this act, twelve cents.

For issuing an execution upon a judgment, a transcript whereof, or of the docket of which, has been filed in his office, fifty cents, to be paid by the party at whose request the execution is issued, and to be collected by the sheriff in addition to the sum due upon the judgment.

For recording and indexing a notice of the pendency of an action, filed in his office, ten cents for each folio contained in the notice.

For cancelling such a notice, or a notice filed in his office, as prescribed in section 649 of this act, twenty-five cents.

For recording any instrument, which must or may legally be recorded by him, ten cents for each folio.

For filing a certificate of satisfaction, or other satisfaction-piece of a mortgage, and entering the satisfaction, twenty-five cents.

For affixing and indexing a notice of foreclosure of a mortgage, as prescribed in section 2390 of this act, twenty-five cents.

For entering a minute that a mortgage has been foreclosed, ten cents.

For filing and entering a satisfaction of an assignment of a judgment, twelve cents.

For filing and entering the bond of a collector or other officer authorized to receive taxes, twelve cents.

For searching for such a bond, six cents.

For entering satisfaction thereof, twelve cents.

For sealing any paper, when required, twelve cents.

For filing and docketing notice of a mechanic's lien, ten cents.

For filing and entering specifications and all other papers relating to a lien against a vessel, twenty-five cents.

For filing any paper required by law to be filed in his office, other than as expressly provided for in this section, six cents.

For filing any paper deposited with him for safe keeping, six cents; and for searching for such a paper, when required, three cents for each paper necessarily opened and examined.

For a certificate, other than that a paper, for the copying of which he is entitled to a fee, is a copy, twenty-five cents.

For inquiring into, determining, and certifying the sufficiency of the sureties of a sheriff, fifty cents.

For attending upon the canvassing of votes, given at an election, two dollars.

For drawing the necessary certificates of the result of the canvass, eighteen cents for each folio; and for the necessary copies thereof, nine cents for each folio.

For notifying the governor that any person has taken an oath of office, ten cents and the necessary postage.

For notifying the governor that any person has neglected to take an oath of office, or to file or renew any security, within the time prescribed by law, or of a vacancy in an office in his county, ten cents and the necessary postage.

For notifying any person of his appointment to office, twenty-five cents, and the expenses, actually and necessarily incurred in giving the notice, which the comptroller deems reasonable.

For entering, in the minutes of the county court, a license to keep a ferry, and for a copy thereof, one dollar.

For taking and entering a recognizance, from any person authorized to keep a ferry, twenty-five cents.

But a county clerk is not entitled to any fee, under this section, for a copy of, or for filing or certifying, any paper, in a civil action or special proceeding, in court of which he is ex-officio clerk.

§ 3305a. **Fees for certifying prepared copies.** Whenever there shall be presented to any public officer for certification or exemplification, a previously prepared legibly typewritten or printed copy of any document, paper, book or record in such officer's custody, the fees in such case, for certification or exemplification, shall be at the rate of three cents for each folio; but the minimum total charge for certification or exemplification in all cases shall be twenty-five cents.

§ 3320. **Receiver's commissions; cost of bonds; trustee's commissions.** A receiver, except as otherwise specially prescribed by statute, is entitled, in addition to his necessary expenses, to such commissions, not exceeding five per centum upon the sums received and disbursed by him, as the court by which, or the judge by whom, he is appointed allows. But if in any case the commissions of a temporary or permanent receiver, so computed, shall not amount to one hundred dollars, said court or judge may in its or his discretion, allow

said receiver such a sum, not exceeding one hundred dollars, for his commissions as shall be commensurate with the services rendered by said receiver. Any receiver, assignee, guardian, trustee, committee, executor, administrator or person appointed under section 111 of the Real Property law or under section 20 of the Personal Property law required by law to give a bond as such may include, as a part of his necessary expenses, such reasonable sum, not exceeding one per centum per annum upon the amount of such bond paid his surety thereon, as such court or judge allows. Except as otherwise prescribed in regard to a testamentary trustee, a trustee of an express trust is entitled, and two or more trustees of such a trust are entitled, to be apportioned between or among them according to the services rendered by them respectively, as compensation for services as such, over and above expenses, to commissions as follows: For receiving and paying out all sums of principal not exceeding one thousand dollars, at the rate of five per centum. For receiving and paying out any additional sums of principal not exceeding ten thousand dollars, at the rate of two and one-half per centum. For receiving and paying out all sums of principal above eleven thousand dollars, at the rate of one per centum. And for receiving and paying out income in each year, at the like rates. In all cases a just and reasonable allowance must be made for the necessary expenses actually paid by such trustee or trustees. If the value of the principal of the trust estate or fund equals or exceeds one hundred thousand dollars, each such trustee is entitled to the full commission on principal, and on income for each year, to which a sole trustee is entitled, unless the trustees are more than three, in which case three full commissions at the rates aforesaid must be apportioned between or among them according to the services rendered by them respectively. If the instrument creating the trust provides specific compensation for the services of the trustee or trustees, no other compensation for such services shall be allowed unless the trustee or trustees shall, before receiving any compensation for such services, by a written instrument duly acknowledged, renounce such specific compensation.

§ 3343. **Miscellaneous general definitions and rules of construction.** In construing this act, the following rules must be observed, except where a contrary intent is expressly declared in the provision to be construed, or plainly apparent from the context thereof:

2. The word, "mandate," includes a writ, process, or other written direction issued pursuant to law, out of a court, or made pursuant to law, by a court, or a judge, or a person acting as a judicial officer, and commanding a court, board, or other body, or an officer, or other person, named or otherwise designated therein, to do, or to refrain from doing, an act therein specified.

3. The word, "judge", includes a justice, surrogate, recorder, justice of the peace, or other judicial officer, authorized or required to act, or prohibited from acting, in or with respect to the matter or thing referred to in the provision wherein that word is used.

4. The word, "clerk", signifies the clerk of the court, wherein the action or special proceeding is brought, or wherein, or by whose authority, the act is to be done, which is referred to in the provision in which it is used. If the action or special proceeding is brought, or the act is to be done, in or by the authority of the supreme court, it signifies the clerk of the county wherein the action or special proceeding is triable, or the act is to be done.

5. The word, "report", when used in connection with a trial, or other inquiry, or a judgment, means a referees's report; and the word, "decision", when used in the same connection, means the decision of the court upon a hearing, or the trial of an issue, before the court, without a jury.

9. A "personal injury" includes libel, slander, criminal conversation, seduction, and malicious prosecution; also and assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff, or of another.

10. An "injury to property" is an actionable act, whereby the estate of another is lessened, other than a personal injury, or the breach of a contract.

11. The word, "affidavit," includes a verified pleading in an action, or a verified petition or answer in a special proceeding.

12. A warrant of attachment against property is said to be "annulled", when the action, in which it was granted, abates or is discontinued; or a final judgment, rendered therein in favor of the plaintiff is fully paid; or a final judgment is rendered therein in favor of the defendant. But, in the case last specified, a stay of proceedings suspends the effect of the annulment, and the reversal or vacating of the judgment revives the warrant.

13. The term, "judgment creditor", signifies the person who is entitled to collect, or otherwise enforce, in his own right, a judgment for a sum of money, or directing the payment of a sum of money.

14. A "judgment creditor's action" is an action brought as prescribed in article first of title fourth of chapter fifteenth of this act, or any other action, brought by a judgment creditor to aid the collection of a judgment for a sum of money, or directing the payment of a sum of money.

16. A "distinct parcel" of real property is a part of the property which is or may be set off by boundary lines, as distinguished from an undivided share or interest therein

18. A "domestic corporation" is a corporation created by or under the laws of the State; or located in the State, and created by or under the laws of the United States, or by or pursuant to the laws, in force in the colony of New-York, before the 19th day of April, in the year 1775. Every other corporation is a "foreign corporation".

19. The terms, "trial juror", and "trial jury", are respectively equivalent to the terms, "petit juror", and "petit jury", as used in the constitution and laws of the State. The word, "notify", as used, with respect to procuring the attendance of a juror, is equivalent to the word, "summon", as used in the like connection, in the same constitution and laws.

20. The word, "action", refers to a civil action; the word "judgment", to a judgment in such an action; the term, "special proceeding", to a civil special proceeding; the word, "order", to an order made in such an action or special proceeding; the words, "an action of ejectment", to an action to recover the immediate possession of real property.

§ 3355. **When this act deemed to have been passed, etc.** For the purpose of determining the effect of the different provisions of this act with respect to each other, they are deemed to have been enacted simultaneously. For the purpose of determining the effect of this act, upon other acts, and the effect of other acts upon this act, chapters fourteen to twenty-two of this act, both inclusive, are deemed to have been enacted on the twelfth day of January, in the year 1880, and all acts passed after the last-mentioned date are to have the same effect as if they were passed after those chapters.

§ 3357. **Title.** This title shall be known as the condemnation law.

§ 3358. **Definitions.** The term "person," when used herein, includes a natural person and also a corporation, joint-stock association, the state and a political division thereof, and any commission, board, board of managers or trustees in charge or having control of any of the charitable or other institutions of the state; the term "real property," any right interest or easement therein or appurtenances thereto; and the term "owner," all persons having any estate, interest, or easement in the property to be taken, or any lien, charge or incumbrance thereon. The person instituting the proceedings shall be termed the plaintiff; and the person against whom the proceeding is brought, the defendant.

§ 3359. **Proceeding to be taken as prescribed in this title.** Whenever any person is authorized to acquire title to real property, for a public use by condemna-

tion proceeding for that purpose shall be taken in the manner prescribed in this title.

§ 3360. **Petition to be presented; contents thereof.** The proceeding shall be instituted by the presentation of a petition by the plaintiff to the supreme court, setting forth the following facts:

1. His name, place of residence, and the business in which engaged; if a corporation or joint-stock association, whether foreign or domestic, its principal place of business within the state, the names and places of residence of its principal officers, and of its directors, trustees or board of managers, as the case may be, and the object or purpose of its incorporation or association; if a political division of the state, the names and places of residence of its principal officers; and if the state, or any commission or board of managers or trustees in charge or having control of any of the charitable or other institutions of the state, the name, place of residence of the officer acting in its or their behalf in the proceedings.

2. A specific description of the property to be condemned, and its location, by metes and bounds, with reasonable certainty.

3. The public use for which the property is required and a concise statement of the facts showing the necessity of its acquisition for such use.

4. The names and places of residence of the owners of the property; if an infant, the name and place of residence of his general guardian, if he has one; if not, the name and place of residence of the person with whom he resides; if a lunatic, idiot, or habitual drunkard, the name and place of residence of his committee or trustee, if he has one; if not, the name and place of residence of the person with whom he resides. If a non-resident, having an agent or attorney residing in the state authorized to contract for the sale of the property, the name and place of residence of such agent or attorney; if the name or place of residence of any owner cannot after diligent inquiry be ascertained, it may be so stated with a specific statement of the extent of the inquiry which has been made.

5. That the plaintiff has been unable to agree with the owner of the property for its purchase, and the reason of such inability.

6. The value of the property to be condemned.

7. A statement that it is the intention of the plaintiff, in good faith, to complete the work or improvement, for which the property is to be condemned; and that all the preliminary steps required by law have been taken to entitle him to institute the proceeding.

8. A demand for relief, that it may be adjudged that the public use requires the condemnation of the real property described, and that the plaintiff is entitled to take and hold such property for the public use specified, upon making compensation therefor, and that commissioners of appraisal be appointed to ascertain the compensation to be made to the owners for the property so taken.

§ 3361. **Notice annexed to petition; when petition and notice served.** There must be annexed to the petition a notice of the time and place at which it will be presented to a special term of the supreme court, held in the judicial district where the property or some portion of it is situated, and a copy of the petition and notice must be served upon all the owners of the property at least eight days prior to its presentation.

§ 3362. **How petition and notice served.** Service of the petition and notice must be made in the same manner as the service of a summons in an action in the supreme court is required to be made, and all the provisions of articles one and two of title one of chapter five of this act, which relate to the service of a summons, either personally or in any other way, and the mode of proving service, shall apply to the service of the petition and notice. If the defendant has an agent or attorney residing in this state, authorized to contract for the sale of

the real property described in the petition, service upon such agent or attorney will be sufficient service upon such defendant. In case the defendant is an infant of the age of fourteen years or upwards, a copy of the petition and notice shall also be served upon his general guardian, if he has one; if not, upon the person with whom he resides.

§ 3363. **Appearance of infant, idiot, lunatic or habitual drunkard.** If a defendant is an infant, idiot, lunatic or habitual drunkard, it shall be the duty of his general guardian, committee or trustee, if he has one, to appear for him upon the presentation of the petition and attend to his interests, and in case he has none, or in case his general guardian, committee or trustee fails to appear for him, the court shall, upon the presentation of the petition and notice, with proof of service, without further notice, appoint a guardian ad litem for such defendant, whose duty it shall be to appear for him and attend to his interests in the proceeding, and if deemed necessary to protect his rights, the court may require a general guardian, committee or trustee, or a guardian ad litem to give security in such sum and with such sureties as the court may approve. If a service other than personal has been made upon any defendant, and he does not appear upon the presentation of the petition, the court shall appoint some competent attorney to appear for him and attend to his interests in the proceeding.

§ 3364. **Appearance of parties generally.** The provisions of law and of the rules and practice of the court, relating to the appearance of parties in person or by attorney in actions in the supreme court, shall apply to the proceeding from and after the service of the petition, and all subsequent orders, notices and papers may be served upon the attorney appearing and upon a guardian ad litem in the same manner and with the same effect as the service of papers in an action in the supreme court may be made.

§ 3365 **Answer; contents thereof.** Upon presentation of the petition and notice with proof of service thereof, an owner of the property may appear and interpose an answer, which must contain a general or specific denial of each material allegation of the petition controverted by him, or of any knowledge or information thereof sufficient to form a belief, or a statement of new matter constituting a defence to the proceeding.

§ 3366. **Verification of petition or answer.** A petition or answer must be verified, and the provisions of this act relating to the form and contents of the verification of pleadings in courts of record, and the persons by whom it may be made, shall apply to the verification.

§ 3367. **Trial; case; exceptions.** The court shall try any issue raised by the petition and answer at such time and place as it may direct, or it may order the same to be referred to a referee to hear and determine, and upon such trial the court or referee shall file a decision in writing, or deliver the same to the attorney for the prevailing party, within twenty days after the final submission of the proofs and allegations of the parties, and the provisions of this act relating to the form and contents of decisions upon the trial of issues of fact by the court or a referee, and to making and filing exceptions thereto, and the making and settlement of a case for the review thereof upon appeal, and to the proceedings which may be had, in case such decision is not filed or delivered within the time herein required, and to the powers of the court and referee upon such trial, shall be applicable to a trial and decision under this title.

§ 3368. **Certain provisions of code applicable.** The provisions of title one of chapter eight of this act shall also apply to proceedings had under this title.

§ 3369. **Judgment; costs to defendant; commissioners.** Judgment shall be entered pursuant to the direction of the court or referee in the decision filed. If in favor of the defendant, the petition shall be dismissed, with costs to be taxed by the clerk, at the same rates as are allowed, of course, to a defendant prevailing in an action in the supreme court, including the allowances for proceed-

ings before, and after notice of trial. If the decision is in favor of the plaintiff, or if no answer has been interposed and it appears from the petition that he is entitled to the relief demanded, judgment shall be entered, adjudging that the condemnation of the real property described is necessary for the public use, and that the plaintiff is entitled to take and hold the property for the public use specified, upon making compensation therefor, and the court shall thereupon appoint three disinterested and competent freeholders, residents of the judicial district embracing the county where the real property, or some part of it, is situated, or of some county adjoining such judicial district, commissioners to ascertain the compensation to be made to the owners for the property to be taken for the public use specified, and fix the time and place for the first meeting of the commissioners. Provided, however, that in any such proceeding instituted within the first or second judicial district, such commissioners shall be residents of the county where the real property, or some part of it, is situated, or of some adjoining county. If a trial has been had, at least eight days' notice of such appointment must be given to all the defendants who have appeared. The parties may waive, in writing, the provisions of this section as to the residence of the commissioners, and in that case they may be residents of any county in the State. Where owners of separate properties are joined in the same proceeding, or separate properties of the same owner are to be condemned, more than one set of commissioners may be appointed.

§ 3370. **Powers and duties of commissioners.** The commissioners shall take and subscribe the constitutional oath of office. Any of them may issue subpoenas and administer oaths to witnesses; a majority of them may adjourn the proceeding before them, from time to time in their discretion. Whenever they meet, except by appointment of the court or pursuant to adjournment, they shall cause at least eight days' notice of such meeting to be given to the defendants who have appeared, or their agents or attorneys. They shall view the premises described in the petition, and hear the proof and allegations of the parties, and reduce the testimony taken by them, if any, to writing, and after the testimony in each case is closed, they, or a majority of them, all being present, shall, without unnecessary delay ascertain and determine the compensation which ought justly to be made by the plaintiff to the owners of the property appraised by them; and, in fixing the amount of such compensation, they shall not make any allowance or deduction on account of any real or supposed benefits which the owners may derive from the public use for which the property is to be taken, or the construction of any proposed improvement connected with such public use. But in case the plaintiff is a railroad corporation and such real property shall belong to any other railroad corporation, the commissioners on fixing the amount of such compensation, shall fix the same at its fair value for railroad purposes. They shall make a report of their proceedings to the supreme court with the minutes of the testimony taken by them, if any; and they shall each be entitled to six dollars for services for every day they are actually engaged in the performance of their duties, and their necessary expenses, to be paid by the plaintiff; provided, that in proceedings within the counties of New York and Kings, such commissioners shall be entitled to such additional compensation not exceeding twenty-five dollars for every such day, as may be awarded by the court, and provided that in proceedings instituted by a village or any board thereof under this title such commissioners shall be entitled to such additional compensation, not exceeding five dollars for every such day, as may be awarded by the court.

§ 3371. **Confirmation or setting aside of report; deposit, when deemed a payment.** Upon filing the report of the commissioners, any party may move for its confirmation at a special term, held in the district where the property or some part of it is situated, upon notice to the other parties who have appeared, and upon such motion, the court may confirm the report, or may set it aside for

irregularity, or for error of law in the proceedings before the commissioners, or upon the ground that the award is excessive or insufficient. If the report is set aside, the court may direct a rehearing before the same commissioners, or may appoint new commissioners for that purpose, and the proceedings upon such rehearing shall be conducted in the manner prescribed for the original hearing, and the same proceedings shall be had for the confirmation of the second report, as are herein prescribed for the confirmation of the first report. If the report is confirmed, the court shall enter a final order in the proceeding, directing that compensation shall be made to the owners of the property, pursuant to the determination of the commissioners, and that upon payment of such compensation, the plaintiff shall be entitled to enter into the possession of the property condemned, and take and hold it for the public use specified in the judgment. Deposit of the money to the credit of, or payable to the order of the owner, pursuant to the direction of the court, shall be deemed a payment within the provisions of this title.

§ 3372. **Offer to purchase; costs; additional allowance.** In all cases where the owner is a resident and not under legal disability to convey title to real property the plaintiff, before service of his petition and notice, may make a written offer to purchase the property at a specified price, which must within ten days thereafter be filed in the office of the clerk of the county where the property is situated; and which cannot be given in evidence before the commissioners, or considered by them. The owner may at the time of the presentation of the petition, or at any time previously, serve notice in writing of the acceptance of plaintiff's offer, and thereupon the plaintiff may, upon filing the petition, with proof of the making of the offer, and its acceptance, enter an order that upon payment of the compensation agreed upon, he may enter into possession of the real property, described in the petition, and take and hold it for the public use therein specified. If the offer is not accepted, and the compensation awarded by the commissioners does not exceed the amount of the offer with interest from the time it was made, no costs shall be allowed to either party. If the compensation awarded shall exceed the amount of the offer with interest from the time it was made, or if no offer was made, the court shall, in the final order, direct that the defendant recover of the plaintiff the costs of the proceeding, to be taxed by the clerk at the same rate as is allowed, of course, to the defendant when he is the prevailing party in an action in the supreme court, including the allowances for proceedings, before and after notice of trial, and the court may also grant an additional allowance of costs, not exceeding five per centum upon the amount awarded. The court shall also direct in the final order what sum shall be paid to the general or special guardian, or committee or trustee of an infant, idiot, lunatic or habitual drunkard, or to an attorney appointed by the court to attend to the interests of any defendant upon whom other than personal service of the petition and notice may have been made, and who has not appeared, for costs, expenses and counsel fees, and by whom or out of what fund the same shall be paid. If a trial has been had, and all the issues determined in favor of the plaintiff, costs of the trial shall not be allowed to the defendant, but the plaintiff shall recover of any defendant answering the costs of such trial caused by the interposition of the unsuccessful defence, to be taxed by the clerk at the same rate as is allowed to the prevailing party for the trial of an action in the supreme court.

§ 3373. **Judgment, how enforced; delivery of possession of premises; when writ of assistance to issue.** Upon the entry of the final order, the same shall be attached to the judgment-roll in the proceeding, and the amount directed to be paid, either as compensation to the owners, or for the costs or expenses of the proceeding, shall be docketed as a judgment against the person who is directed to pay the same, and it shall have all the force and effect of a money judgment in an

action in the supreme court, and collection thereof may be enforced by execution and by the same proceedings as judgments for the recovery of money in the supreme court may be enforced under the provisions of this act. When payment of the compensation awarded, and costs of the proceedings, if any, has been made, as directed in the final order, and a certified copy of such order has been served upon the owner, he shall, upon demand of the plaintiff, deliver possession thereof to him, and in case possession is not delivered when demanded, the plaintiff may apply to the court without notice, unless the court shall require notice to be given, upon proof of such payment and of service of the copy order, and of the demand and non-compliance therewith, for a writ of assistance, and the court shall thereupon cause such writ to be issued, which shall be executed in the same manner as when issued in other cases for the delivery of possession of real property.

§ 3374. **Abandonment and discontinuance of proceeding.** Upon the application of the plaintiff to be made at any time after the presentation of the petition and before the expiration of thirty days after the entry of the final order, upon eight day's notice of motion to all other parties to the proceeding who have appeared therein or upon an order to show cause, the court may, in its discretion, and for good cause shown, authorize and direct the abandonment and discontinuance of the proceeding, upon payment of the fees and expenses, if any, of the commissioners, and the costs and expenses, directed to be paid in such final order, if such final order shall have been entered, and upon such other terms and conditions as the court may prescribe; and upon entry of the order granting such application and upon compliance with the terms and conditions therein prescribed, payment of the amount awarded for compensation, if such compensation shall have been theretofore awarded, shall not be enforced, but in such case, if such abandonment and discontinuance of the proceedings be directed upon the application of the plaintiff, the order granting such application, if permitting a renewal of such proceedings, shall provide that proceedings to acquire title to such lands or any part thereof shall not be renewed by the plaintiff without a tender or deposit in court of the amount of the award and interest thereon.

§ 3375. **Appeal from final order; stay of proceedings.** Appeal may be taken to the appellate division of the supreme court from the final order, within the time provided for appeals from orders by title four of chapter twelve of this act; and all the provisions of such chapter relating to appeals to the appellate division of the supreme court from orders of the special term shall apply to such appeals. Such appeal will bring up for review all the proceedings subsequent to the judgment, but the judgment and proceedings antecedent thereto may be reviewed on such appeal, if the appellant states in his notice that the same will be brought up for review, and exceptions shall have been filed to the decision of the court or the referee, and a case or a case and exceptions shall have been made, settled and allowed, as required by the provisions of this act for the review of the trial of actions in the supreme court without a jury. The proceedings of the plaintiff shall not be stayed upon such an appeal, except by order of the court, upon notice to him, and the appeal shall not affect his possession of the property taken, and the appeal of a defendant shall not be heard except on his stipulation not to disturb such possession.

§ 3376. **Appeal by plaintiff to appellate division of Supreme Court.** If a trial has been had and judgment entered in favor of the defendant, the plaintiff may appeal therefrom to the appellate division of the supreme court within the time provided for appeals from judgments by title four of chapter twelve of this act, and all the provisions of said chapter relating to appeals from judgments shall apply to such appeals; and on the hearing of the appeal the appellate division may affirm, reverse or modify the judgment, and in case of reversal may grant a new trial, or direct that judgment be entered in favor of the plaintiff. If the

judgment is affirmed, costs shall be allowed to the respondent, but if reversed or modified, no costs of the appeal shall be allowed to either party.

§ 3377. **Court may direct a new appraisal.** On the hearing of the appeal from the final order the court may direct a new appraisal before the same or new commissioners, in its discretion, and the report of such commissioners shall be final and conclusive upon all parties interested. If the amount of the compensation to be paid is increased by the last report, the difference shall be a lien upon the land appraised, and shall be paid to the parties entitled to the same, or shall be deposited as the court shall direct; and if the amount is diminished, the difference shall be refunded to the plaintiff by the party to whom the same may have been paid, and judgment therefor may be rendered by the court, on the filing of the last report, against the parties liable to pay the same.

§ 3378. **Conflicting claimants.** If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the property taken, the court may direct the money to be paid into the court by the plaintiff, and may determine who is entitled to the same, and direct to whom the same shall be paid, and may, in its discretion, order a reference to ascertain the facts on which such determination and direction are to be made.

§ 3379. **Plaintiff in possession may have stay of proceedings on giving security.** At any stage of the proceeding the court may authorize the plaintiff, if in possession of the property sought to be condemned to continue in possession, and may stay all actions or proceedings against him on account thereof, upon giving security, or depositing such sum of money as the court may direct to be held as security for the payment of the compensation which may be finally awarded to the owner therefor and the costs of the proceedings, and in every such case the owner may conduct the proceeding to a conclusion, if the plaintiff delays or neglects to prosecute the same. When the final award to any owner is less than fifty dollars, in proceedings to condemn a right of way, for telephone or telegraph poles and wires, the allowance of costs, if any, and the amount thereof not exceeding that prescribed by statute, shall be in the discretion of the court in any action or proceeding that may have been or may hereafter be stayed, if the telephone or telegraph poles and wires, in such action or proceeding so stayed, shall have been erected for more than three years prior to the commencement thereof.

§ 3380. **Temporary possession pending proceedings.** When an answer to the petition has been interposed, and it appears to the satisfaction of the court that the public interests will be prejudiced by delay, it may direct that the plaintiff be permitted to enter immediately upon the real property to be taken, and devote it temporarily to the public use specified in the petition, upon depositing with the court the sum stated in the answer as the value of the property, and which sum shall be applied, so far as it may be necessary for that purpose, to the payment of the award that may be made, and the costs and expenses of the proceeding, and the residue, if any, returned to the plaintiff, and, in case the petition should be dismissed, or no award should be made, or the proceedings should be abandoned by the plaintiff, the court shall direct that the money so deposited, so far as it may be necessary, shall be applied to the payment of any damages which the defendant may have sustained by such entry upon and use of his property, and his costs and expenses of the proceedings, such damages to be ascertained by the court, or a referee to be appointed for that purpose, and if the sum so deposited shall be insufficient to pay such damages, and all costs and expenses awarded to the defendant, judgment shall be entered against the plaintiff for the deficiency, to be enforced and collected in the same manner as a judgment in the supreme court; and the possession of the property shall be restored to the defendant.

§ 3381. **Notice of pendency of action to be filed.** Upon service of the petition, or at any time afterwards before the entry of the final order, the plaintiff may file in the clerk's office of each county where any part of the property is situated, a notice of the pendency of the proceeding, stating the names of the parties and the object of the proceeding, and containing a brief description of the property affected thereby, and from the time of filing, such notice shall be constructive notice to a purchaser, or incumbrancer of the property affected thereby, from or against a defendant with respect to whom the notice is directed to be indexed, as herein prescribed, and a person whose conveyance or incumbrance is subsequently executed or subsequently recorded, is bound by all proceedings taken in the proceeding, after the filing of the notice, to the same extent as if he was a party thereto. The county clerk must immediately record such notice when filed in the book in his office kept for the purpose of recording notices of pendency of actions, and index it to the name of each defendant specified in the direction appended at the foot of the notice, and subscribed by the plaintiff or his attorney.

§ 3382. **Practice in cases not herein provided for.** In all proceedings under this title, where the mode or manner of conducting all or any of the proceedings therein is not expressly provided for by law, the court before whom such proceedings may be pending, shall have the power to make all necessary orders and give necessary directions to carry into effect the object and intent of this title, and of the several acts conferring authority to condemn lands for public use, and the practice in such cases shall conform, as near as may be, to the ordinary practice in such court.

§ 3383. **Repealing clause limitations.** So much of all acts and parts of acts as prescribed a method of procedure in proceedings for the condemnation of real property for a public use is repealed, except such acts and parts of acts as prescribed a method of procedure for the condemnation of real property for public use as a highway, or as a street, avenue, or public place in an incorporated city or village, or as may prescribe methods of procedure for such condemnation for any public use for by, on behalf, on the part, or in the name of the corporation of the city of New York, known as the mayor, aldermen, and commonalty of the city of New York, or by whatever name known, or by or on the application of any board, department, commissioners or other officers acting for or on behalf or in the name of such corporation or city, or where the title to the real property so to be acquired vests in such corporation or in such city; and all proceedings for the condemnation of real property embraced within the exceptions enumerated in this section are exempted from the operation of this title.

§ 3384. **When act takes effect.** This title shall take effect on the first day of May, 1890, and shall not affect any proceeding previously commenced.

## PENAL CODE

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§ 245. **Punishment for assault in third degree.** Assault in the third degree is punishable by imprisonment for not more than one year, or by a fine of not more than five hundred dollars, or both.

§ 246. **Use of force not unlawful in certain cases.** To use or attempt, or offer to use, force or violence upon or towards the person of another is not unlawful in the following cases:

1. When necessarily committed by a public officer in the performance of a legal duty; or by any other person assisting him or acting by his direction;

2. When necessarily committed by any person in arresting one who has committed a felony, and delivering him to a public officer competent to receive him in custody;

3. When committed either by the party about to be injured or by another person in his aid or defense, in preventing or attempting to prevent an offense against his person, or a trespass or other unlawful interference with real or personal property in his unlawful possession, if the force or violence used is not more than sufficient to prevent such offense;

4. When committed by a parent or the authorized agent of any parent, or by any guardian, master, or teacher, in the exercise of a lawful authority to restrain or correct his child, ward, apprentice or scholar, and the force or violence used is reasonable in manner and moderate in degree;

5. When committed by a carrier of passengers, or the authorized agents or servants of such carrier, or by any person assisting them, at their request, in expelling from a carriage, railway car, vessel or other vehicle, a passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped and the force or violence used is not more than sufficient to expel the offending passenger, with a reasonable regard to his personal safety;

6. When committed by any person in preventing an idiot, lunatic, insane person, or other person of unsound mind, including persons temporarily or partially deprived of reason, from committing an act dangerous to himself or to another, or in enforcing such restraint as is necessary for the protection of his person or for his restoration to health, during such period only as shall be necessary to obtain legal authority for the restraint or custody of his person.

# MUNICIPAL COURT CODE OF NEW YORK CITY

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§ 6. Jurisdiction. The municipal court code of the city of New York shall have jurisdiction:

1. Of the following actions when the amount claimed in the summons does not exceed one thousand dollars, exclusive of interest and costs: an action upon a contract, express or implied, other than a contract to marry; an action to recover a fine or penalty; an action to establish a mechanic's lien on real property and to recover a personal judgment for the amount due; an action to foreclose a lien on a chattel; an action to recover damages for an escape from the jail liberties of any county within the city of New York; an action to recover damages for fraud or deceit, or for a personal injury or an injury to property, except actions to recover damages for assault, battery, malicious prosecution, false imprisonment, libel, slander, criminal conversation, seduction, or loss of society of husband or wife; an action to take, state and determine the account between partners after dissolution or other termination of their partnership relations, and to render judgment for the amount so found to be due, but in no event for more than one thousand dollars.

2. Of the following actions and proceedings: an action to recover a chattel or chattels the aggregate value of which does not exceed one thousand dollars, with or without damages for the taking or detention thereof; a summary proceeding authorized by the code of civil procedure to recover possession of real property situated wholly or partly within the district where the application is made, and in such a proceeding it shall not be necessary for the court to sign the warrant, but it may be signed by the clerk; an action in behalf of the people of the state or the city of New York, brought by the direction of a commissioner of public charities or an overseer of the poor, upon a bastardy or abandonment bond; an action upon the bond of a marshal of the city of New York.

3. To issue or vacate a requisition to replevy, a warrant of attachment, a warrant to seize a chattel and an order of arrest; to grant or vacate a stay of execution or of other proceedings, including a warrant in summary proceedings to recover possession of real property, provided that in summary proceedings no stay shall be granted for more than five days; to render judgment in an action, or to make a final order in a summary proceeding, upon confession or upon the consent of both parties.

4. Of actions and summary proceedings, within the foregoing limitations, by or against the city of New York; by or on behalf of the people of the state of New York; by or against a domestic corporation or a foreign corporation; by or against a domestic or foreign executor or administrator in his representative capacity; by or against a committee of an incompetent.

5. Of actions and proceedings of which the municipal court of the city of New York had jurisdiction on the 31st day of August, 1915.

6. To provide systems of conciliation and arbitration and to enter judgment upon an award of arbitrators.

7. To open a default; to direct or set aside a verdict; to vacate, amend, correct or modify any process, mandate, judgment, order or final order, in furtherance of justice, for any error in form or substance; to grant a new trial upon any of the grounds for which a new trial may be granted by the supreme court in an action pending therein, including the grounds of fraud and newly discovered evidence.

§ 17. **Venue.** 1. An action must be brought in a district in which either the plaintiff or defendant or one of the plaintiffs or one of the defendants resides, unless all the plaintiffs or all the defendants reside out of the city of New York, in which case the action may be brought in any district; but an action brought by the assignee of the cause of action shall, upon the demand of a defendant made as provided in subdivision two of this section, be transferred to the district in which the defendant resides, and the court must make an order for such transfer, as provided in said subdivision. The district in which is situated the place for the regular transaction of business of an individual who does not reside in the city of New York, and the place where a corporation transacts its general business or keeps an office or has an agency established for the transaction of business, or is established by law, shall be deemed the place of residence under the provisions of this section. The city of New York may sue or be sued in any district, except as provided in subdivision three of this section.

2. If the action is brought in the wrong district, it may nevertheless remain there unless the defendant demands that it be transferred. Such demand must be made in writing and filed with the clerk before or at joinder of issue and must specify the district to which the defendant desires the action to be transferred and facts under oath showing that such district is the proper one. The court must thereupon transfer the action to the proper district, and may in its discretion impose five dollars costs against the plaintiff.

3. All actions by or on behalf of the city of New York, or any department thereof, to recover a fine or penalty, must be brought in the district where the violation of law occurred.

4. An action or special proceeding may upon consent be transferred by the court to a district other than that in which it is pending.

5. Nothing in this section shall be construed to prevent the board of justices from designating a part or parts of the court where special classes of cases shall be brought or tried, or the president of the board of justices from transferring cases from one district to another in the same borough.

§ 21. **Method of serving summons.** 1. The summons may be served upon the defendant within the city of New York in like manner as though the summons issued out of the supreme court, except as otherwise provided in this act or in the rules, provided that it shall not be served by publication.

§ 40. **Grounds; affidavit.** To entitle the plaintiff to a warrant of attachment he must show by affidavit to the satisfaction of the court:

1. That a cause of action for which a warrant of attachment may be granted exists against the defendant; and if the action is based upon a breach of contract, that the plaintiff is entitled to recover a sum stated, in excess of all counterclaims known to him.

2. That the defendant is either a foreign corporation or not a resident of the state; or, if the defendant is a natural person and a resident of the city of New York, that he has departed or is about to depart therefrom with intent to defraud his creditors or to avoid the service of a summons, or keeps himself concealed with the like intent; or, if the defendant is a natural person or a domestic corporation, that he or it has removed or is about to remove property from the city of New York with intent to defraud his or its creditors, or has assigned, disposed of or secreted, or is about to assign, dispose of or secrete property with the like intent; or, where for the purpose of procuring credit or the extension of credit, the defendant has made a false statement in writing under his own hand and signature, or under the hand and signature of a duly authorized agent made with his knowledge and acquiescence, as to his financial responsibility or standing; or, that the defendant, being a natural person of full age and a resident of the state, has been continuously without the state for the space of six months or more immedi-

ately before the application, and either that he has not made a designation of a person upon whom to serve a summons in his behalf as prescribed in section 430 of the code of civil procedure, or that a designation so made no longer remains in force.

The affidavit must be filed in the office of the clerk of the court in the district in which the action is brought.

§ 94. **Order that issues be tried unnecessary in action against corporation.** In an action against a corporation, an order directing that the issues presented by the pleadings be tried shall not be required.

§ 108. **The same; affidavit on application.** The party desiring to take a deposition as prescribed in the last preceding section, must present to the court in the district where the action or special proceeding is pending, an affidavit showing:

1. The title and nature of the action or proceeding and the name and residence of the person to be examined; and that the testimony of such person is material and necessary for the prosecution or defense of the action or proceeding.

2. That the person to be examined is about to depart from the city of New York, or that he is so sick or infirm as to afford reasonable ground to believe that he will not be able to attend the trial, or that any other special circumstances exist which render it proper that he should be examined; but this subdivision does not apply where the person to be examined is a party to the actions, except in case of his sickness or infirmity.

3. If the party sought to be examined is a corporation, the affidavit shall state the names of the officers or directors thereof whose testimony is necessary and material, or the books and papers as to the contents of which an examination or inspection is desired; and the order to be made in respect thereto shall direct the examination of such persons and the production of such books and papers.

# CONSOLIDATED LAWS

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## BUSINESS CORPORATIONS LAW.

§ 1. **Short title.** This chapter shall be known as the "Business Corporations Law."

§ 2. **Incorporation.** Except as provided in section two-a of this chapter, three or more persons may become a stock corporation for any lawful business purpose or purposes other than a moneyed corporation, or a corporation provided for by the banking, the insurance, the railroad and the transportation corporations laws, or an educational institution or corporation which may be incorporated as provided in the education law, by making, signing, acknowledging and filing a certificate which shall contain:

1. The name of the proposed corporation.
2. The purpose or purposes for which it is to be formed.
3. The amount of the capital stock, and if any portion be preferred stock, the preferences thereof.
4. The number of shares of which the capital stock shall consist, each of which shall not be less than five nor more than one hundred dollars, and the amount of capital not less than five hundred dollars, with which said corporation will begin business.
5. The city, village or town in which its principal business office is to be located. If it is to be located in the city of New York, the borough therein in which it is to be located.
6. Its duration.
7. The number of its directors, not less than three.
8. The names and post-office addresses of the directors for the first year.
9. The names and post-office addresses of the subscribers to the certificate, and a statement of the number of shares of stock which each agrees to take in the corporation.

Any certificate of incorporation filed, prior to April twenty-second, eighteen hundred and ninety-six, under the provisions of the business corporations law theretofore in force which shall contain the names and post-office addresses, either of the subscribers to the stock or of the subscribers to the certificate, and a statement of the number of shares of stock which each agrees to take in the corporation, shall be deemed to have complied with the requirements of section two, subdivision nine of said law.

If meetings of the board of directors are to be held only within the state the certificate or by-laws must so provide.

§ 2-a. **Incorporating for the purpose of conducting law business, et cetera, prohibited.** No corporation shall be organized or created under the provisions of this chapter for the purpose or purposes of conducting any branch of the practice of law or of retaining or employing an attorney or attorneys to furnish legal advice, draw legal papers or perform legal services of any kind or description, either directly for the person, persons or corporation for whose use such services are rendered, or for the corporation retaining such attorney in compliance with any contract of employment of the corporation or of the attorney made by the corporation with any other person, persons or corporation. The statement of the purpose or purposes of a corporation, in any certificate filed under the provisions of this chapter, in whatsoever language the same may be set forth, shall not be held or construed to confer on the corporation the power

to transact any business specified in this section as a purpose for which the creation of a corporation under this chapter is prohibited; and particularly when the stated objects of a corporation include the collection of debts or accounts, in words or substance, they shall not be construed to include the employment or furnishing of attorneys to prosecute any action or pursue any legal or equitable remedy in aid of such collections.

§ 3. **Restrictions upon commencement of business.** No such corporation shall incur any debts until the amount of capital specified in its certificate of incorporation, as the amount of capital with which it will begin business, shall have been paid in in money or property.

§ 4. **Reorganization of existing corporations.** Any stock corporation heretofore organized, except a moneyed or transportation corporation, or a corporation the business of which partakes of the nature of banking or insurance, may reincorporate under this chapter in the following manner: The directors of the corporation shall call a meeting of the stockholders thereof by publishing a notice, stating the time, place and object of the meeting, signed by at least a majority of them, in a newspaper of the county in which its principal business office is situated, once a week, for at least three successive weeks, and by serving upon each stockholder, at least three weeks before the meeting, a copy of such notice either personally or by depositing it in the post-office, postage prepaid, addressed to him at his last known post-office address. The stockholders shall meet at the time and place specified in the notice and organize by choosing one of the directors chairman, and a suitable secretary, and shall then take a vote of those present in person or by proxy upon the proposition to reincorporate under this chapter, and if votes representing a majority of all the stock of the corporation shall be cast in favor of the proposition, the officers of the meeting shall execute and acknowledge a certificate of the proceedings, which certificate shall also contain the statements required by section two of this chapter, and shall be filed in the offices where certificates of incorporation under this chapter are required to be filed. From the time of such filing such corporation shall be deemed to be a corporation organized under this chapter, and if originally organized or incorporated under a general law of this state, it shall have and exercise all such rights and franchises as it has heretofore had and exercised under the laws pursuant to which it was originally incorporated, and such reorganization shall not in any way affect, change or diminish the existing liabilities of the corporation.

§ 5. **Payment of capital stock.** One-half of the capital stock of every such corporation shall be paid in within one year from its incorporation, or the corporation shall be dissolved, and the directors within thirty days after such payment shall make a certificate of the fact of such payment, which shall be signed and acknowledged by a majority of the directors, and verified by the president or vice-president and secretary or treasurer, and filed in the office where the certificates of incorporation are filed. The dissolution of any such corporation for any cause shall not take away or impair any remedy against it, its stockholders or officers, for any liabilities incurred previous to its dissolution.

§ 6. **Full liability corporations.** Every corporation formed under this chapter may be or become a full liability corporation by inserting a statement in the certificate of incorporation, that the corporation thereby formed is intended to be a full liability corporation; and in case of an existing corporation, which is not a full liability corporation, it may become such by filing in the offices where certificates of incorporation are required to be filed, a supplemental certificate stating that thereafter the corporation intends to be a full liability corporation, which certificate shall be executed and acknowledged by the president and treasurer of the corporation or by the board of directors, and shall have annexed thereto a copy of a resolution, adopted by a two-thirds vote of the board of

directors, and the written consent of all the stockholders of the corporation, authorizing and consenting to the change of the corporation to a full liability corporation. If the corporation is formed as or becomes a full liability corporation all the stockholders of the corporation shall be severally individually liable to its creditors for all its debts and liabilities, and may be joined as defendants in any action against it. No execution shall issue against any stockholder individually until execution has been issued against the corporation and returned unsatisfied, and all the stockholders shall contribute a proportionate share, according to the number of shares of stock owned by each, of the amount paid by any stockholder on a judgment recovered against him individually for a debt of the corporation, and he may recover from the other stockholders in the corporation in a joint or several action the proper portion due by them and each of them, of the amount paid by him on any such judgment.

§ 7. **Consolidation of corporations.** Any two or more corporations organized under the laws of this state for the purpose of carrying on any kind of business of the same or of a similar nature, which a corporation organized under this chapter might carry on, may consolidate such corporations into a single corporation, as follows: The respective corporations may enter into and make an agreement signed by a majority of their respective boards of directors and under their respective corporate seals, for the consolidation of such corporations, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number of directors who shall manage its affairs, not less than three, the names and post-office addresses of the directors for the first year, the term of its existence, not exceeding fifty years, the name of the town or towns, county or counties, in which its operations are to be carried on, the name of the town or city and county in this state in which its principal place of business is to be situated, the amount of its capital stock, which shall not be larger in amount than the fair aggregate value of the property, franchises and rights of such corporations, and the number of shares into which the same is to be divided, the manner of distributing such capital stock among the holders thereof, and if such corporations, or either of them, shall have been organized for the purpose of carrying on any part of its business in any place out of this state, the agreement shall so state, with such other particulars as they may deem necessary.

§ 8. **Submission of consolidation agreement to stockholders.** Such agreement shall be submitted to the stockholders of each of such corporations, at a meeting thereof to be called upon notice of at least two weeks, specifying the time, place and object thereof, and addressed to each at his last known post-office address, and deposited in the post-office, postage prepaid, and published for at least two successive weeks in one of the newspaper in each of the counties of this state in which either of such corporations shall have its place of business, and if such agreement shall be approved at each of such meetings of the respective stockholders separately, by the vote by ballot of the stockholders owning at least two-thirds of the stock, the same shall be the agreement of such corporation, and a sworn copy of the proceedings of such meetings, made by the secretaries thereof, respectively, and attached thereto, shall be presumptive evidence of the holding and action of such meetings. Such agreement and verified copy of proceedings of such meetings shall be made in duplicate, one of which shall be filed in the office of the secretary of state, and the other in the office of the clerk of the county where the principal business office of the new corporation is to be situated in this state, and thereupon such corporation shall be merged into the new corporation specified in such agreement, to be known by the corporate name therein mentioned, and the provisions of such agreement shall be carried into effect as therein provided. If any stockholder,

not voting in favor of such agreement to consolidate, shall at such meeting, or within twenty days thereafter, object to such consolidation and demand payment for his stock, such stockholder or such new corporation, if the consolidation takes effect at any time thereafter, may at any time within sixty days after such meeting apply to the supreme court at any special term thereof held in the district in which any county is situated in which such new corporation may have its place of business, upon at least eight days' notice to the new corporation, for the appointment of three persons to appraise the value of such stock, and the court shall appoint three such appraisers and designate the time and place of their first meeting, with such directions in regard to their proceedings as shall be deemed proper, and also direct the manner in which payment for such stock shall be made to such stockholder. The court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise. The appraisers shall meet at the time and place designated, and they or any two of them, after being duly sworn honestly and faithfully to discharge their duties, shall estimate and certify the value of such stock at the time of such dissent, and deliver one copy to such new corporation, and another to such stockholder if demanded; the charges and expenses of the appraisers shall be paid by the new corporation. When the new corporation shall have paid the amount of such appraisal, as directed by the court, such stockholder shall cease to have any interest in such stock and in the corporate property of such corporation, and such stock may be held or disposed of by such new corporation. Where any consolidation has been heretofore or shall be hereafter effected pursuant to the laws of this state, and the holders of ninety per centum of the capital stock of each of such corporations have voted in favor of such agreement to consolidate, if any stockholder not voting in favor of such consolidation shall fail to exchange his stock for stock of such new corporation within sixty days after this act shall go into effect, or, in case of a consolidation hereafter effected, within sixty days after he shall have become entitled to make such exchange, such new corporation may, at any time thereafter, upon at least eight days' notice to such stockholder, to be given personally, within the state, if possible, and if not, then in such manner as the court shall direct, apply to the court as herein provided, for the appointment of three persons to appraise the value of such stock at the time of the expiration of such sixty days. Upon the completion of the appraisal in the manner hereinbefore provided for, and the payment by such new corporation of the amount of such appraisal, as directed by the court, such stockholder shall cease to have any interest in such stock, and in the corporate property of such corporation, and such stock may be held or disposed of by such new corporation.

§ 9. Powers of consolidated corporations. Such new corporation in addition to the general powers of corporations shall enjoy the rights, franchises and privileges possessed by each of the corporations so consolidated, subject to the restrictions, liabilities, duties and provisions contained in this chapter so far as the same may be applicable to the purposes for which it shall have been organized and expressed in the agreement for consolidation, and may prosecute or carry on any kind of business which each of the consolidating corporations was authorized by law to conduct.

§ 10. Transfer of property of old corporations to consolidated corporations. Upon the consummation of such act of consolidation, all the rights, privileges, franchises and interests of each of the corporations, parties to the same, and all the property, real, personal and mixed, and all the debts due on whatever account to either of them, as well as all stock subscriptions and other things in action belonging to either of them, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed; and

all claims demands, property and every other interest shall be as effectually the property of the new corporation as they were of the former corporations, parties to such agreement and act; and the title to all real estate, taken by deed or otherwise, under the laws of this state, vested in either of such corporations, parties to such agreement and act, shall not be deemed to revert or be in any way impaired by reason of this chapter, or anything done by virtue thereof, but shall be vested in the new corporation by virtue of such act of consolidation; and all the rights, privileges, franchises and property of the corporations, parties to any consolidation heretofore made under this chapter, shall vest as fully in the new corporation thereby created as they were vested in the corporations, parties to such consolidations.

§ 11. **Rights of creditors of old corporations.** The rights of creditors of any corporation that shall be so consolidated shall not in any manner be impaired, nor any liability or obligation for the payment of any money due or to become due to any person or persons, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof be released or impaired by any such consolidation; but such new corporation shall succeed to and be held liable to pay and discharge all such debts and liabilities of each of the corporations consolidated in the same manner as if such new corporation had itself incurred the obligation or liability to pay such debt or damages and the stockholders of the respective corporations consolidated shall continue, subject to all the liabilities, claims and demands existing against them as such, at or before the consolidation; and no action or proceeding then pending before any court or tribunal in which any corporation that may be so consolidated is a party, or in which any such stockholder is a party, shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation had been entered into; or such new corporation may be substituted as a party in place of any corporation so consolidated, by order of the court in which such action or proceeding may be pending.

§ 25. **Definition.** For the purposes of this article, the words "corporation," "company," "association," "exchange," "society" or "union" shall be synonymous.

§ 26. **Incorporation.** Five or more persons may become a co-operative corporation, company, association, exchange, society or union for the purpose of conducting a general producing, manufacturing and merchandising business, on the co-operative plan as limited in this article, in articles of common use, including farm products, food supplies, farm machinery and supplies and articles of domestic and personal use, by making, signing, acknowledging and filing a certificate in the form and manner prescribed by article two of this chapter.

§ 27. **Application of corporate law.** The provisions of the business corporations law, the general corporation law and the stock corporation law shall apply to co-operative corporations formed under this article, except where such provisions are in conflict with this article.

§ 28. **Directors; officers.** Every such corporation shall be managed by a board of not less than five directors. The directors shall be elected by and from the stockholders at such time and for such term as the by-laws may prescribe, and shall hold office until their successors are elected, and shall enter upon the discharge of their duties. The officers of every such corporation shall be a president, one or more vice-presidents, a secretary and a treasurer, who shall be elected annually by the directors, and each of whom must be a director. The office of secretary and treasurer may be combined. A majority of the stockholders may, at any regular or special meeting, duly called, remove any director or officer for cause, and fill the vacancy.

§ 29. **Amendment of certificate.** The stockholders of any such corporation may, by a three-fourths vote, at any regular meeting, or at any special meeting called for that purpose on ten days' notice to the stockholders, amend its certificate of incorporation. The power to amend shall include the power to increase or diminish the amount of capital stock and the number of shares; but such amount shall not be diminished below the amount of paid-up capital at the time the amendment is adopted. The certificate of the action of such meeting shall be executed and filed in the manner prescribed by section sixty-four of the stock corporation law.

§ 30. **Stock and stockholders.** The capital stock of any such corporation shall be divided into shares of the par value of five dollars each. A stockholder in any such corporation shall not own shares of a greater aggregate par value than five thousand dollars, except as hereinafter provided. A stockholder shall be entitled to but one vote, without regard to the amount of stock held by him. Certificates of stock shall not be issued to any subscriber until fully paid, but the by-laws of the corporation may allow subscribers to vote as stockholders, if part of the stock subscribed for has been paid for in cash. No stock shall be transferred without the written consent of the corporation indorsed on the certificate of stock. The corporation shall have the first right to purchase at par any stock of a stockholder offered for transfer or the stock of any deceased or retiring stockholder, or of any stockholder who shall have purchased of or sold to the corporation goods of the value of less than one hundred dollars in any one corporation year.

§ 31. **Written vote of stockholders.** At any regularly called general or special meeting of the stockholders the written vote of an absent stockholder signed by him shall be received and counted, provided he shall have been previously notified, in writing, of the exact motion or resolution upon which such vote is taken and a copy of the same is forwarded with and attached to his written vote.

§ 32. **Subscription of stock in other corporations.** At any duly called regular or special meeting at which at least a majority of the stockholders may be present or represented a co-operative corporation may, by a majority vote of the stockholders present or represented, subscribe for shares and invest its reserve fund to an amount not to exceed twenty-five per centum of its capital, in the capital stock of any other co-operative corporation.

§ 33. **Purchasing business of other corporations or persons.** Whenever a co-operative corporation shall purchase the business of another corporation, person or persons, it may pay for the same wholly or partly by the issue of shares of its capital stock to an amount which at par value would equal the fair market value of the business so purchased; and the transfer to the corporation of such business at such valuation shall be equivalent to payment in cash for the shares of the stock so purchased. No such purchase shall be made until the proposal therefor shall have been submitted by the directors to a meeting of the stockholders, together with an itemized inventory of assets and liabilities of the vendor, including the value of the good will as a separate item, and such proposal shall have been ratified by a vote of at least two-thirds of the total number of stockholders. If the cash value of such purchased business exceed one thousand dollars, the directors may hold the shares in excess of one thousand dollars in trust for the vendor and dispose of the same to such persons, and within such times, as may be agreed upon, and pay the proceeds thereof as received from time to time to the former owner of such business.

§ 34. **Earnings; dividends.** The directors, subject to revision by the stockholders at any general or special meeting, shall apportion the net earnings by first paying dividends on the paid-up capital stock at a rate not exceeding six per centum per annum. They shall set aside not less than ten per centum of the

net earnings for a reserve fund until the reserve fund shall equal thirty per centum of the paid-up capital stock. They shall also annually set aside five per centum of the net earnings for an educational fund to be used in teaching co-operation. The remainder of the net earnings shall be distributed by uniform dividend to members of the first class and members of the second class. Members of the first class shall include stockholders and employees. Members of the second class shall include non-stockholders who shall during any fiscal year do business with the corporation amounting to not less than one hundred dollars. Dividends shall be paid on purchases amounting to one hundred dollars and over from or by members and on the amount earned by each employee during the fiscal year. Members of the first class and employees shall be entitled to dividends at double the rate of dividends to which members of the second class shall be entitled. Dividends to non-shareholders may be credited on account of such non-shareholders, in the purchase of capital stock of the corporation. In productive corporations, including creameries, canneries, elevators, factories, and the like, dividends shall be calculated on raw material delivered instead of on goods purchased. If the corporation be both a selling and a productive concern, the dividends may be on both raw material delivered and on goods purchased.

The net earnings of such corporation shall be distributed at such times as the by-laws shall prescribe, but such distribution shall be made at least once every twelve months.

§ 35. **Dissolution.** If any such corporation, for five consecutive years, shall fail to declare a dividend upon the shares of its paid-up capital stock, five or more stockholders may present a petition to the supreme court of a county in which the principal office of the corporation is situated, praying for its dissolution upon such ground. If upon the hearing the allegations of the petition are found to be true, the court may adjudge such corporation dissolved.

§ 36. **Annual report.** Every co-operative corporation shall, annually, on or before the thirty-first day of October, make a report to the secretary of state, containing the name of the corporation, its principal place of business, and generally a statement as to its business, showing the total amount of business transacted, the number of stockholders, the amount of capital stock subscribed for and paid in, the total expenses of operation, the amount of indebtedness or liabilities, and its profits and losses.

§ 37. **Existing co-operative corporations and associations.** An existing co-operative corporation, company or association heretofore organized and doing business in this state may file with the secretary of state a written certificate signed and sworn to by the president and secretary to the fact that such corporation has, by a majority vote of its stockholders, decided to accept the provisions of this article, and thereupon such corporation shall be deemed to have abandoned its certificate filed under any other law and be subject to the provisions of this article.

§ 38. **Corporate name.** No corporation shall be formed under this article unless there be affixed or prefixed to the name thereof, as required by section six of the general corporation law, such word or words or abbreviation as will indicate that it is a corporation as distinguished from a natural person, firm or copartnership. No corporation hereafter organized under any general law other than this article shall use the term "co-operative" or any other derivative of the term "co-operate" as part of its corporate name.

#### CIVIL RIGHTS LAW.

§ 51. **Action for injunction and for damages.** Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided

may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed.

#### DECEDENT ESTATE LAW.

§ 120. Actions for wrongs, by or against executors and administrators. For wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or after his death, by his executors or administrators, against such wrong-doer, and after his death against his executors or administrators, in the manner and with the like effect in all respects, as actions founded upon contracts. This section shall not extend to an action for personal injuries, as such action is defined in section thirty-three hundred and forty-three of the code of civil procedure; except that nothing herein contained shall affect the right of action now existing to recover damages for injuries resulting in death.

#### EXECUTIVE LAW.

§ 26. Fees. The secretary of state shall collect the following fees:

1. For entering a caveat, twelve and a half cents.
2. For searching the records in his office for any one year and for every other year in which such search is made, six cents.
3. For a copy of any paper or record not required to be certified or otherwise authenticated by him, ten cents per folio.
4. For a certified or exemplified copy of any law, record or paper, fifteen cents per folio, and one dollar additional for the certificate under seal of his office, attached thereto; and this fee shall be the same whether such copy be made by the secretary of state or previously prepared and presented to him for certification, any other law to the contrary notwithstanding.
5. For a certificate under the great seal of the state, two dollars.
6. For recording a certificate, notice or other paper required to be recorded, except as otherwise provided by this section, twenty-five cents per folio.
7. For a certificate as to the official character of a commissioner of deeds residing in another state or a foreign country, twenty-five cents, and for every other certificate under the seal of his office, two dollars.
8. For every patent for lands under water, five dollars for each parcel included therein, and for every other patent the sum of five dollars except when the parcels conveyed exceed five in number, when an additional sum of one dollar shall be charged for each lot in excess of five embraced in such patent.
9. For each license granted to a peddler, the sum of two dollars.
10. For filing the original certificate of incorporation of a railroad corporation, fifty dollars; for filing the original certificate of incorporation of any other stock corporation, twenty-five dollars; for filing the original certificate

of incorporation drawn under article three or article twelve of the membership corporations law, twenty-five dollars; for filing a consent to, or certificate of, increase of capital stock, pursuant to either section six or sixty-three or sixty-four of the stock corporation law, ten dollars; for filing a certificate of merger, pursuant to section fifteen of the stock corporation law, twenty-five dollars; for filing an agreement for the consolidation of two or more railroad corporations, fifty dollars; for filing an agreement for the consolidation of two or more corporations other than railroad corporations, twenty-five dollars; for filing an amended certificate of incorporation, pursuant to either section seven of the general corporation law or section eighteen or twenty-two of the stock corporations law, ten dollars; for filing a certificate of change of number of directors, pursuant to section twenty-six of the stock corporation law, ten dollars; for filing a certificate of reorganization, pursuant to section nine of the stock corporation law, twenty-five dollars; for filing a certificate of extension or revival of corporate existence, twenty-five dollars.

11. For filing the statement and designation and copy of certificate of incorporation of a foreign corporation desiring to do business in the state, fifty dollars.

12. For certified copies of the evidence and proceedings of the board of audit on appeal to the supreme court, to be paid by the appellant on serving notice of appeal, fifteen cents per folio.

13. For registering a notice of a mining claim as required by section eighty-three of the public lands law, and recording same, five dollars.

14. For registering a trade mark, name, brand, device or label, in pursuance of law, for the registry of which no other fee is exacted, five dollars.

15. For a certificate under subdivision three of section nine of the general corporation law, twenty-five dollars.

No fee shall be collected for copies of records furnished to state officers for use in their official capacity.

§ 42. Fees. The comptroller shall collect the following fees:

1. For copies of all papers and records not required to be certified or otherwise authenticated by him, ten cents per folio.

2. For certified or exemplified copies of all records and papers, fifteen cents per folio.

3. For every certificate under the seal of his office, one dollar.

4. For opening a new account for part of the consideration due on any lot or piece of land, or for a discharge for any such part, where no new account shall have been opened, two dollars.

5. For a deed of land sold for taxes containing the description of but one piece, fifty cents, and for every additional piece described in the same, ten cents.

6. For searching the records in his office, on request, fifteen cents for the first book examined, and ten cents for each subsequent book.

### GENERAL BUSINESS LAW.

§ 340. Contracts for monopoly illegal and void. Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful

business, trade or occupation is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void.

§ 341. **Penalty.** Every person or corporation, or any officer or agent thereof, who shall make or attempt to make or enter into any such contract, agreement, arrangement or combination, or who within this state shall do any act pursuant thereto, or in, toward or for the consummation thereof, wherever the same may have been made, is guilty of a misdemeanor, and on conviction thereof shall, if a natural person, be punished by a fine not exceeding five thousand dollars, or by imprisonment for not longer than one year, or by both such fine and imprisonment; and if a corporation, by a fine of not exceeding twenty thousand dollars. An indictment based on a violation of any of the provisions of this section must be found within two years after its commission.

§ 342. **Action to restrain and prevent.** The attorney-general may bring an action in the name and in behalf of the people of the state against any person, trustee, director, manager or other officer or agent of a corporation, or against a corporation, foreign or domestic, to restrain and prevent the doing in this state of any act herein declared to be illegal, or any act in, toward or for the making or consummation of any contract, agreement, arrangement or combination herein prohibited, wherever the same may have been made.

§ 343. **Procedure; application for order.** Whenever the attorney-general has determined to commence an action or proceeding under this article, he may present to any justice of the supreme court, before beginning such action or proceeding, an application in writing, for an order directing the persons mentioned in the application to appear before a justice of the supreme court, or a referee designated in such order, and answer such questions as may be put to them or to any of them, and produce such papers, documents and books concerning any alleged illegal contract, arrangement, agreement or combination in violation of this article; and it shall be the duty of the justice of the supreme court, to whom such application for the order is made, to grant such application. The application for such order made by the attorney-general may simply show upon his information and belief that the testimony of such person is material and necessary. The provisions of the code of civil procedure, chapter nine, title three, article one, relating to the application for an order for the examination of witnesses before the commencement of an action and the method of proceeding on such examinations, shall not apply except as herein prescribed. The order shall be granted by the justice of the supreme court to whom the application has been made, with such preliminary injunction or stay as may appear to such justice to be proper and expedient, and shall specify the time when and place where the witnesses are required to appear, and such examination shall be held either in the city of Albany, or in the judicial district in which the witness resides, or in which the principal office within the state, of the corporation affected, is located. The justice or referee may adjourn such examination from time to time and witnesses must attend accordingly. The testimony of each witness must be subscribed by him, and all must be filed in the office of the clerk of the county in which such order for examination is filed.

§ 344. **Order for examination.** The order for such examination must be signed by the justice making it, and the service of a copy thereof, with an indorsement by the attorney-general, signed by him, to the effect that the person named therein is required to appear and be examined at the time and place, and before the justice or referee specified in such indorsement, shall be sufficient notice for the attendance of witnesses. Such indorsement may contain a clause requiring such person to produce on such examination all books, papers and documents in his possession, or under his control, relating to the

subject of such examination. The order shall be served upon the person named in the indorsement aforesaid by showing him the original order, and delivering to and leaving with him, at the same time, a copy thereof indorsed as above provided, and by paying or tendering to him the fee allowed by law to witnesses subpoenaed to attend trials of civil actions in a court of record in this state.

§ 345. **No person excused from answering.** No person shall be excused from attending and testifying, or from producing any books, papers or other documents before any court, magistrate or referee, upon any investigation, proceeding or trial, pursuant to or for a violation of any of the provisions of this article, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture, for or on account of any transaction, matter or thing concerning which he may so testify, or produce evidence, documentary or otherwise. And no testimony so given or produced shall be received against him upon any criminal investigation, proceeding or trial.

§ 346. **Powers of referee.** A referee appointed as provided in this article possesses all the powers and is subject to all the duties of a referee appointed under section ten hundred and eighteen of the code of civil procedure, so far as practicable, and may punish for contempt a witness duly served as prescribed in this article for non-attendance or refusal to be sworn or to testify or to produce books, papers and documents according to the direction of the indorsement aforesaid, in the same manner, and to the same extent as a referee appointed to hear, try and determine an issue of fact or of law.

§ 370. **Rate of interest.** The rate of interest upon the loan or forbearance of any money, goods, or things, in action, except as otherwise provided by law, shall be six dollars upon one hundred dollars, for one year, and at that rate, for a greater or less sum, or for a longer or shorter time.

§ 371. **Usury forbidden.** No person or corporation shall, directly or indirectly, take or receive in money, goods or things in action, or in any other way, any greater sum or greater value, for the loan or forbearance of any money, goods or things in action, than is above prescribed.

§ 372. **Recovery of excess.** Every person who, for any such loan or forbearance, shall pay or deliver any greater sum or value than is above allowed to be received, and his personal representatives, may recover in an action against the person who shall have taken or received the same, and his personal representatives, the amount of the money so paid or value delivered, above the rate aforesaid, if such action be brought within one year after such payment or delivery.

If such suit be not brought within the said one year, and prosecuted with effect, then the said sum may be sued for and recovered with costs, at any time within three years after the said one year, by any overseer of the poor of the town where such payment may have been made, or by any county superintendent of the poor of the county, in which the payment may have been made.

§ 373. **Usurious contracts void.** All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever, except bottomry and respondentia bonds and contracts, and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken, or secured or agreed to be reserved or taken, any greater sum, or greater value, for the loan or forbearance of any money, goods or other things in action, than is above prescribed, shall be void.

Whenever it shall satisfactorily appear by the admissions of the defendant, or by proof, that any bond, bill, note assurance, pledge, conveyance, contract, security or any evidence of debt, has been taken or received in violation of the

foregoing provisions, the court shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and canceled.

§ 374. Corporations prohibited from interposing defense of usury. No corporation shall hereafter interpose the defense of usury in any action. The term corporation, as used in this section, shall be construed to include all associations, and joint-stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships.

### GENERAL CONSTRUCTION LAW.

§ 10. Acknowledge and acknowledgment. The terms acknowledge and acknowledgment, when used with reference to the execution of an instrument or writing other than a deed of real property, include a compliance with the provisions of the next section by either such proof or acknowledgment.

§ 11. Acknowledgment or proof of instrument. When the execution of any instrument or writing is authorized or required by law to be acknowledged, or to be proven so as to entitle it to be filed or recorded in a public office, the acknowledgment may be taken or the proof made before any officer then and there authorized to take the acknowledgment or proof of the execution of a deed of real property to entitle it to be recorded in a county clerk's office, and shall be made and certified in the same manner as such acknowledgment or proof of such deed.

§ 12. Affidavit. When an affidavit is authorized or required it may be sworn to before any officer authorized by law to take the acknowledgment of deeds in this state, unless a particular officer is specified before whom it is to be taken.

§ 13. Adjournment of meeting. Any meeting referred to in section forty-one of this chapter may be adjourned by a less number than a quorum.

§ 14. Bond and undertaking. A provision of law authorizing or requiring a bond to be given shall be deemed to have been complied with by the execution of an undertaking to the same effect.

§ 15. Chattels. The term chattels includes goods and chattels.

§ 16. Choose. The term choose includes elect and appoint.

§ 17. Civil code and criminal code. The term civil code means the code of civil procedure. The term criminal code means the code of criminal procedure.

§ 18. Consolidated Laws. The term Consolidated Laws shall mean the compilation of the statutes prepared by the board of statutory consolidation and the amendments thereof.

§ 19. Day, calendar. A calendar day includes the time from midnight to midnight. Sunday or any day of the week specifically mentioned means a calendar day.

§ 20. Day computation. A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made. Sunday or a public holiday, other than a half holiday, must be excluded from the reckoning if it is the last day of any such period, or if it is an intervening day of any such period of two days. In computing any specified period of time from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified period of time is reckoned shall be excluded in making the reckoning.

§ 21. **Folio.** The term folio shall mean one hundred words, counting each figure as a word. When an officer empowered by law to do so shall order an official advertisement published in a newspaper in display type or to be so displayed as to leave an unusual quantity of blank space in the advertisement, or to contain pictures or diagrams, or where the character of such advertisement requires it, such advertisement shall be paid for by measurement over all of such space necessarily used, two square inches of space to count as one folio. When there are over fifty and under one hundred words, they shall be counted as one folio; but a less number than fifty words shall not be counted, except when the whole statute, notice or order contains less than fifty words.

§ 22. **Gender.** Words of the masculine gender include the feminine and the neuter, and may refer to a corporation, or to a board or other body or assemblage of persons; and, when the sense so indicates, words of the neuter gender may refer to any gender.

§ 23. **Heretofore and hereafter.** Each of the terms, heretofore, and hereafter, in any provision of a statute, relates to the time such provision takes effect.

§ 24. **Holidays; half-holiday.** The term holiday includes the following days in each year: the first day of January known as New Year's day; the twelfth day of February, known as Lincoln's birthday; the twenty-second of February, known as Washington's birthday; the thirtieth day of May, known as memorial day; the fourth day of July, known as independence day; the first Monday of September, known as labor day; the twelfth day of October, known as Columbus day, and the twenty-fifth day of December, known as Christmas day, and if either of such days is Sunday, the next day thereafter; each general election day and each day appointed by the president of the United States or by the governor of this state as a day of general thanksgiving, general fasting and prayer, or other general religious observances. The term half-holiday includes the period from noon to midnight of each Saturday which is not a holiday.

§ 25. **Holiday in contractual obligations.** Where a contract by its terms requires the payment of money or the performance of a condition on a public holiday, such payment may be made or condition performed on the next business day succeeding such holiday, with the same force and effect as if made or performed in accordance with the terms of the contract.

§ 26. **Judge.** The term judge includes every judicial officer authorized, alone or with others, to hold or preside over a court of record.

§ 27. **Last, preceding, next and following.** A reference to the last or preceding section, or other provision of a statute, means the section or other division immediately preceding, and a reference to the next or following section or other division of a statute means the section or other division immediately following.

§ 28. **Lunatic and lunacy.** The terms lunatic and lunacy include every kind of unsoundness of mind except idiocy.

§ 29. **Men.** The term men includes boys.

§ 30. **Month, computation.** A number of months after or before a certain day shall be computed by counting such number of calendar months from such day, exclusive of the calendar month in which such day occurs, and shall include the day of the month in the last month so counted having the same numerical order in days of the month as the day from which the computation is made, unless there be not so many days in the last month so counted, in which case the period computed shall expire with the last day of the month so counted.

§ 31. **Month in statute, contract and public or private instrument.** In a statute, contract or public or private instrument, unless otherwise provided in such contract or instrument or by law, the term month means a calendar month and not a lunar month.

§ 32. **Municipal officers.** A reference to several officers of a municipal corporation holding the same office, or to a board of such officers, shall be deemed to refer to the single officer holding such office, when but one person is chosen to fill such office in pursuance of law.

§ 33. **Notice.** When a notice is required to be given to a board or body, service of such notice upon the clerk or chairman thereof shall be sufficient.

§ 34. **Now.** The term now in any provision of a statute referring to other laws in force, or to persons in office, or to any facts or circumstances as existing, relates to the laws in force, or to the person in office, or to the facts or circumstances existing, respectively, immediately before the taking effect of such provision.

§ 35. **Number, singular and plural.** Words in the singular number include the plural, and in the plural number include the singular.

§ 36. **Oath, affidavit and swear.** The terms oath and affidavit include every mode authorized by law of attesting the truth of that which is stated. The term swear includes every mode authorized by law for administering an oath.

§ 37. **Person.** The term person includes a corporation and a joint-stock association. When used to designate a party whose property may be the subject of any offense, the term person also includes the state, or any other state, government or country which may lawfully own property in the state.

§ 38. **Property.** The term property includes real and personal property.

§ 39. **Property, personal.** The term personal property includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien, or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated wholly or in part, and everything, except real property, which may be the subject of ownership.

Oil wells and all fixtures connected therewith, situate on lands leased for oil purposes and oil interests, and rights held under and by virtue of any lease or contract or other right or license to operate for or produce petroleum oil, shall be deemed personal property for all purposes except taxation.

§ 40. **Property, real.** The term real property includes real estate, lands, tenements and hereditaments, corporeal and incorporeal.

§ 41. **Quorum and majority.** Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of all such persons or officers at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at a meeting duly held upon reasonable notice to all of them, may perform and exercise such power, authority or duty, and if one or more of such persons or officers shall have died or have become mentally incapable of acting, or shall refuse or neglect to attend any such meeting, a majority of the whole number of such persons or officers shall be a quorum of such board or body, and a majority of such a quorum, if not less than a majority of the whole number of such persons or officers may perform and exercise any such power, authority or duty.

§ 42. **Register of county.** Any act done in pursuance of law by the register of a county shall be deemed to be a compliance with any provision of law authorizing or requiring such act to be done by the county clerk of such county, and any instrument or writing filed, entered or recorded in pursuance of law in the office of a register of a county, shall be deemed to be a compliance with any provision of law authorizing or requiring such paper to be filed, entered or recorded, as the case may be, in the office of the clerk of such county.

The term county clerk when used in relation to conveyances of real property or the filing or recording of instruments which are or may be filed in the office of the register of a county, shall include the register of each county in which there is a register.

§ 43. **Seal of court, public officer or corporation.** A seal of a court, public officer or corporation may be impressed directly upon the instrument or writing to be sealed, or upon wafer, wax or other adhesive substance affixed thereto, or upon paper, or other similar substance affixed thereto by mucilage or other adhesive substance.

§ 44. **Seal, private.** The private seal of a person, other than a corporation, to any instrument or writing shall consist of a wafer, wax or other similar adhesive substance affixed thereto, or of paper or other similar substance affixed thereto, by mucilage or other adhesive substance, or of the word "seal," or the letters "L. S." opposite the signature.

§ 45. **Seal, private as corporate seal.** An instrument or writing duly executed, in the corporate name of a corporation, which shall not have adopted a corporate seal, by the proper officers of the corporation under their private seals, shall be deemed to have been executed under the corporate seal.

§ 46. **Signature.** The term signature includes any memorandum, mark or sign, written or placed upon any instrument or writing with intent to execute or authenticate such instrument or writing.

§ 47. **State.** The term state, when used generally to include every state of the United States, includes also every territory of the United States and the District of Columbia.

§ 48. **Tense, present.** Words in the present tense include the future.

§ 49. **Territory.** The term territory when used generally to include every territory of the United States, includes also the District of Columbia.

§ 50. **Time, computation.** Time shall continue to be computed in this state according to the Gregorian or new style. The first day of each year after the year seventeen hundred and fifty-two is the first day of January, according to such style.

§ 51. **Time, night.** Night time includes the time from sunset to sunrise.

§ 52. **Time, standard.** The standard time throughout this state is that of the seventy-fifth meridian of longitude west from Greenwich, except that at two o'clock ante meridian of the last Sunday in March of each year such standard time throughout this state shall be advanced one hour, and at two o'clock ante meridian of the last Sunday in October, of each year such standard time throughout this state shall, by the retarding of one hour, be returned to the mean astronomical time of the seventy-fifth meridian of longitude west from Greenwich, and all courts and public officers, and legal official proceedings, shall be regulated thereby.

§ 53. **Time, use of standard.** Any act required by or in pursuance of law to be performed at or within a prescribed time, shall be performed according to the standard time.

§ 54. **Village.** The term village means an incorporated village.

§ 55. **Women.** The term women includes girls.

§ 56. **Writing and written.** The terms writing and written include every legible representation of letters upon a material substance, except when applied to the signature of an instrument.

§ 57. **Year, common and leap.** For the purpose of computing and reckoning the days of the year in the same regular course in the future, every year, the number of which in the Christian era is a multiple of four, is a bisextile or leap year consisting of three hundred and sixty-six days, unless such number of year is a multiple of one hundred and the first two figures thereof treated as a

separate number is not a multiple of four, and every year which is not a leap year is a common year consisting of three hundred and sixty-five days.

§ 58. **Year in statute, contract and public or private instrument.** The term year in a statute, contract, or any public or private instrument, means three hundred and sixty-five days, but the added day of a leap year and the day immediately preceding shall for the purpose of such computation be counted as one day. In a statute, contract or public or private instrument, the term year means twelve months, the term half year, six months, and the term a quarter of a year, three months.

### GENERAL CORPORATION LAW.

§ 1. **Short title.** This chapter shall be known as the "General Corporation Law."

§ 2. **Classification of corporations.** A corporation shall be either,

1. A municipal corporation,
2. A stock corporation, or
3. A non-stock corporation.

A stock corporation shall be either

1. A moneyed corporation,
2. A railroad or other transportation corporation, or
3. A business corporation.

A non-stock corporation shall be either.

1. A religious corporation,
2. A membership corporation, or
3. Any corporation other than a stock corporation.

A reference in a general law to a class of corporations described in accordance with this classification shall include all corporations theretofore formed belonging to such class.

§ 3. **Definitions.** 1. A "municipal corporation" includes a county, town, school district, village and city and any other territorial division of the state established by law with powers of local government.

2. A "stock corporation" is a corporation having a capital stock divided into shares, and which is authorized by law to distribute to the holders thereof dividends or shares of the surplus profits of the corporation. A corporation is not a stock corporation because of having issued certificates called certificates of stock, but which are in fact merely certificates of membership, and which is not authorized by law to distribute to its members any dividends or share of profits arising from the operations of the corporation.

3. The term "non-stock corporation" includes every corporation other than a stock corporation.

4. A "moneyed corporation" is a corporation formed under or subject to the banking or the insurance law.

5. A "domestic corporation" is a corporation incorporated by or under the laws of the state or colony of New York. Every corporation which is not a domestic corporation is a foreign corporation, except as provided by the code of civil procedure for the purpose of construing such code.

6. The term "directors," when used in relation to corporations, shall include trustees or other persons, by whatever name known, duly appointed or designated to manage the affairs of the corporation.,

7. The term "certificate of incorporation" shall include articles of association or any other written instruments required by law to be filed, to effect the incorporation of a corporation, including a certified copy of an original certificate of incorporation filed for such purpose in pursuance of law.

8. The term "member of a corporation" shall include every person having

a right to vote at a meeting of the corporation for the election of directors, other than a person having a right to vote only upon a proxy.

9. The term "office of a corporation" means its principal office within the state, or principal place of business within the state if it has no principal office therein.

10. The term "business of a corporation," when used with reference to a non-stock corporation, includes the operations for the conduct of which it is incorporated.

11. The term "corporate law" or "laws," when used in any law forming a part of the consolidation of the general laws of the state of which this chapter is a part, means the general statutes of this state relating to corporations included in such consolidation.

12. The existence of an easement in real property acquired or reserved by a municipal corporation, a railroad corporation or other transportation corporation, shall not be deemed an encumbrance upon such real property under any law relating to investments in mortgages upon real property by corporations, trustees, executors, administrators, guardians or other persons holding trust funds, but the effect of such an easement upon the real property which it affects, shall be taken into consideration in determining the value thereof.

§ 4. **Qualifications of incorporators.** A certificate of incorporation must be executed by natural persons, who must be of full age, and at least two-thirds of them must be citizens of the United States and one of them a resident of this state. This section shall not apply to a corporation formed by the reincorporation or consolidation of existing corporations, or to the reorganization of a corporation upon the sale of the property and franchises of a previously existing corporation or otherwise.

§ 5. **Filing and recording certificates of incorporation.** 1. Every certificate of incorporation and every amended or supplemental certificate, and every certificate which alters the provisions of any certificate of incorporation or any amended or supplemental certificate hereafter executed, shall be in the English language, and except as otherwise provided by law, shall be filed in the office of the secretary of state, and shall be by him duly recorded and indexed in books specially provided therefor, and a certified copy of such certificate or amended or supplemental certificate with a certificate of the secretary of state of such filing and record, or a duplicate original of such certificate or amended or supplemental certificate shall be filed and similarly recorded and indexed in the office of the clerk of the county in which the office of the corporation is to be located, or if it be a non-stock corporation, and such county be not determined upon at the time of executing the certificate of incorporation, in such county clerk's office as the judge approving the certificate shall direct. Nothing herein contained, however, shall be deemed to prohibit a corporation from having and using a corporate name or title in a language other than the English language if the same be in English letters or characters. All taxes required by law to be paid before or upon incorporation and the fees for filing and recording such certificate must be paid before filing. No corporation shall exercise any corporate powers or privileges until such taxes and fees have been paid.

2. Whenever under any law now or heretofore in force the certificate of incorporation of any corporation other than a stock corporation was or is required to be filed in more than one public office, a certified copy of such certificate so filed in any one of such public offices may be filed in such other office with the like effect as if the original had been duly filed therein, provided, however, that no rights accrued prior to the filing of such copy shall be impaired or affected thereby, provided also, that such filing of a copy shall not cause a duplication or similarity of corporate names in violation of the next succeeding section.

§ 6. **Corporate names.** 1. No certificate of incorporation of a proposed corporation having the same name as a corporation authorized to do business under the laws of this state, or a name so nearly resembling it as to be calculated to deceive, shall be filed or recorded in any office for the purpose of effecting its incorporation, or of authorizing it to do business in this state; nor shall any corporation except a religious, charitable or benevolent corporation or bar association be authorized to do business in this state unless its name has such word or words, abbreviation, affix or prefix, therein or thereto, as will clearly indicate that it is a corporation as distinguished from a natural person, firm or copartnership; or unless such corporation uses with its corporate name, in this state, such an affix or prefix. A corporation formed by the reincorporation, reorganization or consolidation of other corporations or upon the sale of the property or franchises of a corporation, or a corporation acquiring or becoming possessed of all the estate, property, rights, privileges and franchises of any other corporation or corporations by merger, may have the same name as the corporation or one of the corporations to whose franchises it has succeeded. No corporation shall be hereafter organized under the laws of this state with the word "trust," "bank," "banking," "insurance," "assurance," "indemnity," "guarantee," "guaranty," "title," "casualty," "surety," "fidelity," "bonding," "savings," "investment," "loan" or "benefit" as part of its name, except a corporation formed under the banking law or the insurance law.

§ 7. **Amended and supplemental certificates.** If in the original or amended certificate of incorporation of any corporation, or if in a supplemental certificate of any corporation any informality exist, or if any such certificate contain any matter not authorized by law to be stated therein, or if the proof or acknowledgment thereof shall be defective, the incorporators or directors of the corporation may make and file an amended certificate correcting such informality or defect or striking out such unauthorized matter; and the certificate amended shall be deemed to be amended accordingly as of the date such amended certificate was filed, and upon the filing of such an amended certificate of incorporation, the corporation shall then for all purposes be deemed to be a corporation from the time of filing the original certificate.

The supreme court may, upon due cause shown, and proof made, and upon notice to the attorney-general, and to such other persons as the court may direct, and upon such terms and conditions as it may impose, amend any certificate of incorporation which fails to express the true object and purpose of the corporation, so as to truly set forth such object and purpose.

When an amended or supplemental certificate is filed, an entry shall be made upon the margin of the index and record of the original certificate of the date and place of record of every such amended certificate.

The amendment of a certificate under this section shall be without prejudice to any pending action or proceeding, or to any rights previously accrued.

§ 8. **Lost or destroyed certificates.** If either of the certificates of incorporation shall be lost or destroyed after filing, a certified copy of the other certificate may be filed in the place of the one lost or destroyed and as of the date of its original filing, and such certified copy shall have the same force and effect as the original certificate had when filed.

§ 9. **Certificate and other papers as evidence; evidence of consolidation.** 1. The certificate of incorporation of any corporation duly filed shall be presumptive evidence of its incorporation, and any amended certificate or other paper duly filed or recorded relating to the incorporation of any corporation or its existence or management, and containing facts required or authorized by law to be stated therein, shall be presumptive evidence of the existence of such facts.

2. Whenever, by the laws of any other state or territory, or the dominion of Canada, a copy of the certificate of organization or incorporation or any other certificate, certified or exemplified by any officer or officers in such state or territory or dominion, is or shall be prima facie evidence of the due formation, creation, existence, organization or capacity of any corporation or joint-stock company, created, organized or located in such state, territory or dominion, or claiming so to be, such certificate or certificates, duly exemplified, or a duly exemplified copy thereof, shall be received in all actions and proceedings in this state, in or before all courts and officers, with the same force and effect in all respects as prima facie evidence as aforesaid, as in such other state, territory or dominion.

3. Where two or more corporations have been or shall hereafter be consolidated and merged into a new corporation, a certificate of the secretary of state under his official seal concisely stating the names of the respective corporations consolidated, the dates of the filing of the certificates respectively of the incorporation of such corporations in his office, the object for which they were formed, including the nature and locality of their business as set forth in their respective incorporation papers on file in his office, the date of the filing of the consolidation agreement and other proceedings in his office, the name of the new corporation formed by such consolidation and merger, the term of its corporate existence, the place where its principal office is situated and the amount of its capital stock, shall be presumptive and prima facie evidence in all actions and special proceedings for all purposes of the incorporation of the corporations so consolidated, the incorporation of the new corporation by such consolidation and merger from the date of filing of said consolidation agreement and proceedings, and of the other facts so certified by him.

§ 10. **Limitation of powers; provisions of certificate.** 1. No corporation shall possess or exercise any corporate powers not given by law, or not necessary to the exercise of the powers so given.

2. The certificate of incorporation of any corporation may contain any provision for the regulation of the business and the conduct of the affairs of the corporation, and any limitation upon its powers, or upon the powers of its directors and stockholders, which does not exempt them from the performance of any obligations or the performance of any duty imposed by law.

§ 11. **Grant of general powers.** Every corporation as such has power, though not specified in the law under which it is incorporated:

1. To have succession for the period specified in its certificate of incorporation or by law, and perpetually when no period is specified.

2. To have a common seal, and alter the same at pleasure.

3. To acquire by grant, gift, purchase, devise or bequest, to hold and to dispose of such property as the purposes of the corporation shall require, subject to such limitations as may be prescribed by law.

4. To appoint such officers and agents as its business shall require, and to fix their compensation, and

5. To make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and the transfer of its stock, if it has any, and the calling of meetings of its members. Such by-laws may also fix the amount of stock, which must be represented at meetings of the stockholders in order to constitute a quorum, unless otherwise provided by law. By-laws duly adopted at a meeting of the members of the corporation shall control the action of its directors. No by-law adopted by the board of directors regulating the election of directors or officers shall be valid unless published for at least once a week for two successive weeks in a newspaper in the county where the election is to be held, and at least thirty days before such election.

Subdivisions four and five of this section shall not apply to municipal corporations.

§ 13. **Acquisition of additional real property.** When any corporation, except a life insurance corporation, shall have sold or conveyed any part of its real property, the supreme court may, notwithstanding any restriction of a general or special law, authorize it to purchase and hold from time to time other real property, upon satisfactory proof that the value of the property so purchased does not exceed the value of the property so sold and conveyed within the three years next preceding the application.

§ 14. **Acquisition of property without the state.** Any domestic corporation transacting business in other states or foreign countries may acquire and dispose of such property as shall be requisite for such corporation in the convenient transaction of its business. Any domestic corporation establishing or maintaining a charitable, philanthropic or educational institution within this state may also carry on its work and establish or maintain one or more branches of such institution or an additional institution or additional institutions in any other state, the District of Columbia or in any part of the territories or dependencies of the United States of America or in any foreign country and for either of said purposes may take by devise or bequest, hold, purchase, mortgage, sell and convey or otherwise dispose of such real and personal property without this state as may be requisite therefor. But nothing in this section contained shall be construed as exempting from taxation property to any additional amount than is now allowed to such corporation under existing laws.

§ 15. **Certificate of authority of a foreign corporation.** No foreign stock corporation other than a moneyed corporation, shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business, or if more than one kind of business, by two of more corporations so incorporated for such kinds of business respectively. The secretary of state shall deliver such certificate to every such corporation so complying with the requirements of law. No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate. This prohibition shall also apply to any assignee of such foreign stock corporation and to any person claiming under such assignee or such foreign stock corporation or under either of them. No certificate of authority shall be granted to any foreign corporation having the same name as an existing domestic corporation, or a name so nearly resembling it as to be calculated to deceive, nor to any foreign corporation, other than a moneyed or insurance corporation, with the word "trust," "bank," "banking," "insurance," "assurance," "indemnity," "guarantee," "guaranty," "title," "casualty," "surety," "fidelity," "bonding," "savings," "investment," "loan" or "benefit," as a part of its name.

§ 16. **Proof to be filed before granting certificate.** Before granting such certificate the secretary of state shall require every such foreign corporation to filed in his office a sworn copy in the English language of its charter or certificate of incorporation and a statement under its corporate seal, and the signature of its president, vice-president or other acting head, particularly setting forth the business or objects of the corporation which it is engaged in carrying on or which it proposes to carry on within the state, and a place within the state which is to be its principal place of business, and designating a person upon whom process against the corporation may be served within the state.

The person so designated must have an office or place of business at the place where such corporation is to have its principal place of business within this state and such designation must specify such office or place of business of the said person so designated, and if it is within a city the street and street number if any, or other suitable designation of the particular locality. Such designation shall be accompanied with the written consent of the person designated and shall continue in force until revoked by an instrument in writing designating in like manner some other person upon whom process against the corporation may be served in this state or until the filing in the same office of a written revocation of said consent executed by the person so designated. If the person so designated dies or removes from the place where the corporation has its principal place of business within the state, or files such revocation of his consent, and the corporation does not within thirty days after such death or removal or revocation of consent designate in like manner another person upon whom process against it may be served within the state, the secretary of state may revoke the authority of the corporation to do business within the state, and process against the corporation in an action upon any liability incurred within this state before such revocation, may, after such death or removal, or revocation of consent, and before another designation is made, be served upon the secretary of state. At the time of such service the plaintiff shall pay to the secretary of state two dollars, to be included in his taxable costs and disbursements, and the secretary of state shall forthwith mail a copy of such notice to such corporation if its address, or the address of any officer thereof, is known to him. The secretary of state may require the execution of any such designation, revocation or consent, to be authenticated as he deems proper and he may refuse to file it without such authentication.

§ 16-a. **Certificate of surrender of authority.** A foreign corporation having authority under section sixteen of this chapter to do business in this state, may surrender such authority by filing in the office of the secretary of state, a certificate under its corporate seal and the signature of its president, vice president, or other acting head, setting forth:

1. The name of the corporation and the state under whose laws it is formed.
2. The date on which it received authority to do business in this state.
3. Revoking its designation of the person upon whom process against the corporation may be served in this state.
4. That it surrenders its authority to do business in this state and that, as evidence of such surrender, it returns to the secretary of state, for cancellation, its certificate of authority to do business in this state, or that such certificate has been lost or destroyed.

Proof of execution in the form prescribed by section three hundred and nine of the real property law shall be attached. The certificate of authority shall be attached to the certificate of surrender, unless such certificate of authority has been lost or destroyed, in which event, there shall be attached an affidavit of the president, vice president, secretary, or other officer of the corporation, to the effect that such certificate has been lost or destroyed, as the case may be. On the filing of such certificate, the secretary of state shall make a note of the filing thereof on his index of corporations and thereupon the authority of the corporation to do business within this state shall cease and determine, and no such corporation doing business in this state after the filing of such certificate of surrender of authority shall maintain any action in this state upon any contract made by it in this state subsequent to the filing of such certificate of surrender of authority. The filing of such certificate shall not, however, affect any action pending at the time of such surrender, or affect any action in the state upon any contract made by the corporation in this state before the filing

of the certificate of surrender of authority. Process against the corporation in an action upon any liability incurred within this state before the filing of such certificate of surrender of authority may, after the filing thereof, be served upon the secretary of state. At the time of such service, the plaintiff shall pay to the secretary of state two dollars to be included in his taxable costs and disbursements, and the secretary of state shall forthwith mail a copy of such process to such corporation, if its address or the address of any officer thereof, is known to him. [L. 1918, c. 193.]

**§ 20. Acquisition of real property in this state by certain foreign corporations.** Any foreign corporation doing business in this state and created under the laws of the United States, or of any state or territory thereof, or of any foreign state or nation which borders the United States of America and which by its laws confers similar privileges on corporations created by the laws of the state of New York, may require and hold such real property in this state as may be necessary for its corporate purposes in the transaction of its business in this state, and convey the same by deed or otherwise in the same manner as a domestic corporation. [General Corporation Law, 1890, c. 563, § 12, as amended and made section 17 by L. 1892, c. 687.]

**§ 21. Acquisition by foreign corporation of real property in this state.** Any foreign corporation may purchase at a sale upon the foreclosure of any mortgage held by it, or, upon any judgment or decree for debts due it, or, upon any settlement to secure such debts, any real property within this state covered by or subject to such mortgage, judgment, decree or settlement, and may take by devise any real property situated within this state and hold the same for not exceeding five years from the date of such purchase, or from the time when the right to the possession thereof vests in such devisee, and convey it by deed or otherwise in the same manner as a domestic corporation.

**§ 22. Prohibition of banking powers.** No corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of this state or of the United States, except as permitted by such laws, shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, of receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt for circulation as money, or of engaging in any other form of banking; nor shall any such corporation, except an express company having contracts with railroad companies for the operation of an express service upon the lines of such railroad companies, or a transatlantic steamship company, or a telegraph company, or a corporation incorporated prior to the year eighteen hundred and fifty, to promote the welfare of emigrants, possess the power of receiving money for transmission or of transmitting the same, by draft, traveler's check, money order or otherwise.

**§ 23. Qualification of members as voters.** Unless otherwise provided in the certificate of incorporation, every stockholder of record of a stock corporation shall be entitled at every meeting of the corporation to one vote for every share of stock standing in his name on the books of the corporation; and at every meeting of a non-stock corporation, every member, unless disqualified by the by-laws, shall be entitled to one vote. The stockholders of a stock corporation by a by-law adopted by a vote at any annual meeting, or at any special meeting duly called for such purpose, may prescribe a period, not exceeding forty days prior to meetings of the stockholders, during which no transfers of stock on the books of the corporation may be made. Except in cases of express trust, or in which other provision shall have been made by written agreement between the parties, the record holder of stock which shall be held by him as security, or which shall actually belong to another, upon demand therefor and payment

of necessary expenses thereof, shall issue to such pledgor or to such actual owner of such stock, a proxy to vote thereon. No member of a corporation shall sell his vote or issue a proxy to vote to any person for any sum of money or any thing of value. The books and papers containing the record of membership of the corporation shall be produced at any meeting of its members upon the request of any member. If the right to vote at any such meeting shall be challenged, the inspectors of election, or other persons presiding thereat, shall require such books, if they can be had, to be produced as evidence of the right of the person challenged to vote at such meeting, and all persons who may appear from such books to be members of the corporation may vote at such meeting in person or by proxy, subject to the provisions of this chapter.

§ 23-a. **Stock held in fiduciary capacity; how voted.** Fiduciaries, whether appointed by last will and testament or by the court, shall have the same right and power, either in person or by proxy, at all corporate meetings to vote any and all shares of stock held by them in a fiduciary capacity, in any corporation organized under the laws of this state, as the deceased or legal owner thereof had in his lifetime. And where such stock is registered on the books of such corporation in the name of, or has passed by operation of law or by virtue of any last will and testament, to more than two fiduciaries, and dispute shall arise among them, the said shares of stock shall be voted by a majority of such fiduciaries, and in such manner and for such purpose as such majority shall authorize, direct, or desire the same to be voted. If the number of fiduciaries shall be even and they shall be equally divided upon the question of voting such stock, it shall be lawful for the court having jurisdiction of their accounts, upon petition filed by any of such fiduciaries or by any party in interest, to direct the voting of such stock by the person or persons beneficially interested in the manner which, in the opinion of such court, will be for the best interests of the parties beneficially interested in the stock. Fiduciaries, whether appointed by last will and testament, filed in any court of this state, or by any court of this state, shall have all the foregoing rights and powers, subject to the foregoing limitations, to vote any and all shares of stock, held by them in a fiduciary capacity, in any corporation, organized under the laws of any other state, providing nothing in the laws of the state, under which the corporation was organized, prohibits the exercise of such rights and powers. [L. 1918, c. 472.]

§ 24. **Cumulative voting.** The certificate of incorporation of any stock corporation may provide that at all elections of directors of such corporation, each stockholder shall be entitled to as many votes as shall equal the number of his shares of stock multiplied by the number of directors to be elected, and that he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them as he may see fit, which right, when exercised, shall be termed cumulative voting. The stockholders of a corporation heretofore formed, who, by the provisions of laws existing on April thirtieth, eighteen hundred and ninety-one, were entitled to the exercise of such right, may hereafter exercise such right according to the provisions of this section.

§ 25. **Voting trust agreements.** A stockholder may, by agreement in writing, transfer his stock to any person or persons for the purpose of vesting in him or them the right to vote thereon for a time not exceeding five years upon terms and conditions stated, pursuant to which such person or persons shall act; every other stockholder, upon his request therefor, may, by a like agreement in writing, also transfer his stock to the same person or persons and thereupon may participate in the terms, conditions and privileges of such agreement; the certificates of stock so transferred shall be surrendered and canceled and certificates therefor issued to such transferee or transferees in which it shall appear that they are issued pursuant to such agreement and in the entry of such transferee

or transferees as owners of such stock in the proper books of said corporation that fact shall also be noted and thereupon he or they may vote upon the stock so transferred during the time in such agreement specified; a duplicate of every such agreement shall be filed in the office of the corporation where its principal business is transacted and be open to the inspection of any stockholder, daily, during business hours.

§ 26. **Proxies.** Every member of a corporation, except a religious corporation, entitled to vote at any meeting thereof may so vote by proxy.

No officer, clerk, teller or bookkeeper of a corporation formed under or subject to the banking law shall act as proxy for any stockholder at any meeting of any such corporation.

Every proxy must be executed in writing by the member himself, or by his duly authorized attorney. No proxy hereafter made shall be valid after the expiration of eleven months from the date of its execution unless the member executing it shall have specified therein the length of time it is to continue in force, which shall be for some limited period. Every proxy shall be revocable at the pleasure of the person executing it; but a corporation having no capital stock may prescribe in its by-laws the persons who may act as proxies for members, and the length of time for which proxies may be executed.

§ 27. **Challenges.** Every member of a corporation offering to vote at any election or meeting of the corporation shall, if required by an inspector of election or other officer presiding at such election or meeting, or by any other member present, take and subscribe the following oath: "I do solemnly swear that in voting at this election I have not, either directly, indirectly or impliedly received any promise or any sum of money or any thing of value to influence the giving of my vote or votes at this meeting or as a consideration therefor." Any person offering to vote as proxy for any other person shall present his proxy and, if so required, take and subscribe the following oath: "I do solemnly swear that I have not, either directly, indirectly or impliedly, given any promise or any sum of money or any thing of value to induce the giving of a proxy to me to vote at this election, or received any promise of any such sum of money or any thing of value to influence the giving of my vote at this meeting, or as a consideration therefor." The inspectors or persons presiding at the election may administer such oath, and all such oaths and proxies shall be filed in the office of the corporation.

§ 28. **Effect of failure to elect directors.** If the directors shall not be elected on the day designated in the by-laws, or by law, the corporation shall not for that reason be dissolved; but every director shall continue to hold his office and discharge his duties until his successor has been elected.

§ 29. **Mode of calling special election of directors.** If the election has not been held on the day so designated, the directors shall forthwith call a meeting of the members of the corporation for the purpose of electing directors, of which meeting notice shall be given in the same manner as of the annual meeting for the election of directors.

If such meeting shall not be so called within one month, or, if held, shall result in a failure to elect directors, any member of the corporation may call a meeting for the purpose of electing directors by publishing a notice of the time and place of holding such meeting at least once in each week for two successive weeks immediately preceding the election, in a newspaper published in the county where the election is to be held and in such other manner as may be prescribed in the by-laws for the publication of notice of the annual meeting, and by serving upon each member, either personally or by mail, directed to him at his last known post-office address, a copy of such notice at least two weeks before the meeting.

§ 30. **Mode of conducting special election of directors.** Such meeting shall be held at the office of the corporation, or if it has none, at the place in this state where its principal business has been transacted, or if access to such office or place is denied or can not be had, at some other place in the city, village or town where such office or place is or was located.

At such meeting the members attending shall constitute a quorum. They may elect inspectors of election and directors and adopt by-laws providing for future annual meetings and election of directors, if the corporation has no such by-laws, and transact any other business which may be transacted at an annual meeting of the members of the corporation.

§ 31. **Qualification of voters and canvass of votes at special election.** In the absence at such meeting of the books of the corporation showing who are members thereof, each person, before voting, shall present his sworn statement setting forth that he is a member of the corporation; and if a stock corporation, the number of shares of stock owned by him and standing in his name on the books of the corporation, and, if known to him, the whole number of shares of stock of the corporation outstanding. On filing such statement, he may vote as a member of the corporation; and if a stock corporation, he may vote on the shares of stock appearing in such statement to be owned by him and standing in his name on the books of the corporation.

The inspectors shall return and file such statements, with a certificate of the result of the election, verified by them, in the office of the clerk of the county in which such election is held, and the persons so elected shall be the directors of the corporation.

§ 32. **Powers of supreme court respecting elections.** The supreme court shall, upon the application of any person or corporation aggrieved by or complaining of any election of any corporation or any proceeding, act or matter touching the same, upon notice thereof to the adverse party, or to those to be affected thereby, forthwith and in a summary way hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matters or causes of complaint, and establish the election or order a new election, or make such order and give such relief as right and justice may require.

§ 33. **Stay of proceedings in actions collusively brought.** If an action is brought against a corporation by the procurement or default of its directors, or any of them, to enforce any claim or obligation declared void by law, or to which the corporation has a valid defense, and such action is in the interest or for the benefit of any director, and the corporation has by his connivance made default of such action, or consented to the validity of such claim or obligation, any member of the corporation may apply to the supreme court, upon affidavit, setting forth the facts, for a stay of proceedings in such action, and on proof of the facts in such further manner and upon such notice as the court may direct, it may stay such proceedings or set aside and vacate the same, or grant such other relief as may seem proper, and which will not injuriously affect an innocent party, who, without notice of such wrongdoing and for a valuable consideration, has acquired rights under such proceedings.

§ 34. **Quorum of directors and powers of majority.** The affairs of every corporation shall be managed by its board of directors, at least one of whom shall be a citizen of the United States and a resident of this state. Unless otherwise provided a majority of the board of directors of a corporation at a meeting duly assembled shall be necessary to constitute a quorum for the transaction of business and the act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors. The members of a corporation may in by-laws fix the number of directors necessary to constitute a quorum at a number less than a majority of the board, but at least equal to

one-third of its number. Subject to the by-laws, if any, adopted by members of a corporation, the directors may make necessary by-laws of the corporation.

§ 35. **Directors as trustees in case of dissolution.** Upon the dissolution of any corporation, its directors, unless other persons shall be appointed by the legislature, or by some court of competent jurisdiction, shall be the trustees of its creditors, stockholders or members, and shall have full power to settle its affairs, collect and pay outstanding debts, and divide among the persons entitled thereto the money and other property remaining after payment of debts and necessary expenses.

Such trustees shall have authority to sue for and recover the debts and property of the corporation, by their name as such trustees, and shall jointly and severally be personally liable to its creditors, stockholders or members, to the extent of its property and effects that shall come into their hands.

§ 36. **Forfeiture for non-user.** If any corporation, except a railroad, turnpike, plank-road or bridge corporation, shall not organize and commence the transaction of its business or undertake the discharge of its corporate duties within two years from the date of its incorporation, its corporate powers shall cease.

§ 37. **Extension of corporate existence.** Any domestic corporation at any time before the expiration thereof, may extend the term of its existence beyond the time specified in its original certificate of incorporation, or by law, or in any certificate of extension of corporate existence, by the consent of the stockholders owning two-thirds in amount of its capital stock, or if not a stock corporation, by the consent of two-thirds of its members, which consent shall be given either in writing or by vote at a special meeting of the stockholders called for that purpose, upon the same notice as that required for the annual meetings of the corporation; and a certificate under the seal of the corporation that such consent was given by the stockholders in writing, or that it was given by vote at a meeting as aforesaid, shall be subscribed and acknowledge by the president or a vice-president, and by the secretary or an assistant secretary of the corporation, and if a corporation formed under or subject to the banking law shall be filed in the office of the superintendent of banks, if an insurance corporation, in the office of the superintendent of insurance, and otherwise in the office of the secretary of state, and shall by such officer be duly recorded and indexed in a book specially provided therefor, and a certified copy of such certificate, with a certificate of such officer of such filing and record, or a duplicate original of such certificate, shall be filed and similarly recorded and indexed in the office of the clerk of the county wherein the corporation has its principal place of business, and shall be noted in the margin of the record of the original certificates of such corporation, if any, in such offices, and thereafter the term of the existence of such corporation shall be extended as designated in such certificate.

The certificate of incorporation of any corporation whose duration is limited by such certificate or by law, may require that the consent of the stockholders owning a greater percentage than two-thirds of the stock, if a stock corporation, or of more than two-thirds of the members, if a non-stock corporation, shall be requisite to affect an extension of corporate existence as authorized by this section.

§ 38. **Revival of corporate existence.** If the term of existence of any domestic corporation shall have expired and it shall be made satisfactorily to appear to the supreme court that such corporation was legally organized pursuant to any law of this state, and that it shall have issued its bonds payable at a date beyond the date fixed in its charter or certificate of incorporation for the expiration of its corporate existence, and such bonds shall be unmatured and unpaid, or, if a bank, incorporated under a general law of this state, that shall have issued any other obligations or shall have incurred any other indebtedness

which at the date of the application shall be unsatisfied or unpaid the supreme court may, upon the application of any person interested and upon such notice to such other parties as the court may require, by order, authorize the filing and recording of a certificate reviving the existence of such corporation, upon such conditions and with such limitations as such order shall specify, and extending such corporate existence for a term not exceeding the term for which it was originally incorporated. Upon filing and recording such certificate in the same manner as certificates of extension of corporate existence duly issued before the expiration of the existence of a domestic corporation are authorized by law to be filed and recorded, such corporate existence shall be revived and extended in pursuance of the terms of such order, but such revival and extension shall not affect any litigation commenced after such expiration and pending at the time of such revival.

§ 39. **Approval of certificates of extension or revival; when required.** In the case of a corporation formed under or subject to the banking law, no certificate of extension or revival shall be filed or recorded unless it shall have indorsed thereon the written approval of the superintendent of banks; or, if an insurance corporation, unless it shall have indorsed thereon the written approval of the superintendent of insurance; and, if a turnpike or bridge corporation, it shall not be filed unless it shall have indorsed thereon or annexed thereto a certified copy of a resolution of the board of supervisors of each county in which such turnpike or bridge is located, approving of and authorizing such extension.

§ 40. **Extension when stock is owned by another corporation.** If all the stock of a corporation other than a corporation formed under or subject to the banking law, or an insurance corporation, or a turnpike, plank-road or bridge corporation shall be lawfully owned by another stock corporation entitled by law to take a surrender and merger thereof, the corporate existence of such corporation whose stock is so owned may be extended at any time for the term of the corporate existence of the possessor corporation, by filing in the office or offices in which the original certificate or certificates of incorporation of the first-mentioned corporation were filed a certificate of such extension executed by its president and secretary and by such corporation owning all the shares of its capital stock.

§ 41. **Effect of extension.** Every corporation extending its corporate existence under this chapter or under any general law of the state shall hereafter be subject to the provisions of this chapter and of such general law, notwithstanding any special provisions in its charter, and shall thereafter be deemed to be incorporated under the general laws of the state relating to the incorporation of a corporation for the purpose of carrying on the business in which it is engaged, and shall be subject to the provisions of such law.

§ 42. **When notice of lapse of time unnecessary.** Whenever under the provisions of any of the corporate laws a corporation is authorized to take any action after notice to its members or after the lapse of a prescribed period of time, such action may be taken without notice and without the lapse of any period of time, if such action be authorized or approved, and such requirements be waived in writing by every member of such corporation, or by his attorney thereunto authorized.

§ 43. **As to acts of directors.** Whenever, under the provisions of any of the corporate laws a corporation is authorized to take any action by the agreement or action of its directors, managers or trustees, such agreement or action may be taken by such directors, regularly convened as a board, and acting by a majority of a quorum, except when otherwise expressly required by law or the by-laws of the corporation and any such agreement shall be executed in behalf of the corporation by such officers as shall be designated by the board of directors, managers or trustees. At any meeting at which every member of the board of

directors shall be present, though held without notice, any business may be transacted which might have been transacted if the meeting had been duly called. Except when otherwise required by law or the by-laws of the corporation, special meetings of the members of the corporation may be called in the same manner as the annual meeting thereof.

§ 44. **Political contributions prohibited; penalty.** No corporation or joint-stock association doing business in this state, except a corporation or association organized or maintained for political purposes only, shall directly or indirectly pay or use or offer, consent or agree to pay or use any money or property for or in aid of any political party, committee or organization, or for, or in aid of, any corporation, joint-stock or other association organized or maintained for political purposes, or for, or in aid of, any candidate for political office or for nomination for such office, or for any political purpose whatever, or for the reimbursement or indemnification of any person for moneys or property so used. Any officer, director, stockholder, attorney or agent of any corporation or joint-stock association which violates any of the provisions of this section, who participates in, aids, abets or advises or consents to any such violation, and any person who solicits or knowingly receives any money or property in violation of this section, shall be guilty of a misdemeanor and punishable by imprisonment in a penitentiary or county jail for not more than one year and a fine of not more than one thousand dollars. No person shall be excused from attending and testifying, or producing any books, papers or other documents before any court or magistrate, upon any investigation, proceeding or trial, for a violation of any of the provisions of this section, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding.

§ 60. **Petition by corporation to change name.** A petition to assume another corporate name may be made by a domestic corporation other than a corporation organized under the business corporations law, the transportation corporations law or the membership corporations law, or organized under any law repealed by either of those laws, whether incorporated by a general or special law, to the supreme court at a special term thereof, held in the judicial district in which its principal business office shall be situated, or, if it be other than a stock corporation, at a special term held in the judicial district in which its certificate of incorporation is filed or recorded, or in which its principal property is situated, or in which its principal operations are or theretofore have been conducted. If it be a banking, insurance or railroad corporation, the petition must be authorized by a resolution of the directors of the corporation, and approved, if a banking corporation, by the superintendent of banks; if an insurance corporation, by the superintendent of insurance, and if a railroad corporation, by the public service commission. The petition to change the name of any other corporation must have annexed thereto a certificate of the secretary of state, that the name which such corporation proposes to assume is not the name of any other corporation appearing on his index of corporations as authorized to do business under the laws of the State of New York, or a name which he deems so nearly resembling it, as to be calculated to deceive.\*

§ 61. **Contents of petition.** The petition must be in writing, signed by the petitioner and verified in like manner as a pleading in a court of record, and must specify the grounds of the application, its present name, and the name it proposes to assume, which must not be the name of any other corporation,

or a name so nearly resembling it as to be calculated to deceive; and if it be a railroad corporation, a corporation having banking powers or the power to make loans upon pledges or deposits, or to make insurances, that the petition has been duly authorized by a resolution of the directors of the corporation and approved by the proper officer.

§ 62. **Notice of presentation of petition.** If the petition be made by a corporation located elsewhere than in the city and county of New York, notice of the presentation thereof shall be published once in each week for three successive weeks in a newspaper of every county in which such corporation shall have a business office, or if it has no business office, of the county in which its principal corporate property is situated, or in which its operations are or theretofore have been principally conducted, which newspaper, if it be a banking corporation, shall be designated by the superintendent of banks, if an insurance corporation by the superintendent of insurance, or if a railroad corporation, by the public service commission. In the city and county of New York such notice shall be published once in each week for three successive weeks in two daily newspapers published in such county. If the petition be made by a domestic corporation organized under or subject to the religious or membership corporations law the court may dispense with the publication of the notice of the presentation of such petition or require notice of such presentation to be given to such persons and in such manner as the court thinks proper. A copy of the petition and notice of motion shall be filed with the secretary of state, and the proposed name shall thereupon be reserved for said corporation until three weeks after the date of such motion, and until three weeks after the date of any adjournment of such motion if notice of such adjournment shall be filed with the secretary of state, and no certificate of incorporation of a proposed corporation, having the same name as the name proposed in such petition, or a name so nearly resembling it as to be calculated to deceive, shall be filed in any office for the purpose of effecting its incorporation, and no corporation formed without the state of New York having the same name or a name so nearly resembling it as to be calculated to deceive shall be given authority to do business in this state.

§ 63. **Order authorizing change.** If the court to which the petition is presented is satisfied thereby, or by the affidavit and certificate presented therewith, that the petition is true, and that there is no reasonable objection to the change of name proposed and that the petition has been duly authorized and that notice of the presentation of the petition, if required by law, has been made, the court shall make an order authorizing the petitioner to assume the name proposed on a day specified therein, not less than thirty days after the entry of the order. The order shall be directed to be entered and the papers on which it was granted to be filed within ten days thereafter in the office of the clerk of the county in which its certificate of incorporation, if any, shall be filed, or if there be none filed, in which its principal office shall be located, or if it has no business office in the county in which its principal property is situated, or in which its operations are or theretofore have been principally conducted or in the office of the clerk of the county in which the special term granting the order is held; and that a certified copy of such order shall, within ten days after the entry thereof, be filed in the office of the secretary of state; and also, if it be a banking corporation, in the office of the superintendent of banks, or if it be an insurance corporation in the office of the superintendent of insurance, or if it be a railroad corporation, in the offices of the public service commissions. Such order shall also direct the publication, within ten days after the entry thereof, of a copy thereof, in a designated newspaper, in the county in which the order is directed to be entered, once in each week for four successive weeks. The court may dispense

with the publication of a copy of such order and require notice to be given to such persons and in such manner as it thinks proper if the petition be made by a domestic corporation organized under or subject to the religious or membership corporations law.

§ 64. **When change to take effect.** If the order shall be fully complied with, and within forty days after the making of the order, an affidavit of the publication thereof shall be filed and recorded in the office in which the order is entered, and in each office in which certified copies thereof are required to be filed, if any, the petitioner shall, on and after the day specified for that purpose in the order, be known by the name which it is thereby authorized to be assumed, and by no other name. No proceedings had prior to April fourth, eighteen hundred and ninety-four, under sections two thousand four hundred and fourteen and two thousand four hundred and fifteen of the code of civil procedure for the change of the name of a corporation, shall be invalid by reason of the non-filing of an affidavit of the publication of the order changing such name within twenty days from the date thereof.

And no proceedings heretofore had under the provisions of article three, chapter twenty-three, consolidated laws, for the change of the name of a corporation, shall be invalid by reason of the non-filing and recording of such affidavit of the publication of the order changing such name within forty days from the making of such order.

§ 65. **Substitution of new name in pending action or proceeding.** An action or special proceeding, civil or criminal, commenced by or against a corporation whose name is so changed shall not abate, nor shall any relief, recovery or other proceeding therein be prevented, impeded or impaired in consequence of such change of name. The plaintiff in the action or the party instituting the special proceeding, or the people, as the case requires, may at any time, obtain an order amending any of the papers or proceedings therein, by the substitution of the new name, without costs and without prejudice to the action or proceeding.

§ 70. **Application of this article.** Whenever any corporation is required by law to make application to the court for leave to mortgage, lease or sell its real estate, the proceeding therefor shall be had pursuant to the provisions of this article.

§ 71. **Petition.** The proceeding shall be instituted by the presentation to the supreme court of the district or the county court of the county where the real property, or some part of it, is situated, by the corporation applicant, of a petition setting forth the following facts:

1. The name of the corporation and of its directors, trustees or managers, and of its principal officers, and their places of residence.
2. The business of the corporation or the object or purpose of its incorporation and a reference to the statute under which it was incorporated.
3. A description of the real property to be sold, mortgaged or leased, by metes and bounds, with reasonable certainty.
4. That the interests of the corporation will be promoted by the sale, mortgage or lease, of the real property specified, and a concise statement of the reasons therefor.
5. That such sale, mortgage or lease has been authorized, by a vote of at least two-thirds of the directors, trustees or managers of the corporation at a meeting thereof, duly called and held, and a copy of the resolution granting such authority.
6. The market value of the remaining real property of the corporation and the cash value of its personal assets, and the total amount of its debts and liabilities, and how secured, if at all.

7. The application proposed to be made of the moneys realized from such sale, mortgage or lease.

8. Where the consent of the shareholders, stockholders or members of the corporation is required by law to be first obtained, a statement that such consent has been given, and a copy of the consent, or a certified transcript of the record of the meeting at which it was given, shall be annexed to the petition.

9. A demand for leave to mortgage, lease or sell the real estate described. The petition shall be verified in the same manner as a verified pleading in an action in a court of record.

§ 72. **Hearing on application.** Upon presentation of the petition, the court may immediately proceed to hear the application, or it may, in its discretion, direct that notice of the application shall be given to any person interested therein, as a member, stockholder, officer or creditor of the corporation or otherwise, in which case the application shall be heard at the time and place specified in such notice, and the court may in any case appoint a referee to take the proofs and report the same to the court, with his opinion thereon. Any person, whose interests may be affected by the proceeding, may appear upon the hearing and show cause why the application should not be granted.

§ 73. **Order to sell, mortgage or lease.** Upon the hearing of the application, if it shall appear, to the satisfaction of the court, that the interests of the corporation will be promoted thereby, an order may be granted authorizing it to sell, mortgage or lease the real property described in the petition, or any part thereof, for such sum, and upon such terms as the court may prescribe, and directing what disposition shall be made of the proceeds of such sale, mortgage or lease.

§ 74. **Insolvent corporation.** If the corporation is insolvent, or its property and assets are insufficient to fully liquidate its debts and liabilities, the application shall not be granted, unless all the creditors of the corporation have been served with a notice of the time and place at which the application will be heard.

§ 75. **Service of notices.** Service of notices, provided for in this article, may be made either personally or, in case of absence, by leaving the same at the place of residence of the person to be served, with some person of mature age and discretion, at least eight days before the hearing of the application, or by mailing the same, duly enveloped and addressed and postage paid, at least sixteen days before such hearing.

§ 76. **Practice in cases not herein provided for.** In all applications made under this article, where the mode or manner of conducting any or all of the proceedings thereon is not expressly provided for, the court before whom such application may be pending, shall have the power to make all the necessary orders and give the proper directions to carry into effect the object and intent of this article, or of any act authorizing the sale of corporate real property, and the practice in such cases shall conform, as near as may be, to the ordinary practice in such court.

§ 90. **Action against officers of corporation for misconduct.** An action may be maintained against one or more trustees, directors, managers, or other officers of a corporation, to procure a judgment for the following purposes, or so much thereof as the case requires:

1. Compelling the defendants to account for their official conduct, including any neglect of or failure to perform their duties, in the management and disposition of the funds and property, committed to their charge.

2. Compelling them to pay to the corporation, which they represent, or to its creditors, any money, and the value of any property, which they have acquired

to themselves, or transferred to others, or lost, or wasted, by or through any neglect or failure to perform or by other violation of their duties.

3. Suspending a defendant from exercising his office, where it appears that he has abused his trust.

4. Removing a defendant from his office, upon proof or conviction of misconduct, and directing a new election to be held by the body or board duly authorized to hold the same, in order to supply the vacancy created by the removal; or, where there is no such body or board, or where all the members thereof are removed, directing the removal to be reported to the governor, who may, with the advice and consent of the senate, fill the vacancies.

5. Setting aside an alienation of property, made by one or more trustees, directors, managers or other officers of a corporation, contrary to a provision of law, or for a purpose foreign to the lawful business and objects of the corporation, where the alienee knew the purpose of the alienation.

6. Restraining and preventing such an alienation, where it is threatened, or where there is good reason to apprehend that it will be made.

7. The court must, upon the application of either party, make an order directing the trial by a jury of the issue of neglect or failure of defendants to perform their duties; and for that purpose the questions to be tried must be prepared and settled as prescribed in section nine hundred and seventy of the code of civil procedure.

As to any litigation pending prior to September one, nineteen hundred and seven, the provisions of this section as they existed prior to that date shall apply.

§ 91. **Who may bring such an action.** An action may be brought, as prescribed in the last section, by the attorney-general in behalf of the people of the state, or, except where the action is brought for the purpose specified in subdivision third or fourth of that section, by a creditor of the corporation, or by a trustee, director, manager, or other officer of the corporation, having a general superintendence of its concerns.

§ 91-a. **Actions against officers by corporation, or receiver or trustee.** The supreme court shall also have and exercise jurisdiction in equity, at the suit of a corporation, or of a receiver, or trustee in bankruptcy thereof, to compel one or more trustees, directors, managers or other officers of the corporation to account for injury to or losses of the funds, assets or property of the corporation, caused by or through any neglect or failure of the defendants to perform, or for violation of, their duties. The court must, upon the application of either party, make an order directing the trial by jury of the issue of negligence, and for that purpose the questions to be tried must be prepared and settled as prescribed in section nine hundred and seventy of the code of civil procedure.

§ 92. **Visitatorial power over corporation not affected by this article.** This article does not divest or impair any visitatorial power over a corporation, which is vested by statute in a corporate body, or a public officer.

§ 100. **Action by judgment creditor for sequestration.** Where final judgment for a sum of money has been rendered against a corporation created by or under the laws of the state, and an execution issued thereupon to the sheriff of the county, where the corporation transacts its general business, or where its principal office is located, has been returned wholly or partly unsatisfied, the judgment creditor may maintain an action to procure a judgment sequestering the property of the corporation, and providing for a distribution thereof, as prescribed in section one hundred and twelve of this chapter.

§ 101. **Action to dissolve a corporation.** In either of the following cases, an action to procure a judgment, dissolving a corporation, created by or under the

laws of the state, and forfeiting its corporate rights, privileges and franchises, may be maintained, as prescribed in the next section:

1. Where the corporation has remained insolvent for at least one year.
2. Where it has neglected or refused, for at least one year, to pay and discharge its notes or other evidences of debt.
3. Where it has suspended its ordinary and lawful business for at least one year.
4. If it has banking powers, or power to make loans on pledges or deposits, or to make insurances, where it becomes insolvent or unable to pay its debts, or has violated any provision of the act, by or under which it was incorporated, or of any other act binding upon it.

§ 102. **Who may bring action to dissolve a corporation.** An action specified in the last section, may be maintained by the attorney-general, in the name and in behalf of the people. And whenever a creditor or stockholder of any corporation submits to the attorney-general a written statement of facts, verified by oath, showing grounds for an action under the provisions of the last section, and the attorney-general omits, for sixty days after this submission, to commence an action specified in the last section, then, and not otherwise, such creditor or stockholder may apply to the proper court for leave to commence such an action, and on obtaining leave may maintain the same accordingly; and if there be no person in existence upon whom service of the summons can be made under the provisions of section four hundred and thirty-one of the code of civil procedure, service of the summons in such action may be made in such manner as the court upon application by petition may direct.

§ 103. **Temporary injunction in action authorized by this article.** In an action, brought as prescribed in this article, the court may, upon proof of the facts authorizing the action to be maintained, grant an injunction order, restraining the corporation, and its trustees, directors, managers and other officers, from collecting or receiving any debt or demand, and from paying out, or in any way transferring or delivering, to any person, any money, property, or effects of the corporation, during the pendency of the action; except by express permission of the court. Where the action is brought to procure the dissolution of the corporation, the injunction may also restrain the corporation, and its trustees, directors, managers and other officers, from exercising any of its corporate rights, privileges, or franchises, during the pendency of the action; except by express permission of the court. The provisions of title second of chapter seventh of the code of civil procedure, relating to the granting, vacating or modifying of an injunction order, apply to an injunction order, granted as prescribed in this section; except that it can be granted only by the court.

§ 104. **Temporary receiver.** In such an action, the court may also, at any stage thereof, appoint one or more receivers of the property of the corporation. A receiver, so appointed, before final judgment is a temporary receiver, until final judgment is entered. A temporary receiver has power to collect and receive the debts, demands, and other property of the corporation; to preserve the property, and the proceeds of the debts and demands collected; to sell or otherwise dispose of the property as directed by the court; to collect, receive and preserve the proceeds thereof; and to maintain any action or special proceeding, for either of those purposes. He must qualify as prescribed by law for the qualification of a permanent receiver. Unless additional powers are specially conferred upon him, as prescribed in the next section, a temporary receiver has only the powers specified in this section, and those which are incidental to the exercise thereof.

§ 105. **Additional powers and duties of temporary receiver.** A temporary receiver, appointed as prescribed in the last section, is, in all respects, subject to the control of the court. In addition to the powers conferred upon him, by the provisions of the last section, the court may, by the order or interlocutory judgment appointing him, or by an order subsequently made in the action, or by the final judgment, confer upon him the powers and authority, and subject him to the duties and liabilities, of a permanent receiver, or so much thereof as it thinks proper; except that he shall not make any distribution among the creditors or stockholders, before final judgment, unless he is specially directed so to do by the court.

§ 106. **Permanent receiver.** A receiver appointed by or pursuant to a final judgment in the action, or a temporary receiver who is continued by the final judgment, is a permanent receiver, and has all the powers and authority conferred, and is subject to all the duties and liabilities imposed upon a receiver in article eleven of this chapter.

§ 107. **Additional duties and liabilities of permanent receiver.** A permanent receiver shall keep an account of all moneys received by him, and on the first days of January, April, July and October, in each and every year make and file a written statement, verified by his oath that such statement is correct and true, showing the amount of money received by such receiver, his agents or attorneys, the amount he has a right to retain and the items for which he claims to retain the same, and the distributive share due each person interested therein. He shall pay such distributive share to the person or persons entitled thereto, on demand, at any time after such statement. Such account, statement, and all the books and papers of the corporation in the hands of such receiver, shall at all reasonable times be open for the inspection of all persons having an interest therein. And in case of neglect or refusal to comply with either of the above requirements, or any duty imposed upon him, the supreme court, at either an appellate division or special term, shall, on the application of the party aggrieved, unless such neglect or refusal shall be satisfactorily explained to the court, forthwith remove such receiver, and appoint some suitable person as receiver in his place. Such removal shall not vitiate or annul any legal proceedings had by such receiver; but such proceedings shall be continued by such successor as if no removal had been made. Such receiver shall also be liable to pay to the party interested, interest at the rate of ten per centum per annum on all moneys due to such party and retained by him more than one day after such demand made as aforesaid.

§ 108. **Application for appointment of receiver.** Applications made by the attorney-general for the appointment of a receiver of a corporation shall be made in the judicial district in which the action in which the appointment is sought is triable.

§ 109. **Officers and stockholders may be made parties in action brought by creditor.** Where the action is brought by a creditor of a corporation, and the stockholders, directors, trustees, or other officers, or any of them, are made liable by law, in any event or contingency, for the payment of his debt, the persons, so made liable, may be made parties defendant, by the original or by a supplemental complaint; and their liability may be declared and enforced by the judgment in the action.

§ 110. **Separate action may be brought against officers and stockholders.** Where the stockholders, directors, trustees, or other officers of a corporation, who are made liable, in any event or contingency, for the payment of a debt, are not made parties defendant, as prescribed in the last section, the plaintiff in the action may maintain a separate action against them, to procure a judgment, declaring, apportioning and enforcing their liability.

§ 111. **Proceedings in such actions.** In an action brought as prescribed in either of the last two sections, the court must, when it is necessary, cause an account to be taken of the property and of the debts of the corporation, and thereupon the defendant's liability must be apportioned accordingly; but, if it affirmatively appears, that the corporation is insolvent, and has no property to satisfy its creditors, the court may, without taking such an account, ascertain and determine the amount of each defendant's liability, and enforce the same accordingly.

§ 112. **Distribution of property of corporation by judgment in actions under this article.** A final judgment in an action, brought against a corporation, as prescribed in this article, either separately or in conjunction with its stockholders, directors, trustees, or other officers, must provide for a just and fair distribution of the property of the corporation, and of the proceeds thereof, among its fair and honest creditors, in the order and in the proportions prescribed by law, in case of the voluntary dissolution of a corporation.

§ 113. **Recovery of stock subscriptions.** Where the stockholders of the corporation are parties to the action, if the property of the corporation is not sufficient to discharge its debts, the interlocutory or final judgment, as the case requires, must adjudge that each stockholder pay into court the amount due and remaining unpaid, on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the corporation.

§ 114. **Liability of directors and stockholders.** If it appears, that the property of the corporation, and the sums collected or collectible from the stockholders, upon their stock subscriptions, are or will be insufficient to pay the debts of the corporation, the court must ascertain the several sums, for which the directors, trustees, or other officers, or the stockholders of the corporation, being parties to the action, are liable; and must adjudge that the same be paid into court, to be applied, in such proportions and in such order as justice requires, to the payment of the debts of the corporation.

§ 115. **Effect of this article.** This article does not repeal or affect any special provision of law, prescribing that a particular kind of corporation shall cease to exist, or shall be dissolved, in a case or in a manner, not prescribed in this article; or any special provision of law, prescribing the mode of enforcing the liability of the stockholders of a particular kind of corporation.

§ 130. **Action by attorney-general to annul corporation when legislature directs.** The attorney-general, whenever he is so directed by the legislature, must bring an action against a corporation created by or under the laws of the state, to procure a judgment, vacating or annulling the act of incorporation, or any act renewing the corporation, or continuing its corporate existence, upon the ground that the act was procured upon a fraudulent suggestion, or the concealment of a material fact, made by or with the knowledge and consent of any of the persons incorporated.

§ 131. **Action by attorney-general to annul corporation by leave of court.** Upon leave being granted, as prescribed in the next section, the attorney-general may bring an action against a corporation created by or under the laws of the state, to procure a judgment, vacating the charter or annulling the existence of the corporation, upon the ground that it has, either

1. Offended against any provision of an act, by or under which it was created, altered or renewed, or an act amending the same, and applicable to the corporation; or,

2. Violated any provision of law, whereby it has forfeited its charter, or become liable to be dissolved, by the abuse of its powers; or,

3. Forfeited its privileges or franchises, by a failure to exercise its powers; or,

4. Done or omitted any act, which amounts to a surrender of its corporate rights, privileges, and franchises; or,

5. Exercised a privilege or franchise, not conferred upon it by law.

§ 132. **Notice of application for leave to commence action to annul corporation.** Before granting leave, the court may, in its discretion, require such previous notice of the application as it thinks proper, to be given to the corporation, or any officer thereof, and may hear the corporation in opposition thereto.

§ 133. **Jury trial.** An action, brought as prescribed in this article, is triable, of course and of right, by a jury, as if it was an action specified in section nine hundred and sixty-eight of the code of civil procedure and without procuring an order, as prescribed in section nine hundred and seventy of the code of civil procedure.

§ 134. **Injunction and receiver in final judgment.** Where any of the matters, specified in section one hundred and thirty or section one hundred and thirty-one of this article, are established in an action, brought as prescribed in either of those sections, the court may render final judgment that the corporation, and each officer thereof, be perpetually enjoined from exercising any of its corporate rights, privileges, and franchises; and that it be dissolved. The judgment must also provide for the appointment of a receiver, the taking of an account, and the distribution of the property of the corporation, among its creditors and stockholders, as where a corporation is dissolved upon its voluntary application, as prescribed in article nine of this chapter.

§ 135. **Temporary injunction.** In an action, brought as prescribed in this article, an injunction order may be granted, at any stage of the action, restraining the corporation, and any or all of its directors, trustees and other officers, from exercising any of its corporate rights, privileges, or franchises; or from exercising certain of its corporate rights, privileges, or franchises, specified in the injunction order; or from exercising any franchise, liberty or privilege, or transacting any business, not allowed by law. Such an injunction is deemed one of those specified in section six hundred and three of the code of civil procedure, and all the provisions of title second of chapter seventh of the code of civil procedure applicable to an injunction, specified in that section, apply to an injunction granted as prescribed in this section, except that it can be granted only by the court.

§ 136. **Filing and publishing judgment.** Where final judgment is rendered against a corporation, in an action, brought as prescribed in this article, the attorney-general must cause a copy of the judgment-roll to be forthwith filed in the office of the secretary of state; who must cause a notice of the substance and effect of the judgment, to be published, for four weeks, in a newspaper printed in the county, wherein the principal place of business of the corporation was located.

§ 170. **Petition for voluntary dissolution of corporation.** If a majority of the directors, trustees, or other officers, having the management of the concerns of a corporation created by or under the laws of the state, discover that the stock, effects, and other property thereof are not sufficient to pay all just demands, for which it is liable, or to afford a reasonable security to those who may deal with it; or if, for any reason, they deem it beneficial to the interests of the stockholders that the corporation should be dissolved, they may present a petition to the supreme court praying for a final order dissolving the corporation, as prescribed in this article.

§ 171. **Directors or trustees may be required to petition.** It shall be the duty of a majority of the directors or trustees of every corporation created by or under the laws of this state to present a petition as prescribed in the last section whenever directed so to do by a majority in interest of its stockholders.

§ 172. **Petition when directors or trustees do not agree.** If a corporation, created under a general statute of the state for the formation of corporations or under any special act or charter has an even number of trustees or directors who are equally divided respecting the management of its affairs, or if the stock of such corporation is equally divided into not more than two independent ownerships or interests, or if the entire stock of the corporation is, at that time, owned by the trustees or directors who are even in number or equally divided representing the management of its affairs, or if the stock is so divided, that one-half thereof is owned or controlled by persons favoring the course of part of the trustees or directors and one-half thereof is owned by persons favoring the course of the other trustees or directors, the trustees or directors or the stockholders or one or more of them may present a petition as prescribed in section one hundred and seventy of this chapter.

§ 173. **Corporations excepted from two preceding sections.** Sections one hundred and seventy-one and one hundred and seventy-two of this chapter do not apply to a savings bank, a trust company, a safe deposit company, or a corporation formed to rent safes in burglar and fire-proof vaults, or for the construction or operation of a railroad, or for aiding in the construction thereof, or for carrying on the business of banking or insurance, or intended to derive a profit from the loan or use of money.

§ 174. **Contents of petition.** The petition must show that the case is one of those specified in sections one hundred and seventy and one hundred and seventy-two of this chapter, and must state the reasons, which induce the petitioner or petitioners to desire the dissolution of the corporation. A schedule must be annexed to the petition, containing the following matters, as far as the petition or petitioners know, or have the means of knowing the same:

1. A full and true account of all the creditors of the corporation, and of all unsatisfied engagements, entered into by, and subsisting against, the corporation.

2. A statement of the name and place of residence of each creditor, and of each person with whom such an engagement was made, and to whom it is to be performed, if known; or, if either is not known, a statement of that fact.

3. A statement of the sum owing to each creditor, or other person specified in the last subdivision, and the nature of each debt, demand, or other engagement.

4. A statement of the true cause and consideration of the indebtedness to each creditor.

5. A full, just and true inventory of all the property of the corporation, and of all the books, vouchers, and securities, relating thereto.

6. A statement of each incumbrance upon the property of the corporation, by judgment, mortgage, pledge, or otherwise.

7. A full, just, and true account of the capital stock of the corporation, specifying the name of each stockholder; his residence, if it is known, or if it is not known, stating that fact; the number of shares belonging to him; the amount paid in upon his shares; and the amount still due thereupon.

§ 175. **Affidavit to be annexed to petition.** An affidavit, made by each of the petitioners, to the effect that the matters of fact, stated in the petition and the schedule, are just and true, so far as the affiant knows or has means of knowing the same, must be annexed to the petition and schedule.

§ 176. **Presentation of petition.** The papers must be presented at a special term of the supreme court, held within the judicial district, embracing the county wherein the principal office of the corporation is located.

§ 177. **Corporations without stockholders.** In the case of corporations affected by the provisions of this article and not having stockholders, it shall be sufficient for the purposes of this article to notify, name and refer to the

"members" of such corporations, instead of "stockholders," as herein provided.

§ 178. **Action by court upon petition for dissolution.** In a case specified in sections one hundred and seventy-one and one hundred and seventy-two of this chapter the court may, in its discretion, entertain or dismiss the application. Where it entertains the application, or where the cause is one of those specified in section one hundred and seventy of this chapter, the court must make an order, requiring all persons interested in the corporation to show cause before it, or before a referee designated in the order, at a time and place therein specified, not less than six week after the granting of the order, why the corporation should not be dissolved.

§ 179. **Publication of order to show cause why corporation should not be dissolved.** A copy of the order must be published, as prescribed therein, at least once in each of the three weeks immediately preceding the time fixed therein for showing cause, in one or more newspapers, specified in the order, published in the city or county wherein the order is entered.

§ 180. **Service of order to show cause.** A copy of the order must also be served upon each of the persons, specified in the schedule as a creditor or stockholder of the corporation, or as a person to whom an engagement of the corporation is to be performed, other than a person whose residence is stated to be unknown, or to be without the United States. The service must be made either personally, at least ten days before the time appointed for the hearing; or by depositing a copy of the order, at least twenty days before the time so appointed, in the post-office, inclosed in a postpaid wrapper, addressed to the person to be served, at his residence, as stated in the schedule.

§ 181. **Entering and filing order and papers.** The order must be entered, and the papers must be filed, within ten days after the order is made, with the clerk of the county where the principal office of the corporation is located.

§ 182. **Temporary receiver.** If it shall be made to appear to the satisfaction of the court that the corporation is insolvent, the court may at any stage of the proceedings before the final order, on motion of the petitioners on notice to the attorney-general, or on motion of the attorney-general on notice to the corporation, appoint a temporary receiver of the property of the corporation, which receiver shall have all the powers and be subject to all the duties that are defined as belonging to temporary receivers appointed in an action, in section one hundred and four of this chapter. The court may also, in its discretion, at any stage in the proceeding after the appointment of a temporary receiver, upon like motion and notice, confer upon such temporary receiver the powers and authority, and subject him to the duties and liabilities of a permanent receiver, or as much thereof as it thinks proper, except that he shall not make any final distribution among the creditors and stockholders, before final order in the proceedings, unless he is specially directed so to do by the court.

§ 183. **Application for appointment of receiver.** Every application made for the appointment of a receiver of a corporation other than applications made by the attorney-general on behalf of the people of the state, shall be made at a special term of the supreme court held in and for the judicial district in which the principal business office of the corporation is located.

§ 184. **Injunction.** If a temporary receiver be appointed, the court may, in its discretion, on like motion and notice, with or without security, at any stage of the proceeding before the final order, grant an injunction, restraining the creditors of the corporation, from beginning any action against the said corporation for the recovery of a sum of money, or from taking any further proceedings in such an action theretofore commenced. Such injunction shall have the same effect and be subject to the same provisions of law as if each creditor upon whom it is served was named therein.

§ 185. **Referee.** If a referee was not designated in the order to show cause, the court may, in its discretion, appoint a referee when or after the order is returnable.

§ 186. **Hearing.** At the time and place specified in the order, or at the time and place to which the hearing is adjourned, the court, or the referee, must hear the allegations and proofs of the parties, and determine the facts.

§ 187. **Decision.** The decision of the court, or the report of the referee, must be in writing, and must be made and filed with all convenient speed. It must contain a statement of the effects, credits, and other property, and of the debts and other engagements, of the corporation, and of all other matters, pertaining to its affairs.

§ 188. **Use of original papers on hearing.** The court or the referee is entitled to use, upon the hearing, the original petition, and the schedules annexed thereto; and the clerk must transmit them accordingly, upon the written order of the judge, or of the referee. In that case, they must be returned with the decision or report.

§ 189. **Amending papers.** The court may, at any stage of the proceedings before final order, on the application of the petitioners, or a majority of them, or on the application of the temporary receiver, grant an order amending the schedules annexed to the original petition, by the insertion of additional items, or by making the statements or inventory fuller and in greater detail than as originally filed, with the like effect as though said petition and schedules had been originally presented and filed as amended.

§ 190. **Final order.** Where the hearing is before a referee, a motion for a final order must be made to the court, upon notice to each person who has made himself a party to the proceedings, by filing with the clerk, before the close of the hearing, a notice of his appearance, in person or by attorney, specifying a post-office within the state, where such a notice may be served. The notice may be served as prescribed in the code of civil procedure for the service of a paper upon an attorney in an action. Where the hearing was before the court, a motion for a final order may be made immediately, or at such a time and upon such a notice, as the court prescribes.

§ 191. **Permanent receiver.** Upon an application for a final order, if it appear to the court in a case specified in section one hundred and seventy of this chapter that the corporation is insolvent, or, in a case specified either in that section, or in sections one hundred and seventy-one and one hundred and seventy-two of this chapter, that for any reason a dissolution of the corporation will be beneficial to the interests of the stockholders and not injurious to the public interests, the court must make a final order dissolving the corporation, and appointing one or more receivers of its property. But in the case of a solvent corporation, the court may, if there is no objection by creditors, dispense with a receiver and provide in the final order for the distribution of the assets. The order shall be entered in the office of the clerk of the county in which the principal business office, or the principal place of business of the corporation is located, and a certified copy thereof, if a banking corporation, shall be filed in the office of the superintendent of banks; if an insurance corporation, in the office of the superintendent of insurance; and if a business, transportation, railroad or membership corporation, in the office of the secretary of state. Upon the entry of the order and the filing of a certified copy thereof as herein provided, the corporation is dissolved. A receiver appointed under this section shall have all the powers, duties and liabilities of receivers under article eleven of this chapter.

§ 192. **Appointment of director, trustee or other officer or stockholder as receiver.** The court may, in its discretion, appoint a director, trustee, or other officer, or a stockholder of the corporation, a receiver of its property.

§ 193. **Certain sales, transfers and judgments void.** A sale, assignment, mortgage, conveyance, or other transfer, of any property of a corporation, made after the filing of a petition as prescribed in this article, in payment of, or as security for, an existing or prior debt, or for any other consideration; or a judgment thereafter rendered against the corporation by confession, or upon the acceptance of an offer, is absolutely void, as against the receiver appointed in the special proceeding, and as against the creditors of the corporation.

§ 194. **Omission, defect or default of receiver.** In a proceeding for the voluntary dissolution of a corporation, the court may, in the furtherance of justice, upon notice to the attorney-general, and the attorney-general not objecting, and upon such further notice to creditors or others interested as the court shall direct, which notice may be made by mail upon all persons and corporations not residing or existing within the state, relieve a receiver from any omission, defect or default, in any proceeding or act required by law to be taken or done, or in the giving of any notice required by law to be given, and the court may upon like notice, confirm any act of a receiver, and any decision, report, order or judgment made in such proceeding.

§ 195. **Exception of certain corporations.** This article does not apply to an incorporated library society, to a religious corporation, or to, a select school or academy, incorporated by the regents of the university or by the legislature, or to a municipal or other political corporation.

§ 200. **Forfeiture of charter or revocation of certificate of authority of corporations maintaining nuisances generated in another state.** Any corporation organized under the laws of this or any other state which shall so conduct its business, without the state, by the emission or discharge of dust, smoke, gas, steam or offensive, noisome or noxious odors or fumes, so as to unreasonably injure or endanger the health or safety in this state of any considerable number of the people of this state, shall be deemed guilty of a nuisance and the charter of such corporation, if incorporated by or under any law of this state shall be deemed forfeited in the manner prescribed in this section, or its certificate of authority to do business in this state, if incorporated or formed under the laws of any other state, shall be deemed revoked and annulled in the manner prescribed in this section, and in either case shall be reviewed, except as prescribed in the next section. Complaints may be made to the state commissioner of health by any person, association or corporation aggrieved, by petition or complaint in writing, setting forth any act or thing done or omitted to be done claimed to constitute a nuisance within the provisions of this section. Upon the presentation of such a complaint, the state commissioner of health shall cause a copy thereof to be served upon the corporation complained of, in the manner provided by law for the service of a summons, accompanied by a notice, directed to such corporation, requiring that the matters complained of be abated, or that the charges be answered in writing within a time to be specified by such commissioner. If the charges contained in such complaint be not thus satisfied and it shall appear to such commissioner of health that there are reasonable grounds therefor, he shall cause such charges to be investigated in such manner and by such means as he shall deem proper and fix a time for a hearing upon such complaint and cause notice thereof to be forwarded to the complainant and the corporation complained of. If the state commissioner of health, or his successor, after such notice to such corporation, and an opportunity for a hearing being given to it, shall find that such corporation is so conducting its business, without the state, as to unreasonably injure or endanger the health or safety in this state of any considerable number of people of this state, he shall file such findings in duplicate in the offices of the secretary of state and the attorney-general. A certificate of the secretary of state giving notice of the filing of such findings shall be served upon the corporation, or upon the designated agent of a

foreign corporation authorized to do business in this state, and thereupon the charter of such corporation if incorporated by or under any law of this state, or its certificate of authority to do business in this state, if incorporated or formed under the laws of any other state, shall be suspended for the period of thirty days. Any person who shall exercise or attempt to exercise any powers under the charter of any corporation or by virtue of a certificate of authority which has been so suspended, during the period of such suspension, shall be guilty of a misdemeanor. If at the expiration of such period the state commissioner of health upon further proof and opportunity to such offending corporation to be heard shall find and determine that such corporation continues to conduct its business so as to constitute such nuisance, he shall cause a notice of such determination to be served upon the corporation, or upon the designated agent of a foreign corporation authorized to do business in this state, and published once a week for two successive weeks in the official state paper. On the tenth day after such service and publication the charter of such corporation, if incorporated by or under any law of this state, shall be deemed forfeited or its certificate of authority to do business in this state, if incorporated or formed under the laws of any other state, shall be deemed to be revoked and canceled. Any person who shall exercise or attempt to exercise any powers under the charter of any corporation which has been so forfeited or by virtue of a certificate of authority which has been so revoked, shall be guilty of a misdemeanor. If, pursuant to this section, the charter of a domestic corporation be forfeited, the attorney-general shall forthwith apply to the supreme court for the appointment of a receiver of its property, who shall have all the powers and duties, so far as practicable, prescribed by articles ten-A and eleven of the general corporation law.

§ 201. **Reinstatement.** When any corporation has ceased to perform the acts or maintain the nuisance by reason of which its charter has been forfeited or its certificate of authority revoked, and shall satisfactorily guarantee that it will not perform such acts or maintain such nuisance in the future, the charter or certificate of authority of such corporation may be revived in the manner prescribed in this section with the same force and effect as if such charter had not been forfeited or such certificate revoked. If such corporation shall file a petition in writing with the state commissioner of health setting forth that the nuisance in fact no longer exists and it shall appear that there are reasonable grounds therefor, such commissioner of health shall cause an investigation to be made in such manner and by such means as he shall deem proper, and if after such investigation, he shall find and certify that such corporation has ceased to conduct its business so as to constitute such nuisance, and shall file such findings in duplicate in the offices of the secretary of state and attorney-general, the charter or certificate of authority of such corporation shall be deemed to be revived with full force and effect. A supplemental certificate of the secretary of state shall be served and published in like manner, and upon such service and publication, such revival shall become effective. Such revival shall not, however, prevent a subsequent forfeiture or revocation of the charter or certificate of the same corporation for the same or similar offense. This article shall not be deemed to apply to a corporation organized and existing under the laws of the state of New York and subject to the jurisdiction of the public service commission under the public service commissions law or principally engaged in furnishing power to such public service corporation.

§ 202. **Application of article.** This article shall not apply to corporations operating railroad or steamboat lines.

§ 220. **Dissolution of stock corporation before beginning business.** The incorporators named in any certificate of incorporation filed for the purpose of creating a domestic stock corporation, other than a moneyed or transportation

corporation, may, before the payment of any part of the capital, and before beginning business, surrender all corporate rights and franchises, by signing, verifying and filing in the office of the secretary of state and the clerk of the county where the certificate of incorporation is filed, a certificate setting forth the names of the incorporators, that no part of the capital has been paid, that there are no liabilities, that such business has not been begun, and surrendering all rights and franchises; and proof of the facts set forth in such certificate to the satisfaction of the secretary of state; and thereupon the said corporation shall be dissolved, and its corporate existence and power shall cease. In case any incorporator of such a corporation shall be deceased, then the aforesaid certificate may be made by the surviving incorporators providing two years shall have elapsed since the date of its incorporation, but in such case the certificate shall set forth the fact that one or more of said incorporators is deceased.

§ 221. **Dissolution of stock corporation before expiration of time limit.** Any stock corporation, except a moneyed or a railroad corporation, may be dissolved before the expiration of the time limited in its certificate of incorporation or in its charter as follows:

1. The board of directors of any such corporation may at a meeting called for that purpose, upon at least three days' notice to each director, by a vote of a majority of the whole board, adopt a resolution that it is in their opinion advisable to dissolve such corporation forthwith, and thereupon shall call a meeting of the stockholders for the purpose of voting upon a proposition that such corporation be forthwith dissolved. Such meeting of the stockholders shall be held not less than thirty nor more than sixty days after the adoption of such resolution, and the notice of the time and place of such meeting so called by the directors shall be published in one or more newspapers published and circulating in the county wherein such corporation has its principal office, at least once a week for three weeks successively next preceding the time appointed for holding such meeting, and on or before the day of the first publication of such notice, a copy thereof shall be served personally on each stockholder, or mailed to him at his last known post-office address. Such meeting shall be held in the city, town or village in which the last preceding annual meeting of the corporation was held, and said meeting may, on the day so appointed, by the consent of a majority in interest of the stockholders present, be adjourned from time to time, and notice of such adjournment shall be published in the newspapers in which the notice of the meeting is published. If at any such meeting the holders of two-thirds in amount of the stock of the corporation, then outstanding, shall, in person or by attorney, consent that such dissolution shall take place and signify such consent, in writing, then such corporation shall file such consent, attested by its secretary or treasurer, and its president or vice-president, together with the powers of attorney signed by such stockholders executing such consent by attorney, with a statement of the names and residences of the then existing board of directors of said corporation, and the names and residences of its officers duly verified by the secretary or treasurer or president of said corporation, in the office of the secretary of state.

2. The secretary of state shall thereupon issue to such corporation, in duplicate, a certificate of the filing of such papers and that it appears therefrom that such corporation has complied with this section in order to be dissolved, and one of such duplicate certificates shall be filed by such corporation in the office of the clerk of the county in which such corporation has its principal office; and thereupon such corporation shall be dissolved and shall cease to carry on business, except for the purpose of adjusting and winding up its business. The board of directors shall cause a copy of such certificate to be published at least once a week for two weeks in one or more newspapers published and circulating in the county in which the principal office of such corporation is located, and at the

expiration of such publication, the said corporation by its board of directors shall proceed to adjust and wind up its business and affairs with power to carry out its contracts and to sell its assets at public or private sale, and to apply the same in discharge of debts and obligations of such corporation, and, after paying and adequately providing for the payment of such debts and obligations, to distribute the balance of assets among the stockholders of said corporation, according to their respective right and interests.

3. Said corporation shall nevertheless continue in existence for the purpose of paying, satisfying and discharging any existing debts or obligations, collecting and distributing its assets and doing all other acts required in order to adjust and wind up its business and affairs, and may sue and be sued for the purpose of enforcing such debts or obligations, until its business and affairs are fully adjusted and wound up.

4. After paying or adequately providing for the debts and obligations of the corporation the directors may, with the written consent of the holders of two-thirds in amount of the capital stock, sell the remaining assets or any part thereof to a corporation organized under the laws of this or any other state, and engaged in a business of the same general character, and take in payment therefor the stock or bonds or both of such corporation and distribute them among the stockholders, in lieu of money, in proportion to their interest therein, but no such sale shall be valid as against any stockholder, who, within sixty days after the mailing of notice to him of such sale, shall apply to the supreme court in the manner provided by section seventeen of the stock corporation law, for an appraisal of the value of his interest in the assets so sold; unless within thirty days after such appraisal the stockholders consenting to such sale, or some of them, shall pay to such objecting stockholder or deposit for his account, in the manner directed by the court, the amount of such appraisal and upon such payment or deposit the interest of such objecting stockholder shall vest in the person or persons making such payment or deposit.

§ 225. **Security.** A receiver, appointed in an action or special proceeding, must, before entering upon his duties, execute and file with the proper clerk, a bond to the people, with at least two sufficient sureties, in a penalty fixed by the court, judge, or referee, making the appointment, conditioned for the faithful discharge of his duties as receiver; and the execution of any such bond by any fidelity or surety company authorized by the laws of this state to transact business, shall be equivalent to the execution of said bond by two sureties. But this section does not apply to a case where special provision is made by law for the security to be given by a receiver or for increasing the same.

§ 226. **Removal or new bond.** The court, or, where the order was made out of court, the judge making the order, by or pursuant to which the receiver was appointed, or his successor in office, may, at any time, remove the receiver, or direct him to give a new bond, with new sureties, with the like condition specified in the last section. But this section does not apply to a case where special provision is made by law for the security to be given by a receiver, or for increasing the same, or for removing a receiver.

§ 227. **Notice to sureties upon accounting.** A receiver who, having executed and filed a bond as provided for in section two hundred and twenty-five or section two hundred and twenty-six of this chapter, before presenting his accounts as receiver, must give notice to the surety or sureties on his official bond, of his intention to present his accounts not less than eight days before the day set for the hearing on said accounting. The same notice must be given to such surety or sureties where the accounting is ordered on the petition of a person or persons other than the receiver, and in no case shall the receiver's accounts be passed, settled or allowed, unless the said notice provided for in this section shall have first been given to the surety or sureties on the official bond of such receiver.

§ 230. **Application of this article.** Unless otherwise provided the provisions of this article shall apply only to permanent receivers appointed pursuant to section one hundred and six or section one hundred and ninety-one of this chapter.

§ 231. **Receiver trustee of property.** Permanent receivers shall be trustees of the property for the benefit of the creditors of the corporation and of its stockholders.

§ 232. **Receiver's title to property.** Such receivers shall, from the time of their having filed the security required by law, be vested with all the property, real or personal, vested or contingent, of the corporation.

§ 233. **Transfer of assets of corporation to receiver.** In all cases where receivers have been or shall be appointed for any corporation of this state other than an insurance company on application by the attorney-general, all property, real and personal, and all securities of any kind and nature belonging to such corporation, no matter where located or by whom held, shall be transferred to, vested in and held by such receiver; provided, however, that such transfer shall only be made when directed by an order of the supreme court, due notice of the application for such order having been made on the attorney-general and the custodian of the funds, securities or property.

§ 234. **Security of receiver.** Before entering upon the duties of their appointment, such receivers shall give such security to the people of the state, and in such penalty, as the court shall direct, conditioned for the faithful discharge of the duties of their appointment, and for the due accounting for all moneys received by them.

§ 235. **Authority of single receiver.** When one receiver only, shall be appointed, all the provisions herein contained, in reference to several receivers shall apply to him.

§ 236. **Authority where there is more than one receiver.** When there are more receivers than one appointed, the debts and property of the corporation may be collected and received by any one of them; and when there are more than two receivers appointed every power and authority conferred on the receivers may be exercised by any two of them.

§ 237. **Surviving receivers.** The survivor or survivors of any receivers shall have all the powers and rights given to receivers. All property in the hands of any receiver at the time of his death, removal or incapacity, shall be delivered to the remaining receiver or receivers, if there be any; or to the successor of the one so dying, removed or incapacitated; who may demand and sue for the same.

§ 238. **Oath of receiver.** Before proceeding to the discharge of any of their duties, all such receivers shall take and subscribe an oath, that they will well and truly execute the trust by their appointment reposed in them, according to the best of their skill and understanding; which oath shall be filed with the officer or court, that appointed them.

§ 239. **General powers of receivers.** The said receivers shall have power:

1. To sue in their own names or otherwise, and recover all the property, debts and things in action belonging or due or to become due to such corporation, whether accruing or maturing before or after the dissolution thereof and whether vested or contingent at the time of such dissolution in the same manner and with the like effect as such corporation might or could have done if no receivers had been appointed; and no set-off shall be allowed in any such suit, for any debt, unless it was owing to such creditor by such corporation before the appointment of the receiver of such corporation, or unless it shall have been duly contracted by such receiver subsequent to his appointment; notwithstanding the notice to creditors the receivers may sue for and recover any property or effects of the corporation and any debts due to it, at any time, before the day appointed for the delivery or payment thereof;

2. To take into their hands, all the property of such corporation, whether attached, or delivered to them, or afterwards discovered; and all books, vouchers and securities relating to the same;

3. In the case of a non-resident, absconding or concealed debtor, to demand and receive of every sheriff who shall have attached any of the property of such debtor, or who shall have in his hands, any moneys arising from the sale of such property, all such property and moneys, on paying him his reasonable costs and charges, for attaching and keeping the same, to be allowed by the court having jurisdiction;

4. From time to time, to sell at public auction, all the property, real and personal, vested in them, which shall come to their hands, after giving at least fourteen days' public notice of the time and place of sale, and also publishing the same for two weeks in a newspaper printed in the county, where the sale shall be made, if there be one;

5. To allow such credit on the sale of real property by them, as they shall deem reasonable, subject to the provisions of this article for not more than three-fourths of the purchase money; which credit shall be secured by a bond of the purchaser, and a mortgage on the property sold;

6. On such sales, to execute the necessary conveyances and bills of sale;

7. To redeem all mortgages and conditional contracts and all pledges of personal property, and to satisfy any judgments, which may be an incumbrance on any property so sold by them; or to sell such property subject to such mortgages, contracts, pledges or judgments;

8. To settle all matters and accounts between such corporation and its debtors, or creditors, and to examine any person touching such matters and accounts, on oath, to be administered by either of them;

9. Under the order of the court appointing them, to compound with any person indebted to such corporation and thereupon to discharge all demands against such person.

§ 240. **Power of receiver to institute proceedings to recover assets.** Whenever any receiver of a domestic corporation, or of the property within this state of any foreign corporation, shall have been appointed and qualified, as provided in articles five, six, seven, nine, eleven or twelve of this chapter either before, upon, or after final judgment or order in the action or special proceeding in which such appointment was made, and shall, by his own verified petition, affidavit or other competent proof, show to the supreme court, at a special term thereof, held within the judicial district wherein such appointment was made, that he has good reason to believe that any officer, stockholder, agent or employee of such corporation, or any other person whomsoever, has embezzled or concealed, or withholds or has in his possession or under his control, or has wrongfully disposed of, any property of such corporation which of right ought to be surrendered to the receiver thereof; or that any person can testify concerning the embezzlement, concealment, withholding, possession, control or wrongful disposition of any such property, the court shall make an order, with or without notice, commanding such person or persons to appear at a time and place to be designated in the order, before the court or before a referee named by the court for that purpose, and to submit to an examination concerning such embezzlement, concealment, withholding, possession, control or wrongful disposition of such property; and at the time of making such order or at any time thereafter, the court may, in its discretion, enjoin and restrain the person or persons so ordered to appear and be examined from in any manner disposing of any property of such corporation which may be in the possession or under the control of the person so ordered to be examined, until the further order of the court in relation thereto. No person so ordered to appear and be examined shall be excused from answering any question on the ground that his answer

might tend to convict him of a criminal offense; but his testimony taken upon such examination shall not be used against him in any criminal action or proceeding. Any person so ordered to appear and be examined shall be entitled to the same fees and mileage, to be paid at the time of serving the order, as are allowed by law to witnesses subpoenaed to attend and testify in an action in the supreme court, and shall be subject to the same penalties upon failure to appear and testify in obedience to such an order as are provided by law in the case of witnesses who fail to obey a subpoena to appear and testify in an action.

Any person appearing for examination in obedience to such order shall be sworn by the court or referee to tell the truth, and shall be entitled to be represented on such examination by counsel, and may be cross-examined, or may make any voluntary statement in his own behalf concerning the subject of his examination which may seem to him desirable or pertinent thereto.

The court before which such examination is taken, as well as the referee, if one be appointed for that purpose, shall have power to adjourn such examination from time to time, and may rule upon any question or objection arising in the course of such examination, to the same extent that might be done if the person so examined were testifying as a witness in the trial of an action.

When the examination of any person under such order shall be concluded, the testimony shall be signed and sworn to by the person so examined, and shall be filed in the office of the clerk of the county where the action is pending, or was tried, in which the receiver was appointed; and if from such testimony it shall appear to the satisfaction of the court that any person so examined is wrongfully concealing or withholding, or has in his possession or under his control, any property which of right belongs to such receiver, the court may make an order commanding the person so examined forthwith to deliver the same to such receiver, who shall hold the same subject to the further order of the court in relation thereto; and otherwise, the court may, at the conclusion of any such examination, make such final order in the premises as the interests of justice require.

§ 241. **Power of receiver in the settlement of controversies.** If any controversy shall arise between the receivers and any other person, in the settlement of any demands against such corporation, or of debts due to such corporation the same may be referred to one or more indifferent persons, who may be agreed upon by the receivers and the party with whom such controversy shall exist, by a writing to that effect signed by them.

If such referee or referees be not selected by agreement, then the receivers or the other party to the controversy, provided no action at law is pending arising out of any such debts or demands, may serve a notice of their intention to apply to any judge of the supreme court at chambers, residing in the same district with said receivers, for the appointment of one or more referees, specifying the time and place when such application will be made, which notice shall be served at least ten days before the time so therein specified.

On the day so specified, upon due proof of the service of such notice, the judge before whom the application is made may, in his discretion, proceed to select one or more referees, the same in all respects as they are now selected according to the rules and practice of the supreme court.

When any witness to such controversy shall reside out of the county where the said receivers resided at the time of their appointment, the referee or referees appointed to hear said controversy shall have power to issue a commission or commissions in like manner as justices of the peace are now authorized to issue the same, and the testimony so taken shall be returned to said referee or referees in the same manner, and be read before them on a hearing, in like manner as testimony taken on commission before justices of the peace.

The officer before whom they shall be selected, shall certify such selection in writing. Such certificate, or the written agreement of the parties, shall be filed by the receivers in the office of a clerk of the supreme court, and an order shall thereupon be entered by such clerk in vacation or in term, appointing the persons so selected to determine the controversy.

Such referees shall have the same powers, and be subject to the like duties and obligations, and shall receive the same compensation, as referees appointed by the supreme court, in personal actions pending therein.

The report of the referees shall be filed in the same office where the order for their appointment was entered, and shall be conclusive on the rights of the parties, if not set aside by the court.

**§ 242. Power of receiver to employ counsel.** If the receiver of a corporation employs counsel he shall within three months after he has qualified as receiver enter into a written contract fixing the compensation of such counsel at not exceeding a certain amount or a certain percentage of the sums received and disbursed by him, which contract must be approved by the supreme court, on at least eight days' notice to the attorney-general. A payment by such receiver to his counsel on account of services shall only be made, pursuant to an order of the court, on notice to the attorney-general and subject to review on the final accounting. A contract with counsel shall not be made for a longer period than eighteen months, but may be renewed from time to time for periods of not more than one year, if approved by the supreme court on at least eight days' notice to the attorney-general. In case of the intervention of any policy-holder or depositor, by permission of the court, such policy-holder or depositor shall defray the legal expenses thereof, and no allowance shall be made for costs or fees to any attorney of such policy-holder or depositor. It shall be unlawful for receivers of an insurance, banking or railroad corporation, or trust company to pay to any attorney or counsel any costs, fees or allowances until the amounts thereof shall have been stated to the special term as provided in section two hundred and forty-nine of this chapter, as expenses incurred, and shall have been approved by that court, by an order of the court duly entered; and any such order shall be the subject of review by the appellate division and the court of appeals on an appeal taken therefrom by any party aggrieved thereby.

**§ 243. Power of receiver to hold real property.** A receiver, appointed by or pursuant to an order or a judgment, in an action in the supreme court or a county court, or in a special proceeding for the voluntary dissolution of a corporation, may take and hold real property, upon such trusts and for such purposes as the court directs, subject to the direction of the court, from time to time, respecting the disposition thereof.

**§ 244. Power of receiver to recover stock subscriptions.** If there shall be any sum remaining due upon any share of stock subscribed in such corporation, the receiver shall immediately proceed to recover the same, unless the person so indebted shall be wholly insolvent; and for that purpose may commence and prosecute any action or proceeding for the recovery of such sum, without the consent of any creditors of such corporation.

**§ 245. Duty of receiver to convert assets into money.** The receivers shall, as speedily as possible, convert the property, real and personal, of the corporation into money.

**§ 246. Duty of receiver as to private sales.** A receiver duly appointed in this state by and pursuant to a judgment in an action, or by and pursuant to an order in a special proceeding, may, upon application to the court by which such judgment was rendered, or such order was made, and upon notice to such parties as may be entitled to notice of applications made in such action or special proceeding, be authorized by the said court to sell or convey the property, whether

real or personal, of the corporation of which he is the receiver, at private sale, upon such terms and conditions as the court may direct.

§ 247. **Duty of receiver to keep accounts.** They shall keep a regular account of all moneys received by them as receivers; to which, every creditor, or other person interested therein, shall be at liberty, at all reasonable times, to have recourse.

§ 248. **Duty of receiver to serve copy of report upon attorney-general and superintendent of banks.** All receivers of insolvent corporations who are required by law to make and file reports of their proceedings shall at the time of making and filing such reports, serve a copy thereof upon the attorney-general of this state, and receivers of such corporations as report to, and are under the supervision of, the banking department shall on the first day of January and July of each year, during the continuance of their respective trusts, file with the superintendent of banks a report, verified by oath, in such form as the superintendent may prescribe, showing the condition of their respective trusts. In case any receiver of an insolvent corporation shall neglect to make and file a report of his proceedings for thirty days after the time he is required by law to make and file such report, or shall neglect for the same length of time to serve a copy thereof on the attorney-general, as required by this section the attorney-general may make a motion in the supreme court for an order to compel the making and filing and serving a copy on him of such report, or for the removal of such receiver from his office.

§ 249. **Duty of certain receivers to make reports.** It shall be the duty of every receiver of an insurance, banking or railroad corporation, or trust company, to present every six months to the special term of the supreme court, held in the judicial district wherein the place of trial or venue of the action or special proceeding in which he was appointed may then be, on the first day of its first sitting, after the expiration of such six months, and to file a copy of the same, if a receiver of a bank or trust company, with the superintendent of banks; if a receiver of an insurance company, with the superintendent of insurance; and in each case with the attorney-general, an account exhibiting in detail the receipts of his trust, and the expenses paid and incurred therein during the preceding six months. Of the intention to present such account, as aforesaid, the attorney-general, and also the surety or sureties on the official bond of such receiver, shall be given eight days' notice in writing; and the attorney-general shall examine the books and accounts of such receiver at least once every twelve months.

§ 250. **Duty of receivers to give notice to creditors.** The receivers immediately upon their appointment, shall give notice thereof which shall be published for three weeks in a newspaper printed in the county where the principal place of conducting the business of such corporation shall have been situated; and therein shall require.

1. All persons indebted to such corporation, by a day and at a place therein to be specified, to render an account of all debts and sums of money owing by them respectively, to such receivers and to pay the same.

2. All persons having in their possession any property or effects of such corporation to deliver the same to the said receivers by the day so appointed.

3. All the creditors of such corporation to deliver their respective accounts and demands to the receivers or one of them, by a day to be therein specified, not less than forty days from the first publication of such notice.

4. All persons holding any open or subsisting contract of such corporation, to present the same in writing and in detail to such receivers, at the time and place in such notice specified.

§ 251. **Delivery of property and payment of debts to receiver after notice.** After the first publication of the notice of the appointment of receivers, every

person having possession of any property belonging to such corporation, and every person indebted to such corporation, shall account and answer for the amount of such debt and for the value of such property to the said receivers.

§ 252. **Penalty for concealing property from receiver.** Every person indebted to such corporation, or having the possession or custody of any property or thing in action, belonging to it, who shall conceal the same, and not deliver a just and true account of such indebtedness, or not deliver such property or thing in action, to the receivers, or one of them, by the day for that purpose appointed, shall forfeit double the amount of such debt, or double the value of such property so concealed; which penalties may be recovered by the receivers.

§ 253. **Duty of receiver to call creditors' meeting.** They shall call a general meeting of the creditors of such corporation, within four months from the time of their appointment by a notice to be published in the same manner, as hereinbefore directed respecting the publication of the notice of their appointment; in which notice, they shall specify the place and time of such meeting, which time shall not be more than three months, nor less than two months after the first publication of such notice. Every such notice shall be published at least once in each week, until the time of such meeting.

§ 254. **Proceedings at creditors' meeting.** At such meeting, or other adjourned meeting thereafter, all accounts and demands for and against such corporation, and all its open and subsisting contracts, shall be ascertained and adjusted as far as may be, and the amount of moneys in the hands of the receivers declared.

§ 255. **Deduction of disbursements and commissions by receiver.** Out of the moneys in their hands the receivers may first deduct all the necessary disbursements made by them in the discharge of their duty and such commissions as may be allowed by law.

§ 256. **Refunding consideration of subsisting contracts.** If there shall be any open and subsisting engagements or contracts of such corporation, which are in the nature of insurances or contingent engagements of any kind, the receivers may, with the consent of the party holding such engagement, cancel and discharge the same, by refunding to such party the premium or consideration paid thereon by such corporation, or so much thereof as shall be in the same proportion to the time which shall remain of any risk assumed by such engagement, as the whole premium bore to the whole term of such risk; and upon such amount being paid by such receivers to the person holding or being the legal owner of such engagement, it shall be deemed canceled and discharged as against such receivers.

§ 257. **Retention of funds for subsisting contracts and pending suits.** The receivers shall retain out of the moneys in their hands, a sufficient amount to pay the sums, which they are hereinbefore authorized to pay, for the purpose of cancelling and discharging any open or subsisting engagements. If any suit be pending against the corporation or against the receivers, for any demand, the receivers may retain the proportion which would belong to such demand if established, and the necessary costs and proceedings, in their hands, to be applied according to the event of such suit, or to be distributed in a second or other dividend.

§ 258. **Payment of debts not due.** Every person to whom a corporation shall be indebted on a valuable consideration, for any sum of money not due at the time of such distribution, but payable afterwards, shall receive his proportion with other creditors, after deducting a rebate of legal interest upon the sum distributed, for the time unexpired of such credit.

§ 259. **Allowance of set-offs.** Where mutual credit has been given by any corporation, and any other person, or mutual debts have subsisted between such corporation and any other person, the receivers may set off such credits or debts, and pay the proportion or receive the balance due. But no set-off shall be

allowed of any claim or debt, which would not have been entitled to a dividend, as hereinbefore directed.

No set-off shall be allowed by such receivers, of any claim or debt, which shall have been purchased by, or transferred to, the person claiming its allowance, which could not have been set off by him, in a suit brought by such receivers.

§ 260. **Penalties recovered by receiver.** All penalties which shall be recovered by any receivers, pursuant to the provisions of this article, shall be deemed a part of the property of the corporation, and shall be distributed as such among its creditors.

§ 261. **Order of payment by receiver.** The receivers shall distribute the residue of the moneys in their hands, among all those who shall have exhibited their claims as creditors, and whose debts shall have been ascertained, as follows:

1. All debts due by such corporation to the United States, and all debts entitled to a preference under the laws of the United States.

2. All debts that may be owing by the corporation as guardian, executor, administrator or trustee; and if there be not sufficient to pay all debts of the character above specified, then a distribution shall be made among them, in proportion to their amounts respectively.

3. Judgments actually obtained against such corporation, to the extent of the value of the real estate on which they shall respectively be liens.

4. All other creditors of such corporation, in proportion to their respective demands, without giving any preference to debts due on specialties.

§ 262. **Failure to file claim before first dividend.** Every creditor who shall have neglected to exhibit his demand before the first dividend, and who shall deliver his account to the receivers before the second dividend, shall receive the sum he would have been entitled to on the first dividend, before any distribution be made to the other creditors.

§ 263. **Second dividend by receiver.** If the whole of the property of such corporation be not distributed on the first dividend, the receiver shall, within one year thereafter, make a second dividend of all the moneys in their hands, among the creditors entitled thereto; of which, and that the same will be a final dividend, three weeks' notice shall be inserted once in each week in a newspaper printed in the county where the principal place of business of such corporation was situated.

Such second dividend shall be made in all respects in the same manner as herein prescribed in relation to the first dividend, and no other shall be made thereafter among the creditors of such corporation, except to the creditors having suits against it, or against the receivers, pending at the time of such second dividend, and except of the moneys which may be retained to pay such creditors, as herein provided.

§ 264. **Surplus to stockholders.** If after the second dividend is made, there shall remain any surplus in the hands of the receivers, they shall distribute the same among the stockholders of such corporation, in proportion to the respective amounts paid in by them, severally, on their shares of stock.

§ 265. **Disposition of moneys retained by receiver for suits.** When any suit pending at the time of the second dividend shall be terminated, they shall apply the moneys retained in their hands for that purpose, to the payment of the amount recovered, and their necessary charges and expenses; and if nothing shall have been recovered, they shall distribute such moneys, after deducting their expenses and costs, among the creditors and stockholders of the corporation, in the same manner as herein directed in respect to a second dividend.

§ 266. **Duty of receiver as to unclaimed dividend.** If any dividend that shall have been declared, shall remain unclaimed by the person entitled thereto for one year after the same was declared, the receivers shall consider it as relinquished, and shall distribute it, on any subsequent dividend, among the other creditors.

§ 267. **Effect of failure to file claim before second dividend.** After such second dividend shall have been made, the receivers shall not be answerable to any creditor of such corporation, or to any person having claims against such corporation, by virtue of any open or subsisting engagement, unless the demands of such creditor shall have been exhibited, and the engagements upon which such claims are founded, shall have been presented to the said receivers, in detail and in writing, before or at the time specified by them in their notice of a second dividend.

§ 268. **Final accounting by receiver.** A receiver shall apply within one year after qualifying as such for a final settlement of his accounts and an order for distribution, or shall apply to the court upon notice to the attorney-general for an extension of time, setting forth the reasons why he is unable to close his accounts, which order may be granted in the discretion of the court. The attorney-general or any creditor, or any party interested, may apply for an order that the receiver show cause why an accounting and distribution shall not be had at any time after the expiration of one year after the receiver qualifies; and it shall be the duty of the attorney-general after the expiration of eighteen months from the time the receiver enters upon his duties, in case he has not applied for a final settlement of his accounts, to apply for such an order on notice to such receiver. In case of such application by a party other than the receiver the court shall direct the receiver to take steps to account with all convenient speed. The receiver is not required or authorized to file any account, except as herein provided, except by special order of the court.

§ 269. **Notice of final accounting.** Previous to rendering such account the receivers shall insert a notice of their intention to present the same, once in each week, for three weeks, in a newspaper, of the county in which notices of dividends are herein required to be inserted, specifying the time and place at which such account will be rendered. Said receivers shall also give notice to the sureties on their official bonds, as provided in section two hundred and twenty-five of this chapter.

§ 270. **Hearing on final accounting.** Upon the coming in of such report, the court shall hear the allegations of all concerned therein, and shall allow or disallow such account, and decree the same to be final and conclusive upon all the creditors of such corporation, upon all persons who have claims against it, upon any open or subsisting engagement, and upon all the stockholders of such corporation.

§ 271. **Reference of final account.** The referee to whom such account shall be referred, shall hear and examine the proofs, vouchers and documents offered for or against such account, and shall report thereon fully to the court.

§ 272. **Further accounting.** Such receivers shall also account from time to time in the same manner, and with the like effect, for all moneys which shall come to their hands after the rendering of such account, and for all moneys which shall have been retained by them for any of the purposes hereinbefore specified, and shall pay into court all unclaimed dividends.

§ 273. **Removal of receiver.** Such receivers may be removed by the court.

§ 274. **Vacancy.** Any vacancy created by removal, death or otherwise, may be supplied by the court.

§ 275. **Renunciation by receiver.** Any receiver who shall be desirous of renouncing the trust vested in him may apply to the court from whom his

appointment was received, for an order to all persons interested, to show cause why such renunciation should not be accepted.

Such application shall be accompanied by a full, true and just account of all the transactions of such receiver, and particularly of the property, moneys and effects received by him; of all payments made, whether to creditors or otherwise; and of the remaining effects and property of the corporation, in respect to which he was appointed receiver, within his knowledge, and the situation of the same.

To such account shall be annexed the affidavit of the receiver, that the said account is in all respects just and true, according to the best of his knowledge and belief; which affidavit shall be subscribed and sworn to, before the court, to whom application is made, and shall be certified by the clerk of the court.

Such court shall thereupon grant an order, directing notice to be given to all persons interested in the property of the corporation, in respect to which such receiver was appointed, to show cause on a day or at a term and at a place therein to be specified, why he should not be permitted to renounce his appointment.

Such notice shall be published, once in each week, for six weeks successively in such newspapers, as such court shall direct.

On the day appointed for such hearing, and on such other days as shall from time to time be appointed; if it shall appear that notice was duly published, the court shall proceed to hear the proofs and allegations of the parties.

If it shall appear that the proceedings of such receiver, in relation to his trust, have been fair and honest, and particularly in the collection of the property and debts vested in him; and if such court be satisfied that for any reason it is inexpedient for such receiver to continue in the execution of the duties of his appointment, and that such duties can be executed by another receiver, without injury to the property of the corporation, or to the creditors; and if no good cause to the contrary appear, such court shall grant an order, allowing such receiver to renounce his appointment.

Upon such order being granted, such receiver shall be discharged from the trust reposed in him, and his power and authority shall thereupon cease; but he shall, notwithstanding, remain subject to any liability he may have incurred, at any time previous to the granting of such order, in the management of his trust.

The expense of all proceedings in effecting such renunciation shall be paid by the receiver making the application.

§ 276. **Control of receiver by court.** The receivers shall be subject to the control of the court and may be compelled to account at any time.

§ 277. **Commissions and expenses of receiver in voluntary dissolution.** A receiver appointed pursuant to article nine is entitled, in addition to his necessary expenses, to commissions upon the sums received and disbursed by him as the court by which or the judge by whom he is appointed allows, as follows: On the first twenty thousand dollars not exceeding five per centum; on the next eighty thousand dollars, not exceeding two and one-half per centum; and on the remainder, not exceeding one per centum; but in case the commissions of a receiver so computed shall not amount to one hundred dollars, said court or judge may in his or its discretion allow said receiver such a sum not exceeding one hundred dollars for his commissions as shall be commensurate with the services rendered by said receiver.

§ 278. **Commissions and expenses of receiver except in voluntary dissolution.** A receiver of a corporation, except a receiver appointed in proceedings for its voluntary dissolution, is entitled, in addition to his necessary expenses, to such commissions, not exceeding two and one-half per centum upon the sums

received and disbursed by him, as the court by which or the judge by whom he is appointed allows, but except upon a final accounting such a receiver shall not receive on account of his services for any one year a greater amount than twelve thousand dollars, nor for any period less than a year more than at that rate. Upon final accounting, the court may make an additional allowance to such receiver, not exceeding two and one-half per centum upon the sums received and disbursed by him, if the court is satisfied that he has performed services that fairly entitle him to such additional allowance. Where more than one receiver shall be appointed, the compensation herein provided shall be divided between said receivers.

§ 300. **Application of preceding articles to certain corporations.** Articles fifth, sixth or seventh of this chapter do not apply to a religious corporation; or to a municipal or other political corporation, created by the constitution, or by or under the laws of this state; or to any corporation which the regents of the university have power to dissolve, except upon the application of the regents, or of the trustees of such a corporation; and in aid of its liquidation under such dissolution.

§ 301. **Officers and agents may be compelled to testify in certain actions.** In an action, brought as prescribed in article fifth, sixth or seventh, a stockholder, officer, alienee, or agent of a corporation, is not excused from answering a question, relating to the management of the corporation, or the transfer or disposition of its property, on the ground that his answer may expose the corporation to a forfeiture of any of its corporate rights, or will tend to convict him of a criminal offense, or to subject him to a penalty or forfeiture. But his testimony shall not be used, as evidence against him, in a criminal action or special proceeding.

§ 302. **Injunction staying actions by creditors in certain actions.** In such an action, the court may, in its discretion, on the application of either party, at any stage of the action, before or after final judgment, and with or without security, grant an injunction order, restraining the creditors of the corporation from bringing actions against the defendants, or any of them, for the recovery of a sum of money, or from taking any further proceedings in such actions, theretofore commenced. Such an injunction has the same effect, and, except as otherwise expressly prescribed in this section, is subject to the same provisions of law, as if each creditor, upon whom it is served, was named therein, and was a party to the action in which it is granted.

§ 303. **Creditors of corporation may be brought in to prove their claims in certain actions.** In such an action, the court may, at any stage of the action, before or after final judgment, make an order requiring all the creditors of the corporation to exhibit and prove their claims, and thereby make themselves parties to the action, in such a manner, and in such a reasonable time, not less than six months from the first publication of notice of the order as the court directs; and that the creditors, who make default in so doing, shall be precluded from all benefit of the judgment, and from any distribution which may be made thereunder, except as hereinafter provided. Notice of the order must be given by publication, in such newspapers, and for such a length of time, as the court directs. Notwithstanding such order any such creditor who shall exhibit and prove his claim in the manner directed thereby, with proof, by affidavit or otherwise, that he has had no notice or knowledge thereof in time to comply therewith, any time before an order is made directing a final distribution of the assets of such corporation, shall be entitled to have his claim received, and shall have the same rights and benefits thereon, so far as the assets of such corporation then remaining undistributed may render possible, as if his claim had been exhibited and proved within the time limited by such order.

§ 304. **When attorney-general must bring certain actions.** Where the attorney-general has good reason to believe, that an action can be maintained in behalf

of the people of the state, as prescribed in articles fifth, sixth or seventh of the chapter, except section one hundred and thirty of this chapter, he must bring an action accordingly, or apply to a competent court for leave to bring an action, as the case requires; if, in his opinion, the public interests require that an action should be brought. In a case where the action can be brought only by the attorney-general in behalf of the people, if a creditor, stockholder, director, or trustee of the corporation, applies to the attorney-general for that purpose, and furnishes the security required by law, the attorney-general must bring the action, or apply for leave to bring it, if he has good reason to believe, that it can be maintained. Where such an application is made section nineteen hundred and eighty-six of the code of civil procedure applies thereto, and to the action brought in pursuance thereof.

§ 305. **Requisites of injunction against corporations in certain cases.** An injunction order, suspending the general and ordinary business of a corporation, or suspending from office, or restraining from the performance of his duties, a trustee, director, or other officer thereof, can be granted only by the court, upon notice of the application therefor, to the proper officer of the corporation, or to the trustee, director, or other officer enjoined. If such an injunction order is made, otherwise than as prescribed in this section, it is void.

§ 306. **Appointment of receivers of property of corporations.** A receiver of the property of a corporation can be appointed only by the court, and in one of the following cases:

1. An action, brought as prescribed in articles fifth, sixth or seventh of this chapter.

2. An action brought for the foreclosure of a mortgage upon the property, of which the receiver is appointed, where the mortgage debt, or the interest thereupon, has remained unpaid, at least thirty days after it was payable, and after payment thereof was duly demanded of the proper officer of the corporation and where either the income of the property is specifically mortgaged, or the property itself is probably insufficient to pay the mortgage debt.

3. An action brought by the attorney-general, or by a stockholder, to preserve the assets of a corporation, having no officer empowered to hold the same.

4. A special proceeding for the voluntary dissolution of a corporation.

5. Upon the application of the regents of the university, in aid of the liquidation of a corporation whose dissolution they contemplate or have decreed; or upon the application of the trustees of such a corporation, with notice to the regents.

Where the receiver is appointed in an action, otherwise than by or pursuant to a final judgment, notice of the application for his appointment must be given to the proper officer of the corporation.

§ 307. **Judicial suspension or removal of officer of corporation.** A trustee, director, or other officer of a corporation shall not be suspended or removed from office, by a court or judge, otherwise than by the final judgment of a competent court, in an action brought by the attorney-general, as prescribed in section ninety of this chapter.

§ 308. **Application of the last three sections.** The last three sections apply to an action or special proceeding, against a corporation created by or under the laws of the state, or a trustee, director, or other officer thereof; or against a corporation created by or under the laws of another state, government, or country, or a trustee, director, or other officer thereof, where the corporation does business within the state, or has, within the state, a business agency or a fiscal agency, or an agency for the transfer of its stock.

§ 309. **Misnomer not available in action against stockholder.** Where an action, authorized by a law of the state, is brought against one or more persons, as stockholders of a corporation, an objection to any of the proceedings cannot be taken, by a person properly made a defendant in the action on the

ground that the plaintiff has joined with him, as a defendant in the action, a person, whose name appears on the stock-books of the corporation, as a stockholder thereof, by the name so appearing; but who is misnamed, or dead, or is not liable for any cause. In such a case, the court may, at any time before final judgment, upon motion of either party, amend the pleadings and other papers, without prejudice to the previous proceedings, by substituting the true name of the person intended, or by striking out the name of the person who is dead, or not liable, and, in a proper case, inserting the name of his representative or successor.

§ 310. **Appraisal of property of insolvent corporation.** Whenever by reason of the provisions of any law of this state it shall become necessary to appraise in whole or in part the property of any corporation in the hands of a receiver or otherwise, the persons whose duty it shall be to make such appraisal shall value the real estate at its full and true value, taking into consideration actual sales of neighboring real estate similarly situated during the year immediately preceding the date of such appraisal, if any; and they shall value all such property, stocks, bonds or securities as are customarily bought or sold in open markets in the city of New York or elsewhere, for the day on which such appraisal or report may be required, by ascertaining the range of the market and the average of prices as thus found, running through a reasonable period of time.

§ 311. **Application by attorney-general for removal of receiver and to facilitate closing affairs of receivership.** The attorney-general may, at any time he deems that the interests of the stockholders, creditors, policy-holders, depositors or other beneficiaries interested in the proper and speedy distribution of the assets of any insolvent corporation will be subserved thereby, make a motion in the supreme court at a special term thereof, in any judicial district:

1. For an order removing the receiver of any insolvent corporation and appointing a receiver thereof in his stead, or,

2. To compel him to account, or,

3. For such other and additional order or orders as to him may seem proper to facilitate the closing up of the affairs of such receivership, and

Any appeal from any order made upon any motion under this section shall be to the appellate division of the department in which such motion is made.

§ 312. **Service of papers upon attorney-general.** A copy of all motions and all motion papers, and a copy of any other application to the court, together with a copy of the order or judgment to be proposed thereon to the court, in every action or proceeding for the dissolution of a corporation or a distribution of its assets, shall, in all cases, be served on the attorney-general, in the same manner as provided by law for the service of papers on attorneys who have appeared in actions, whether the applications but for this section would be ex parte or upon notice, and no order or judgment granted shall vary in any material respect from the relief specified in such copy, order or judgment, unless the attorney-general shall appear on the return day and shall have been heard in relation thereto; and any order or judgment granted in any action or proceeding aforesaid, without such service of such papers upon the attorney-general, shall be void, and no receiver of any such corporation shall pay to any person any money directed to be paid by any order or judgment made in any such action or proceeding, until the expiration of eight days after a certified copy of such order or judgment shall have been served as aforesaid upon the attorney-general.

§ 313. **Designation of depositories of funds in order appointing receiver.** All orders appointing receivers of corporations shall designate therein one or more places of deposit, wherein all funds of the corporation not needed for immediate disbursement shall be deposited and no deposits or investments of such trust

funds shall be made elsewhere, except upon the order of the court upon due notice given to the attorney-general.

§ 314. **Application to the court in certain actions and proceedings.** All applications to the court shall be made in the judicial district where the principal office of the corporation against which proceedings are taken is located, excepting such applications as are made in actions brought by the attorney-general on behalf of the people of the state, and all such applications shall be made in the judicial district in which the action is triable.

§ 315. **County wherein action may be brought by attorney-general on behalf of the people.** An action or proceeding brought by the attorney-general on behalf of the people of the state against any corporation for the purpose of procuring its dissolution, the appointment of a receiver, or the sequestration of its property, may be brought in any county of the state, to be designated by the attorney-general.

§ 316. **Preferences in actions or proceedings by or against receivers.** All actions or other legal proceedings and appeals therefrom or therein brought by or against a receiver of any of the insolvent corporations referred to in this chapter, shall have a preference upon the calendars of all courts next in order to actions or proceedings brought by the people of the state of New York.

§ 320. **Alteration and repeal of charter.** The charter of every corporation shall be subject to alteration, suspension and repeal, in the discretion of the legislature.

§ 321. **Conflicting corporate laws.** If in any corporate law there is or shall be any provision in conflict with any provisions of this chapter or of the stock corporation law, the provisions so conflicting shall prevail, and the provision of this chapter or of the stock corporation law with which it conflicts shall not apply in such a case. If in any such law there is or shall be a provision relating to a matter embraced in this chapter or in the stock corporation law, but not in conflict with it, such provision in such other law shall be deemed to be in addition to the provision in this chapter or in the stock corporation law relating to the same subject-matter, and both provisions shall in such case, be applicable.

§ 331. **Construction.** Nothing in this chapter shall be construed to impair any right or liability which any existing corporation, its officers, directors, stockholders or creditors may have or be subject to or which any such corporation, other than a railroad corporation, had or was subject to on the date when this chapter takes effect, by virtue of any special act of the legislature creating such corporation or creating or defining any such right or liability, unless such special act is repealed by this chapter or the other general laws hereinbefore mentioned.

## LABOR LAW.

### § 2. Definitions. 1. Whenever used in this chapter:

The term "employee" means a mechanic, workingman or laborer who works for another for hire.

The term "employer" means the person employing any such mechanic, workingman or laborer, whether the owner, proprietor, agent, superintendent, foreman or other subordinate.

The term "factory" includes any mill, workshop, or other manufacturing establishment and all buildings, sheds, structures or other places used for or in connection therewith, where one or more persons are employed at manufacturing, including making, altering, repairing, finishing, bottling, canning, cleaning or laundering any article or thing, in whole or in part, except, dry dock plants engaged in making repairs to ships, and except power houses, generating plants, barns, storage houses, sheds and other structures owned or operated by a public

service corporation, other than construction or repair shops, subject to the jurisdiction of the public service commission under the public service commissions law. The provisions of this chapter affecting structural changes and alterations, shall not apply to factories or to any buildings, sheds, structures, or other places used for or in connection therewith, where less than six persons are employed at manufacturing except as otherwise prescribed by the state industrial commission in its rules.

The term "factory building" means any building, shed or structure which, or any part of which, is occupied by or used for a factory, and in which at least one-tenth or more than twenty-five of all the persons employed in the building are engaged in work for a factory but shall not include a building used exclusively for dwelling purposes above the first story. The provisions of this chapter shall, so far as prescribed by the state industrial commission in its rules, also apply to any building, not a factory building within the meaning thereof, any part of which is occupied by or used for a factory.

The term "mercantile establishment" means any place where goods, wares or merchandise are offered for sale and shall include any building, shed or structure, or any part thereof, which is occupied in connection with such establishment. The provisions of this chapter affecting structural changes and alterations, shall not apply to mercantile establishments where less than six persons are employed except as otherwise prescribed by the state industrial commission in its rules.

The term "tenement house" means any house or building, or portion thereof, which is either rented, leased, let or hired out, to be occupied, or is occupied in whole or in part as the home or residence of three families or more living independently of each other and doing their cooking upon the premises, and includes apartment houses, flat houses and all other houses so occupied, and for the purposes of this chapter shall be construed to include any building on the same lot with any such tenement house and which is used for any of the purposes specified in section one hundred of this chapter.

The term "department" means the department of labor of the state of New York.

The term "commission" means the industrial commission of the state of New York.

The term "rule" means any rule or regulation made by the industrial commission and any amendment or repeal thereof.

Whenever, in this chapter, authority is conferred upon the state industrial commission, it shall also be deemed to include its deputies or a deputy acting under its direction. Whenever the enforcement of any of the provisions of this chapter is committed to any local officer or officers, by any law now in force or hereafter enacted, such local officer or officers with respect to the matters thus committed to them shall be deemed to have the powers and jurisdiction of the industrial commission of the state of New York to the extent specified in the law committing the enforcement of such provisions to such local officer or officers.

2. Prohibited employment. Whenever the provisions of this chapter prohibit the employment of a person in certain work or under certain conditions, the employer shall not permit, suffer or allow such person to so work, either with or without compensation, and in a prosecution or action therefor lack of consent on the part of the employer shall be no defense.

3. Work shall be deemed to be done for a factory within the meaning of this chapter whenever it is done at any place, upon the work of a factory or upon any of the materials entering into the product of the factory, whether under contract or arrangement with any person in charge of or connected with such factory directly or indirectly through the instrumentality of one or more contractors or other third persons.

§ 9. **Payment of wages by receivers.** Upon the appointment of a receiver of a partnership or of a corporation organized under the laws of this state and doing business therein, other than a moneyed corporation, the wages of the employees of such partnership or corporation shall be preferred to every other debt or claim.

§ 10. **Cash payment of wages.** Every manufacturing, mining, quarrying, mercantile, railroad, street railway, canal, steamboat, telegraph and telephone company, every express company, every corporation engaged in harvesting and storing ice, and every water company, not municipal, and every person, firm or corporation, engaged in or upon any public work for the state or municipal corporation thereof, either as a contractor or a subcontractor therewith, shall pay to each employee engaged in his, their or its business the wages earned by such employee in cash. No such company, person, firm or corporation shall hereafter pay such employees in scrip, commonly known as store money-orders. No person, firm or corporation engaged in carrying on public work under contract with the state or with any municipal corporation of the state, either as a contractor or subcontractor therewith, shall, directly or indirectly, conduct or carry on what is commonly known as a company store, if there shall, at the time, be any store selling supplies within two miles of the place where such contract is being executed. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor.

§ 11. **When wages are to be paid.** Every corporation or joint-stock association, or person carrying on the business thereof by lease or otherwise, shall pay weekly to each employee the wages earned by him to a day not more than six days prior to the date of such payment.

But every person or corporation operating a steam surface railroad shall, on or before the first day of each month, pay the employees thereof the wages earned by them during the first half of the proceeding month ending with the fifteenth day thereof, and on or before the fifteenth day of each month pay the employees thereof the wages earned by them during the last half of the preceding calendar month.

§ 12. **Penalty for violation of preceding section.** If a corporation or joint-stock association, its lessee or other person carrying on the business thereof, shall fail to pay the wages of all its employees, as provided in this article, it shall forfeit to the people of the state the sum of fifty dollars for each such failure, to be recovered by the commissioner of labor in his name of office in a civil action.

## PENAL LAW.

§ 280. **Corporations and voluntary associations not to practice law.** It shall be unlawful for any corporation or voluntary association to practice or appear as an attorney-at-law for any person other than itself in any court in this state or before any judicial body, or to make it a business to practice as an attorney-at-law, for any person other than itself, in any of said courts or to hold itself out to the public as being entitled to practice law, or render or furnish legal services or advice, or to furnish attorneys or counsel or to render legal services of any kind in actions or proceedings of any nature or in any other way or manner, or in any other manner to assume to be entitled to practice law or to assume, use or advertise the title of lawyer or attorney, attorney-at-law, or equivalent terms in any language in such manner as to convey the impression that it is entitled to practice law, or to furnish legal advice, services or counsel, or to advertise that either alone or together with or by or through any person whether a duly and regularly admitted attorney-at-law, or not, it has, owns, conducts or maintains a law office or an office for the practice of law, or for furnishing legal advice, services or counsel. It shall be unlawful further for

any corporation or voluntary association to solicit itself or by or through its officers, agents or employees any claim or demand for the purpose of bringing an action thereon or of representing as attorney-at-law, or for furnishing legal advice, services or counsel to a person sued or about to be sued in any action or proceeding or against whom an action or proceeding has been or is about to be brought, or who may be affected by any action or proceeding which has been or may be instituted in any court or before any judicial body, or for the purpose of so representing any person in the pursuit of any civil remedy. Any corporation or voluntary association violating the provisions of this section shall be liable to a fine of not more than five thousand dollars and every officer, trustee, director, agent or employee of such corporation or voluntary association who directly or indirectly engages in any of the acts herein prohibited or assists such corporation or voluntary association to do such prohibited acts is guilty of a misdemeanor. The fact that such officer, trustee, director, agent or employee shall be a duly and regularly admitted attorney-at-law, shall not be held to permit or allow any such corporation or voluntary association to do the acts prohibited herein nor shall such fact be a defense upon the trial of any of the persons mentioned herein for a violation of the provisions of this section. This section shall not apply to any corporation or voluntary association lawfully engaged in a business authorized by the provisions of any existing statute, nor to a corporation or voluntary association lawfully engaged in the examination and insuring of titles to real property, nor shall it prohibit a corporation or voluntary association from employing an attorney or attorneys in and about its own immediate affairs or in any litigation to which it is or may be a party, nor shall it apply to organizations organized for benevolent or charitable purposes, or for the purpose of assisting persons without means in the pursuit of any civil remedy, which existence, organization or incorporation may be approved by the appellate division of the supreme court of the department in which the principal office of said corporation or voluntary association may be located.

Nothing herein contained shall be construed to prevent a corporation from furnishing to any person, lawfully engaged in the practice of the law, such information or such clerical services in and about his professional work as, except for the provisions of this section, may be lawful, provided that at all times the lawyer receiving such information or such services shall maintain full professional and direct responsibility to his clients for the information and services so received. But no corporation shall be permitted to render any services which cannot lawfully be rendered by a person not admitted to practice law in this state nor to solicit directly or indirectly professional employment for a lawyer.

**§ 660. Frauds in the organization of corporations.** A person who:

1. Without authority subscribes the name of another to or inserts the name of another in any prospectus, circular or other advertisement or announcement of any corporation or joint-stock association existing or intended to be formed, with intent to permit the same to be published, and thereby to lead persons to believe that the person whose name is so subscribed is an officer, agent, member or promoter of such corporation or association; or,
2. Signs the name of a fictitious person to any subscription for or agreement to take stock in any corporation, existing or proposed; or,
3. Signs to any such subscription or agreement the name of any person, knowing that such person does not intend in good faith to comply with the terms thereof, or under any understanding or agreement, that the terms of such subscription or agreement are not to be complied with or enforced,

Is guilty of a misdemeanor.

§ 661. **Frauds in procuring organization of corporations.** An officer, agent or clerk of a corporation, or of persons proposing to organize a corporation, or to increase the capital stock of a corporation, who knowingly exhibits a false, forged or altered book, paper, voucher, security or other instrument of evidence to any public officer or board authorized by law to examine the organization of such corporation, or to investigate its affairs, or to allow an increase of its capital, with intent to deceive such officer or board in respect thereto, is punishable by imprisonment in a state prison not exceeding ten years.

§ 662. **Fraudulent issue of stocks and bonds.** An officer, agent or other person in the service of any joint-stock company or corporation formed or existing under the laws of this state, or of the United States or of any state or territory thereof, or of any foreign government or country, who wilfully and knowingly with intent to defraud:

1. Sells, pledges or issues, or causes to be sold, pledged or issued, or signs or executes, or causes to be signed or executed with intent to sell, pledge or issue, or causes to be sold, pledged or issued, any certificate or instrument purporting to be a certificate of evidence of the ownership of any share or shares of such company or corporation, or any bond or evidence of debt, or writing purporting to be a bond or evidence of debt of such company or corporation, without being first thereto duly authorized by such company or corporation, or contrary to the charter or laws under which such corporation or company exists, or in excess of the power of such company or corporation or of the limit imposed by law or otherwise upon its power to create or issue stock or evidences of debt; or,

2. Reissues, sells, pledges or disposes of, or causes to be reissued, sold, pledged or disposed of, and surrendered or canceled certificates, or other evidence of the transfer or ownership of any such share or shares,

Is punishable by imprisonment for a term not exceeding seven years, or by a fine not exceeding three thousand dollars, or by both.

§ 664. **Misconduct of officers and directors of stock corporations.** A director of a stock corporation, who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended:

1. To make a dividend, except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law; or,

2. To divide, withdraw, or in any manner pay to the stockholders, or any of them, any part of the capital stock of the corporation; or to reduce such capital stock without the consent of the legislature; or,

3. To discount or receive any note or other evidence of debt in payment of an instalment of capital stock actually called in, and required to be paid, or with intent to provide the means of making such payment; or,

4. To receive or discount any note or other evidence of debt with intent to enable any stockholder to withdraw any part of the money paid in by him on his stock; or,

5. To apply any portion of the funds of such corporation, except surplus profits, directly or indirectly, to the purchase of shares of its own stock,

Is guilty of a misdemeanor.

An officer or director of a stock corporation who:

6. Issues, participates in issuing, or concurs in a vote to issue any increase of its capital stock beyond the amount of the capital stock thereof, duly authorized by or in pursuance of law; or,

7. Sells, or agrees to sell, or is directly or indirectly interested in the sale of any share of stock of such corporation, or in any agreement to sell the same, unless at the time of such sale or agreement he is an actual owner of such share,

Is guilty of a misdemeanor, punishable by imprisonment for not less than six months, or by a fine not exceeding five thousand dollars, or by both.

**§ 665. Misconduct of directors, officers, agents and employees of corporations.** A director, officer, agent or employee of any corporation or joint-stock association who:

1. Knowingly receives or possesses himself of any of its property otherwise than in payment for a just demand, and with intent to defraud, omits to make or to cause or direct to be made a full and true entry thereof in its books and accounts; or,

2. Makes or concurs in making any false entry, or concurs in omitting to make any material entry in its books or accounts; or,

3. Knowingly (a) concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition containing any material statement which is false, or (b), omits or concurs in omitting any statement required by law to be contained therein; or,

4. Having the custody or control of its books, wilfully refuses or neglects to make any proper entry in the stock book of such corporation as required by law, or to exhibit or allow the same to be inspected, and extracts to be taken therefrom by any person entitled by law to inspect the same, or take extracts therefrom; or,

5. If a notice of an application for an injunction affecting the property or business of such joint-stock association or corporation is served upon him, omits to disclose the fact of such service and the time and place of such application to the other directors, officers and managers thereof; or,

6. Refuses or neglects to make any report or statement lawfully required by a public officer,

Is guilty of a misdemeanor.

**§ 667. Presumption of knowledge of corporate condition and business and of assent thereto by directors; definitions.** It is no defense to a prosecution for a violation of the provisions of this article and article twenty-six, that the corporation is a foreign corporation, if it carries on business or keeps an office therefor in this state.

The term "director" as used in this article and article twenty-six includes any of the persons having, by law, the direction or management of the affairs of a corporation, by whatever name described.

A director of a corporation or joint-stock association is deemed to have such a knowledge of the affairs of the corporation or association as to enable him to determine whether any act, proceeding or omission of its directors is a violation of this article and article twenty-six. If present at a meeting of the directors at which any act, proceeding or omission of such directors in violation of this article and article twenty-six occurs, he must be deemed to have concurred therein, unless he at the time causes or in writing requires his dissent therefrom to be entered on the minutes of the directors. If absent from such meeting, he must be deemed to have concurred in any such violation, if the facts constituting such violation appear on the record or minutes of the proceedings of the board of directors, and he remains a director of the corporation for six months thereafter without causing or in writing requiring his dissent from such violation to be entered on such record of minutes.

**§ 668. Misconduct at corporate elections.** Any person who:

1. Being entitled to vote at any meeting of the stockholders or bondholders or both of a stock corporation, sells his vote, or who issues a proxy to vote to any person for any sum of money or thing of value, except as expressly authorized by law; or,

2. Acts as an inspector of election of any such meeting and violates an oath taken by him in pursuance of law as such inspector, or violates the provisions

of an oath required by law to be taken by him as such inspector, or is guilty of any dishonest or corrupt conduct as such inspector,

Is guilty of a misdemeanor.

§ 890. **Officer of corporation selling fraudulent shares.** An officer, agent or other person employed by any company or corporation existing under the laws of this state, or of any other state or territory of the United States, or of any foreign government, who wilfully and with a design to defraud, sells, pledges or issues, or causes to be sold, pledged or issued, or signs or procures to be signed with intent to sell, pledge or issue, or to be sold, pledged or issued, a false, forged or fraudulent paper, writing or instrument, being or purporting to be a script, certificate or other evidence of the ownership or transfer of any share or share of the capital stock of such company or corporation, or a bond or other evidence of debt of such company or corporation, or a certificate or other evidence of the ownership or of the transfer of any such bond or other evidence of debt, is guilty of forgery in the third degree, and upon conviction, in addition to the punishment prescribed in section eight hundred and ninety-three of this chapter for that offense, may also be sentenced to pay a fine not exceeding three thousand dollars.

### STOCK CORPORATION LAW.

§ 1. **Short title.** This chapter shall be known as the "Stock Corporation law."

§ 5. **Application of article.** This article except sections eight, fifteen, sixteen, seventeen and eighteen thereof, shall not apply to moneyed corporations.

§ 6. **Power to borrow money and mortgage property.** In addition to the powers conferred by the general corporation law, every stock corporation shall have the power to borrow money and contract debts, when necessary for the transaction of its business, or for the exercise of its corporate rights, privileges or franchises or for any other lawful purpose of its incorporation; and it may issue and dispose of its obligations for any amount so borrowed, and may mortgage its property and franchises to secure the payment of such obligations, or of any debt contracted for said purposes. Every such mortgage, except purchase-money mortgages and mortgages authorized by contracts made prior to May first eighteen hundred and ninety-one, shall be consented to by the holders of not less than two-thirds of the capital stock of the corporation, which consent shall be given either in writing or by vote at a special meeting of the stockholders called for that purpose, upon the same notice as that required for the annual meetings of the corporation; and a certificate under the seal of the corporation that such consent was given by the stockholders in writing, or that it was given by vote at a meeting as aforesaid, shall be subscribed and acknowledged by the president or a vice-president and by the secretary or an assistant secretary, of the corporation, and shall be filed and recorded in the office of the clerk or register of the county wherein the corporation has its principal place of business. When authorized by like consent, the directors under such regulations as they may adopt, may confer on the holder of any debt or obligation, whether secured or unsecured, evidenced by bonds of the corporation, the right to convert the principal thereof, after two and not more than twelve years from the date of such bonds, into stock of the corporation; and if the capital stock shall not be sufficient to meet the conversion when made, the directors shall from time to time, authorize an increase of capital stock sufficient for that purpose by causing to be filed in the office of the secretary of state, and a duplicate thereof in the office of the clerk of the county where the principal place of business of the corporation shall be located, a certificate under the seal of the corporation, subscribed and acknowledged by the president and secretary of the corporation setting forth,

1. A copy of such mortgage; or resolution of directors authorizing the issue of such bonds;

2. That the holders of not less than two-thirds of the capital stock of the corporation duly consented to the execution of such mortgage or resolution of directors authorizing the issue of such bonds by such corporation;

3. A copy of the resolution of the directors of the corporation authorizing the increase of the capital stock of the corporation necessary for the purpose of such conversion;

4. The amount of capital theretofore authorized, the proportion thereof actually issued and the amount of the increased capital stock.

If the corporation be a railroad corporation the certificate shall have indorsed thereon the approval of the public service commission having jurisdiction thereof. When the certificate herein provided for has been filed, the capital stock of such corporation shall be increased to the amount specified in such certificate.

**§ 7. Validating corporate mortgages.** Whenever any mortgage affecting property or franchises within this state heretofore or hereafter executed by authority of the board of directors in behalf of any stock corporation, domestic or foreign, of any description, recites or represents in substance or effect that the execution of such mortgage has been duly consented to, or authorized by stockholders, such recital or representation in any such mortgage, after public record thereof within this state, shall be presumptive evidence that the execution of such mortgage has been duly and sufficiently consented to, and authorized by stockholders as required by any provision of law. After any such mortgage heretofore or hereafter shall have been publicly recorded for more than one year in one or more of the counties of this state containing the mortgaged premises or any part thereof, and the corporation shall have received value for bonds actually issued under and secured by such mortgage, and interest shall have been paid on any of such bonds according to the terms thereof, such recital or representation of such mortgage so recorded shall be conclusive evidence that the execution of such mortgage has been duly and sufficiently consented to, and authorized by stockholders as required by any provision of law, and its validity shall not be impaired by reason of any defect or insufficiency of consent or authority of stockholders or in filing or recording such consent or authority, and such mortgage shall be valid and binding upon the corporation, and those claiming under it, as security for all valid bonds issued or to be issued thereunder, unless such mortgage shall be adjudged invalid in an action begun as hereinafter, in this section, provided. Notwithstanding the foregoing provisions of this section, the invalidity of any such mortgage heretofore recorded because of insufficiency of consent by stockholders may be adjudged in any action for such purpose begun before the first day of April, nineteen hundred and two, and the invalidity of any such mortgage hereafter recorded, because of insufficiency of consent by stockholders, may be adjudged in any action for such purpose begun, within one year after the earliest record of such mortgage in any county in this state, provided in either case that such action shall have been so begun by or in behalf of the corporation by direction of the board of directors acting in their own discretion, or upon the written request of the holders of not less than one-third of the capital stock of the corporation; and in any such action so begun by or in behalf of the corporation, the recitals or representations of the mortgage shall be presumptive evidence only as first above provided. Whenever hereafter, in compliance with any law of this state, the officers of any corporation shall have made and filed and recorded a certificate that the execution of a mortgage hereafter made by the corporation has been duly consented to by stockholders, such certificate shall be conclusive evidence as to the truth

thereof, in favor of any and all persons who in good faith shall receive or purchase, for value, any bond or obligation purporting to be secured by such mortgage, at any time when said certificate shall remain of record and uncanceled. Nothing in this section contained shall affect any right or any remedy in respect of any such right of any creditor accrued before this enactment nor shall it dispense with the necessity of obtaining the consent of the public service commission having jurisdiction thereof to any mortgage by a railroad corporation.

§ 8. **Power to guarantee bonds of other corporations.** Any stock corporation may, in pursuance of a unanimous vote of its stockholders voting at a special meeting called for that purpose by notice in writing signed by a majority of the directors of such corporation stating the time and place and object of the meeting and served upon each stockholder appearing as such upon the books of the corporation, personally or by mail at his last-known post-office address at least sixty days prior to such meeting, guarantee the bonds of any other domestic corporation engaged in the same general line of business; and any stock corporation owning the entire capital stock of any other domestic stock corporation engaged in the same general line of business may in pursuance of a two-thirds vote of its stockholders voting at a special meeting called for that purpose by notice in writing signed by a majority of the directors of such corporation, stating the time and place and object of the meeting and served upon each stockholder appearing as such upon the books of the corporation personally, or by mail, at his last-known post-office address, at least sixty days prior to such meeting, guarantee the bonds of such other corporation.

§ 9. **Reorganization upon sale of corporate property and franchises.** When the property and franchises of any domestic stock corporation shall be sold by virtue of a mortgage or deed of trust, duly executed by it, or pursuant to the judgment or decree of a court of competent jurisdiction, or by virtue of any execution issued thereon, and the purchaser, his assignee or grantee shall have acquired title to the same in the manner prescribed by law, he may associate with him any number of persons, not less than the number required by law for an incorporation for similar purposes at least two-thirds of whom shall be citizens of the United States and one shall be a resident of this state, and they may become a corporation and take and possess the property and franchises thus sold, and which were at the time of the sale possessed by the corporation whose property shall have been so sold, upon making and acknowledging and filing in the offices where certificates of incorporation are required by law to be filed, a certificate in which they shall describe by name and reference to the law under which it was organized, the corporation whose property and franchises they have acquired, and the court by whose authority the sale had been made, with the date of the judgment or decree authorizing or directing the same, and a brief description of the property sold, and also the following particulars:

1. The name of the new corporation intended to be formed by the filing of such certificate; and the place where its principal office is to be located.

2. The maximum amount of its capital stock and the number of shares into which it is to be divided, specifying the classes thereof, whether common or preferred, and the amount of and rights pertaining to each class.

3. The number of directors, not less nor more than the number required by law for the old corporation, who shall manage the affairs of the new corporation, and the names and post-office addresses of the directors for the first year. They may insert in such certificate any provisions relating to the new corporation, or its management, contained in any plan or agreement which may have been entered into as provided in section ten of this chapter. Such corporation

shall be vested with, and be entitled to exercise and enjoy, all the rights, privileges and franchises, which at the time of such sale belonged to, or were vested in the corporation last owning the property sold, or its receiver, and shall be subject to all the provisions, duties and liabilities imposed by law on that corporation. Any proceedings heretofore taken in substantial compliance with this section as hereby amended, and any and all incorporations based thereon are hereby ratified and confirmed.

§ 10. **Contents of plan or agreement.** At or previous to the sale the purchasers thereat, or the persons for whom the purchase is to be made, may enter into a plan or agreement, for or in anticipation of the readjustment of the respective interests therein of any creditors, mortgagees, stockholders, or any of them, of the corporation owning such property and franchises at the time of the sale, and of holders of claims for materials, supplies and equipment furnished, and for injuries and damages sustained, in and about the operation, maintenance or construction of any or all the property formerly owned or leased to said corporation, and for the representation of such interests in the bonds or stock of the new corporation to be formed, and may therein regulate, voting by the holders of the preferred and common stock at any meeting of the stockholders, and may provide for, and regulate voting by the holders, and owners of any or all the bonds of the corporation, foreclosed, or of the bonds issued or to be issued by the new corporation; and such right of voting by bondholders shall be exercised in such manner, for such period, and upon such conditions, as shall be therein described. Such plan or agreement must not be inconsistent with the laws of the state and shall be binding upon the corporation, until changed as herein provided, or as otherwise provided by law. The new corporation when duly organized, pursuant to such plan or agreement and to the provisions of law, may issue its bonds and stock in conformity with the provisions of such plan or agreement, and may at any time within six months after its organization, compromise, settle or assume the payment of any debt, claim or liability of the former corporation or any claims for materials, supplies and equipment furnished, or any claims for injuries and damages sustained, in and about the operation, maintenance or construction of any or all the property formerly owned or leased to said corporation, upon such terms as may be lawfully approved by a majority of the agents or trustees intrusted with the carrying out of the plan or agreement or reorganization, and may establish preferences in favor of any portion of its capital stock and may divide its stock into classes; but the capital stock of the new corporation shall not exceed in the aggregate the maximum amount of stock mentioned in the certificate of incorporation.

§ 11. **Sale of property; possession of receiver and suits against him.** The supreme court may direct a sale of the whole of the property, rights and franchises covered by the mortgage or mortgages, or deeds of trust foreclosed at any one time and place to be named in the judgment or order, either in case of the non-payment of interest only, or of both the principal and interest due and unpaid and secured by any such mortgage or mortgages or deeds of trust. Neither the sale nor the formation of the new corporation shall interfere with the authority or possession of any receiver of such property and franchises, but he shall remain liable to be removed or discharged at such time as the court may deem proper. No suit or proceeding shall be commenced against such receiver unless founded on wilful misconduct or fraud in his trust after the expiration of sixty days from the time of his discharge; but after the expiration of sixty days the new corporation shall be liable in any action that may be commenced against it, and founded on any act or omission of such receiver for which he may not be sued, and to the same extent as the receiver, but for this

section would be or remain liable, or to the same extent that the new corporation would be had it done or omitted the acts complained of.

§ 12. **Municipalities may assent to plan of readjustment.** The commissioners, corporate authorities or proper officers of any city, town or village, who may hold stock in any corporation, the property and franchises whereof shall be liable to be sold, may assent to any plan or agreement of reorganization which lawfully provides for the formation of a new corporation, and the issue of stock therein to the proper authorities or officers of such cities, towns or villages in exchange for the stock of the old or former corporation by them respectively held. And such commissioners, corporate authorities or other proper officers may assign, transfer or surrender the stock so held by them in the manner required by such plan, and accept in lieu thereof the stock issued by such new corporation in conformity therewith.

§ 13. **Change of place of business.** Any stock corporation now existing or hereafter organized under the laws of this state, except moneyed corporations, may at any time change its principal office and place of business from the city, town or county named in its certificate of incorporation, or to which it may have been changed under the provisions of this section, to any other city, town or county in this state, in which it may desire to actually transact and carry on its regular business from day to day, provided that such change has been authorized, either by unanimous consent of the stockholders expressed in writing and duly acknowledged and filed in the office of the secretary of state, by a vote of the stockholders of said corporation at a special meeting of the stockholders called for that purpose, or such change has been effected by an act of legislature creating a separate and distinct county wholly within the limits and boundaries of a then existing county or counties. When such change shall be authorized by the stockholders or effected by the creation of a new county wholly within the limits and boundaries of the then existing county or counties as herein provided, the president and secretary and a majority of the directors of such corporation shall sign a certificate stating the name of said corporation, the city, town and county where its principal office and place of business was originally located, and to which it may have been subsequently changed, and the city, town and county to which it is desired to change its said principal office and place of business, and that it is the purpose of said corporation to actually transact and carry on its regular business from day to day at such place, and that such change has been authorized as herein provided, and the names of the directors of said corporation and their respective places of residence, which certificate shall be verified by the oaths of all the persons signing the same, and when so signed and verified, shall be filed in the office of the secretary of state and a duplicate thereof in the office of the clerk of the county from which said principal office and place of business is about to be removed or changed, and another in the office of the clerk of the county to which said removal or change is to be made, and thereupon the principal office and place of business of such corporation shall be changed as stated in said certificate.

§ 14. **Combinations prohibited.** No domestic stock corporation and no foreign corporation doing business in this state shall combine with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life.

§ 15. **Merger.** Any domestic stock corporation and any foreign stock corporation authorized to do business in this state lawfully owning all the stock of any other stock corporation organized for, or engaged in business similar or incidental to that of the possessor corporation may file in the office of the secretary of state, under its common seal, a certificate of such ownership, and of the resolution of its board of directors to merge such other corporation, and

thereupon it shall acquire and become, and be possessed of all the estate, property, rights, privileges and franchises of such other corporation, and they shall vest in and be held and enjoyed by it as fully and entirely and without change or diminution as the same were before held and enjoyed by such other corporation, and be managed and controlled by the board of directors of such possessor corporation, and in its name, but without prejudice to any liabilities of such other corporation or the rights of any creditors thereof. Any bridge corporation may be merged under this section with any railroad corporation which shall have acquired the right by contract to run its cars over the bridge of such bridge corporation.

§ 16. **Voluntary sale of franchise and property.** A stock corporation, except a railroad corporation and except as otherwise provided by law, with the consent of two-thirds of its stock, may sell and convey its property, rights, privileges and franchises, or any interest therein or any part thereof to a domestic corporation, engaged in a business of the same general character, or which might be included in the certificate of incorporation of a corporation organizing under any general law of this state for a business of the same general character, and a domestic corporation the principal business of which is carried on in, and the principal tangible property of which is located within a state adjoining the state of New York, may with the consent of the holders of ninety-five per centum of its capital stock, sell and convey its property situate without the state of New York, not including its franchises, to a corporation organized under the laws of such adjoining state, and such sale and conveyance shall, in case of a sale to a domestic corporation, vest the rights, property and franchises thereby transferred, and in case of a sale to a foreign corporation the property sold, in the corporation to which they are conveyed for the term of its corporate existence, subject to the provisions and restrictions applicable to the corporation conveying them. Before such sale or conveyance shall be made such consent shall be obtained at a meeting of the stockholders called upon like notice as that required for an annual meeting.

§ 17. **Rights of non-consenting stockholders on voluntary sale of franchise and property.** If any stockholder not voting in favor of such proposed sale or conveyance shall at such meeting, or within twenty days thereafter, object to such sale, and demand payment for his stock, he may, within sixty days after such meeting, apply to the supreme court at any special term thereof held in the district in which the principal place of business of such corporation is situated, upon eight days' notice to the corporation, for the appointment of three persons to appraise the value of such stock, and the court shall appoint three such appraisers, and designate the time and place of their proceedings as shall be deemed proper, and also direct the manner in which payment for such stock shall be made to such stockholders. The court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise. The appraisers shall meet at the time and place designated, and they or any two of them, after being duly sworn honestly and faithfully to discharge their duties, shall estimate and certify the value of such stock at the time of such dissent, and deliver one copy to such corporation, and another to such stockholder, if demanded; the charges and expenses of the appraisers shall be paid by the corporation. When the corporation shall have paid the amount of such appraisal, as directed by the court, such stockholders shall cease to have any interest in such stock and in the corporate property of such corporation and such stock may be held or disposed of by such corporation.

§ 18. **Alterations or extension of business.** Any stock corporation heretofore or hereafter organized under any general or special law of this state may alter its certificate of incorporation so as to include therein any purposes, powers or

provisions which at the time of such alteration may apply to corporations engaged in a business of the same general character, or which might be included in the certificate of incorporation of a corporation organized under any general law of this state for a business of the same general character, by filing in the manner provided for the original certificate of incorporation an amended certificate, executed by the president and secretary, stating the alteration proposed, and that the same has been duly authorized by a vote of a majority of the directors and also by vote of stockholders representing at least three-fifths of the capital stock, at a meeting of the stockholders called for the purpose in the manner provided in section sixty-three of this chapter, and a copy of the proceedings of such meeting, verified by the affidavit of one of the directors present thereat, shall be filed with such amended certificate.

§ 19. **Issuance of shares of stock without nominal or par value.** Upon the formation or the reorganization of any stock corporation, other than a moneyed corporation, and other than a corporation under the jurisdiction of any public service commission, the certificate of incorporation may provide for the issuance of the shares of stock of such corporation, other than preferred stock having a preference as to principal, without any nominal or par value, by stating in such certificate:

(1) The number of shares that may be issued by the corporation, and if any of such shares be preferred stock, the preferences thereof. If such preferred stock or any part thereof shall have a preference as to principal, the certificate shall state the amount of such preferred stock having such preference, the particular character of such preferences, and the amount of each share thereof, which shall be five dollars or some multiple of five dollars, but not more than one hundred dollars.

(2) The amount of capital with which the corporation will carry on business, which amount shall be not less than the amount of preferred stock (if any) authorized to be issued with a preference as to principal, and in addition thereto a sum equivalent to five dollars or to some multiple of five dollars for every share authorized to be issued other than such preferred stock; but in no event shall the amount of such capital be less than five hundred dollars.

Such statements in the certificates shall be in lieu of any statements prescribed by the law under which the corporation shall have been formed or reorganized as to the amount or the maximum amount of its capital stock or the number of shares into which the same shall be divided, or of the amount or the par value of such shares.

Each share of such stock without nominal or par value shall be equal to every other share of such stock, subject to the preferences given to the preferred stock if any authorized to be issued. Every certificate for such shares without nominal or par value shall have plainly written or printed upon its face the number of such shares which it represents and the number of such shares which the corporation is authorized to issue, and no such certificate shall express any nominal or par value of such shares. The certificates for preferred shares having a preference as to principal shall state briefly the amount which the holders of each of such preferred shares shall be entitled to receive on account of principal from the surplus assets of the corporation in preference to the holders of other shares, and shall state briefly any other rights or preferences given to the holders of such shares.

Such corporation may issue and may sell its authorized shares, from time to time, for such consideration as may be prescribed in the certificate of incorporation, or for such consideration as shall be the fair market value of such shares, and, in the absence of fraud in the transaction, the judgment of the board of directors as to such value shall be conclusive; or for such consideration

as shall be consented to by the holders of two-thirds of each class of shares then outstanding at a meeting called for that purpose in such manner as shall be prescribed by the by-law. Any and all shares issued as permitted by the section shall be deemed fully paid and non-assessable and the holder of such shares shall not be liable to the corporation or to its creditors in respect thereof.

§ 20. **Commencement of business; authorized debts.** No corporation formed pursuant to section nineteen hereof shall begin to carry on business or shall incur any debts until the amount of capital stated in its certificate of incorporation shall have been fully paid in money, or in property taken at its actual value. In case the amount of capital stated in its certificate of incorporation shall be increased as herein provided, such corporation shall not increase the amount of its indebtedness then existing until it shall have received in money or property the amount of such increase of its stated capital. The directors of the corporation assenting to the creation of any debt in violation of this section shall be liable jointly and severally for such debt; but no action shall be brought under the foregoing provision of this section unless within one year after the debt shall have been incurred the creditor shall have served upon the director written notice of intention to hold him personally liable for such debt. Any director who, because of any such liability under this section, shall pay any debt of the corporation, shall be subrogated to all rights of the creditor in respect thereof against the corporation and its property and also shall be entitled to contribution from all other directors of the corporation similarly liable for the same debt and the personal representative of any such director who shall have died before making such contribution.

No such corporation shall declare any dividend which shall reduce the amount of its capital below the amount stated in the certificate as the amount of capital with which the corporation will carry on business. In case any such dividend shall be declared, the directors in whose administration the same shall have been declared, except those who may have caused their dissent therefrom to be entered upon the minutes of such directors at the time or who were not present when such action was taken, shall be liable jointly and severally to such corporation and to the creditors thereof to the full amount of any loss sustained by such corporation or by its creditors respectively by reason of such dividend.

§ 21. **Taxation.** The organization tax payable under section one hundred and eighty of the tax law by any corporation issuing such shares without designated monetary value shall be at the rate of five cents on each such share which the corporation is authorized to issue, and a like tax upon any subsequent increase thereof. The tax payable under section two hundred and seventy of the tax law in respect of any sale or agreement of sale or any memorandum of sale or delivery or transfers of shares or certificates of any share without designated monetary value hereafter issued by any such corporation issuing such shares shall be at the rate of two cents for each and every share of such stock so transferred. The franchise tax upon any corporation issuing such shares of stock payable under section one hundred and eighty-two of the tax law shall be determined by taking as a base such portion of the net assets of the corporation as its gross assets employed in any business within this state bear to its entire gross assets wherever employed in business, and the rate of such franchise tax shall be fixed in the manner provided in said section one hundred and eighty-two of the tax law. For this purpose the rate of dividends shall be computed by dividing the total amount of dividends which has been paid during the year by the amount of the net assets of the corporation upon the first day of such year.

§ 22. Increase or reduction of shares or capital. Any corporation formed or reorganized pursuant to section nineteen may amend its certificate of incorporation so as to increase or to reduce the number of shares which it may issue, or so as to increase or to reduce the amount of its stated capital, by filing, in the manner provided for the original certificate of incorporation, a certificate of amendment under seal executed by its president or a vice-president and by its secretary or its treasurer, stating the amendment proposed and that the same has been duly authorized by a vote of a majority of the directors and also by the vote of the holders of at least three-fifths of the outstanding shares of each class issued by the corporation, at a meeting of the stockholders called for the purpose in the manner provided in section sixty-three hereof, and by filing with such certificate of amendment a copy of the proceedings of such meeting, made, signed, verified and acknowledged by the president or a vice-president and by the secretary or the treasurer of the corporation; but an amendment cannot be made under this section unless as so amended the certificate of incorporation could lawfully have been filed under section nineteen of this chapter. In case of a reduction of the amount of capital of a corporation, a certificate setting forth the whole amount of the ascertained debts and liabilities of the corporation shall be made, signed, verified and acknowledged by the president or a vice-president and by the secretary or the treasurer of the corporation and shall be filed with the certificate of amendment; and such certificate of amendment shall have endorsed thereon the approval of the comptroller to the effect that as so stated the reduced amount of capital is sufficient for the proper purposes of the corporation and is in excess of its ascertained debts and liabilities.

§ 23. Amount of capital stock and of shares within meaning of other laws. For the purpose of any rule of law or of any statutory provision (other than the foregoing sections nineteen, twenty, twenty-one and twenty-two) relating to the amount of the capital stock of a corporation or the amount or par value of its shares, the aggregate amount of the capital stock of any such corporation formed pursuant to section nineteen hereof shall be deemed to be the aggregate amount specified in the certificate or amended certificate of incorporation or of reorganization as the amount of capital with which the corporation will carry on business; the amount or the par value of each share of preferred stock having a preference as to principal shall be deemed to be the amount thereof so specified in such certificate or such amended certificate; and the amount or the par value of each other share shall be deemed to be an aliquot part of the aggregate capital so specified in such certificate or in such amended certificate in excess of the specified amount (if any) of the preferred stock therein authorized to be issued with a preference as to principal.

§ 24. Certificate of reorganization. Any stock corporation heretofore or hereafter organized under any general law, other than a corporation belonging to one of the classes specifically excepted by section nineteen of this chapter, may be reorganized so that such corporation, its officers, directors and stockholders, shall acquire and enjoy all the rights, privileges, powers and exemptions, and become subject to all of the liabilities and obligations imposed by sections nineteen to twenty-three, inclusive, of this chapter, upon the filing and recording, pursuant to section five of the general corporation law, of a certificate, which shall be entitled and endorsed "Certificate of reorganization of . . . . . pursuant to section twenty-four of the stock corporation law," (the blank space being filled in with the name of the corporation) and which certificate shall state:

1. The name under which the corporation was originally organized, and if it has been changed, the present corporate title.

2. The law under which the corporation was organized, by year of passage, chapter number, and article if any.

3. The date on which, and the public office or offices in which its certificate of incorporation was filed.

4. The amount of capital stock authorized by its certificate of incorporation, and if that amount has been changed, the date of filing of each certificate or consent authorizing a change, and the amount to which the capital stock was increased or reduced by each such certificate or consent.

5. The amount of each payment of taxes for the privilege of organizing or of increasing the capital stock of the corporation.

6. The number of shares into which the capital stock has been divided, and, if classified, the number and par value of the shares included in each class together with the preferences or distinctive features of the shares of each class.

7. The number of shares of each class issued and outstanding.

8. The number of shares that may henceforth be issued by the corporation, which may be either less than, or equal to or in excess of the number of shares into which the capital stock was previously divided, and all of the matters and things required to be stated in an original certificate of incorporation by subdivision one of section nineteen of this chapter.

9. If any of the new shares are to be preferred, the number of shares to be included in each class and the preferences thereof, which preferences must be such as are authorized by law at the time of reorganization.

10. The amount of capital with which the corporation will carry on business, which shall be in all respects as required by subdivision two of section nineteen of this chapter.

11. The terms upon which the new shares of the reorganized corporation shall be issued in place of the outstanding shares of stock.

12. It may also prescribe the consideration for which the reorganized corporation may issue and sell its authorized shares, or it may authorize the board of directors to issue and sell its authorized shares from time to time, for such consideration, as shall be the fair market value of said shares, and, in the absence of fraud in the transaction, the judgment of the board of directors as to such value shall be conclusive.

Nothing shall be included in such certificate other than as authorized by this section, and it shall be either:

(a) Signed and acknowledged by every stockholder of record of the corporation, or his duly authorized proxy, and shall have annexed an affidavit of the custodian of the stock book to the effect that the persons who have executed the certificate, in person or by proxy, constitute the holders of record of all of the shares of stock of the corporation, irrespective of class, issued and outstanding, or;

(b) Signed and acknowledged by the president or a vice-president and the secretary or treasurer of the corporation, who shall make and annex an affidavit stating that they have been authorized and directed to execute and file the certificate by the votes, cast in person or by proxy, of the holders of record of two-thirds or more of each class of the outstanding shares of stock, irrespective of any provision of the certificate of incorporation purporting to deny voting powers to the holders of any class of stock, at a meeting called and held upon written notice mailed to each stockholder at least two weeks before the date set for the meeting and published once a week for at least two successive weeks in a newspaper published and circulating in the county wherein the principal office of the corporation is located; and that such notice did expressly state the purpose of the meeting to be that of reorganizing the corporation pursuant to section twenty-four of the stock corporation law, so as to permit

the issuance of shares without par value, and did state the terms upon which the outstanding shares of stock were to be exchanged for the new shares.

§ 24-a. **Comptroller's approval of reduction of capital.** If the amount of capital stated in the certificate of reorganization as that with which the corporation will carry on business, be less than the total amount of the par value of the previously issued and outstanding capital stock, there shall be annexed to such certificate an affidavit of the president or a vice-president and the secretary or treasurer of the corporation, setting forth the whole amount of the ascertained debts and liabilities of the corporation; and, in such case, the certificate of reorganization shall have endorsed thereon the approval of the comptroller to the effect that the amount of capital stated in the certificate as that with which the corporation will carry on business is sufficient for the proper purposes of the corporation and is in excess of its debts and liabilities.

§ 24-b. **Restriction upon incurring of debts.** No corporation reorganized under section twenty-four of this chapter shall incur any debts subsequent to the filing of the certificate of reorganization until it shall have assets of an actual value at least equal to the amount of capital stated in its certificate of reorganization as that with which it will carry on business. The directors of a corporation assenting to the creation of a debt in violation of this section shall be jointly and severally liable for such debt in like manner as provided, and subject to the conditions and limitations imposed by section twenty of this chapter.

§ 24-c. **Liability upon existing obligations.** The liability of the corporation, its officers, directors and stockholders for corporate debts contracted or obligations incurred prior to the filing of the certificate of reorganization pursuant to section twenty-four of this chapter shall be unaffected thereby, but for the purpose of enforcing and recovering upon such claims creditors shall have the same right of recourse against the corporation, or against its officers, directors and stockholders individually that they would have had if the corporation had not been reorganized, and there shall be especially reserved and saved to such creditors all of the rights and benefits conferred by sections fifty-six to fifty-nine, inclusive, of this chapter, subject to the conditions, limitations and restrictions imposed by those sections.

Except as provided by this section the new shares issued by the reorganized corporation shall be deemed fully paid and nonassessable and the holder of such shares shall not be liable to the corporation or to its creditors in respect thereof.

§ 24-d. **Not to be construed as dissolution or re-incorporation.** No proceedings taken under section twenty-four of this chapter shall be deemed to work a dissolution, or to create a new corporation or to interrupt in any way the continuity of existence of the corporation affected.

§ 24-e. **Reorganization tax.** Every corporation reorganized pursuant to section twenty-four of this chapter shall pay to the state treasurer for the privilege of such reorganization a tax of the same amount, and computed in like manner as upon the organization of a new corporation, authorized to issue shares of the same number and kinds as the reorganized corporation, less one-half of the aggregate amount of all sums previously paid for the privilege of organizing or of increasing the capital stock; provided however, that every corporation so reorganized shall pay a tax for the privilege of such reorganization, which in no case shall be less than twenty-five dollars. Neither the secretary of state nor the county clerk shall file any certificate of reorganization under section twenty-four of this chapter until he is furnished with a receipt for such tax from the state treasurer.

§ 25. **Directors.** The directors of every stock corporation shall be chosen at the time and place fixed by the by-laws of the corporation by a plurality of the votes at such election. Each director shall be a stockholder unless otherwise provided in the certificate, or in a by-law adopted by a stockholders' meeting. Vacancies in the board of directors shall be filled in the manner prescribed in the by-laws. Notice of the time and place of holding any election of directors shall be either published at least once in each week for two successive weeks immediately preceding such election, in a newspaper published in the county where such election is to be held, or delivered personally or mailed, not less than ten nor more than twenty days before the election, to each person who appears on the books of the corporation as a stockholder; if mailed, it shall be directed to a stockholder at his address as it appears on such books. The by-laws may require such notice to be published and also mailed or delivered as above provided. In the case of a domestic stock life insurance corporation no such election shall be valid unless a copy of such notice shall have been filed in the office of the superintendent of insurance at least ten days before the day of such election in addition to the publication or service thereof, or both, required above. Whenever any of the directors of a domestic stock life insurance corporation shall have resigned and successors shall have been chosen pursuant to the provisions of the by-laws of the corporation, such successors shall not take office nor exercise the duties thereof until ten days after written notice of their election shall have been filed in the office of the superintendent of insurance. Policyholders of an insurance corporation shall be eligible to election as directors, whether or not they be stockholders. At least one-fourth in number of the directors of every stock corporation shall be elected annually. [L. 1918, c. 267.]

§ 26. **Change of number of directors.** The number of directors of any stock corporation may be increased or reduced, but not below the minimum number prescribed by law, when the stockholders owning a majority of the stock of the corporation shall so determine, at a meeting to be held on two weeks' notice in writing to each stockholder of record. Such notice shall be served personally or by mail, directed to each stockholder at his last known post-office address. Proof of the service of such notice shall be filed in the office of the corporation at or before the time of such meeting. The proceedings of such meeting shall be entered in the minutes of the corporation and a transcript thereof verified by the president and secretary of the meeting shall be filed in the offices where the original certificates of incorporation were filed. Such increase or reduction may also be effected by unanimous consent without a meeting, in which case there shall be filed in the offices herein specified the unanimous consent of the stockholders in writing, signed by them, or their duly authorized proxies, but no such consent shall be valid unless there is annexed thereto an affidavit of the custodian of the stock book of such corporation stating that the persons who have signed such consent, either in person or by proxy, are the holders of record of the entire capital stock of said corporation issued and outstanding. If a corporation formed under or subject to the banking law, the consent of the superintendent of banks, and if an insurance corporation, the consent of the superintendent of insurance, shall be first obtained to such increase or reduction of the number of directors. This section shall apply to any stock corporation whether organized under a general or special law, and the number of directors may be increased as hereby provided notwithstanding the maximum number of directors now prescribed by law. If the number of directors be increased, the additional directors authorized by such increase shall be elected by the votes of a majority of the directors in office at the time of the increase. If the original or an amended certificate of incorporation of the corporation shall

provide that the directors shall be divided into two or more classes, whose terms of office shall respectively expire at different times, the additional directors shall be divided among such classes as nearly as practicable in proportion to the respective numbers of directors constituting each class prior to such increase.

§ 27. **When acts of directors void.** When the directors of any corporation for the first year of its corporate existence shall hold over and continue to be directors after the first year, because of their neglect or refusal to adopt the by-laws required to enable the stockholders to hold the annual election for directors, all their acts and proceedings while so holding over, done for and in the name of the corporation, designed to charge upon it any liability or obligation for the services of any such director, or any officer, or attorney or counsel appointed by them, and every such liability or obligation shall be held to be fraudulent and void.

§ 28. **Liability of directors for making unauthorized dividends.** The directors of a stock corporation shall not make dividends, except from the surplus profits arising from the business of such corporation, nor divide, withdraw or in any way pay to the stockholders or any of them, any part of the capital of such corporation, or reduce its capital stock, except as authorized by law. In case of any violation of the provisions of this section, the directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large upon the minutes of such directors at the time, or were not present when the same happened, shall jointly and severally be liable to such corporation and to the creditors thereof to the full amount of any loss sustained by such corporation or its creditors respectively by reason of such withdrawal, division or reduction. But this section shall not prevent a division and distribution of the assets of any such corporation remaining after the payment of all its debts and liabilities upon the dissolution of such corporation or the expiration of its charter; nor shall it prevent a corporation from accepting shares of its capital stock in complete or partial settlement of a debt owing to the corporation, which by the board of directors shall be deemed to be bad or doubtful.

§ 29. **Liability of directors for loans to stockholders.** No loan of moneys shall be made by any stock corporation, except a moneyed corporation, or by any officer thereof out of its funds to any stockholder therein, nor shall any such corporation or officer discount any note or other evidence of debt, or receive the same in payment of any instalment or any part thereof due or to become due on any stock in such corporation, or receive or discount any note, or other evidence of debt, to enable any stockholder to withdraw any part of the money paid in by him on his stock. In case of the violation of any provision of this section, the officers or directors making such loan, or assenting thereto, or receiving or discounting such notes or other evidences of debt, shall, jointly and severally, be personally liable to the extent of such loan and interest, for all the debts of the corporation contracted before the repayment of the sum loaned, and to the full amount of the notes or other evidences of debt so received or discounted, with interest from the time such liability accrued.

§ 30. **Officers.** The directors of a stock corporation may appoint from their number a president, and may appoint a secretary, treasurer, and other officers, agents and employees, who shall respectively have such powers and perform such duties in the management of the property and affairs of the corporation, subject to the control of the directors, as may be prescribed by them or in the by-laws. The directors may require any such officer, agent or employee to give security for the faithful performance of his duties, and may remove him at pleasure. The policyholders of an insurance corporation shall be eligible to election or appointment as its officers.

§ 31. **Inspectors and their oath.** The inspectors of election of every stock corporation shall be appointed in the manner prescribed in the by-laws, but the inspectors of the first election of directors and of all previous meetings of the stockholders shall be appointed by the board of directors named in the certificate of incorporation. No director or officer of a moneyed corporation shall be eligible to election or appointment as inspector. Each inspector shall be entitled to a reasonable compensation for his services, to be paid by the corporation, and if any inspector shall refuse to serve, or neglect to attend at the election, or his office become vacant, the meeting may appoint an inspector in his place unless the by-laws otherwise provide. The inspectors appointed to act at any meeting of the stockholders shall, before entering upon the discharge of their duties, be sworn to faithfully execute the duties of inspector at such meeting with strict impartiality, and according to the best of their ability, and the oath so taken shall be subscribed by them, and immediately filed in the office of the clerk of the county in which such election or meeting shall be held, with a certificate of the result of the vote taken thereat.

§ 32. **Books to be kept.** Every stock corporation shall keep at its office correct books of account of all its business and transactions, and a book to be known as the stock book, containing the names, alphabetically arranged, of all persons who are stockholders of the corporation, showing their places of residence, the number of shares of stock held by them respectively, the time when they respectively became the owners thereof, and the amount paid thereon. On or before May first, nineteen hundred and eighteen, every domestic stock life insurance corporation shall cause to be filed in the office of the superintendent of insurance a list of the stockholders of such corporation showing their places of residence and the number of shares held by them respectively. The stock book of every such corporation shall be open daily, during at least three business hours, for inspection by any judgment creditor of the corporation; or by any person who shall have been stockholder of record in such corporation for at least six months immediately preceding his demand; or by any person holding stock of such corporation to an amount equal to five per centum of all its outstanding shares; or by any person thereunto in writing authorized by the holders of stock of such corporation to an amount equal to five per centum of all of its outstanding shares. Persons so entitled to inspect stock books may make extracts therefrom. No transfer of stock shall be valid as against the corporation, its stockholders and creditors for any purpose except to render the transferee liable for the debts of the corporation to the extent provided for in this chapter, until it shall have been entered in such book as required by this section, by an entry showing from and to whom transferred, nor, in the case of a domestic stock life insurance corporation until ten days after written notice of such transfer shall have been filed in the office of the superintendent of insurance. The stock book of every such corporation and the books of account of every bank shall be presumptive evidence of the facts therein so stated in favor of the plaintiff, in any action or proceeding against such corporation or any of its officers, directors or stockholders. Every corporation that shall neglect or refuse to keep or cause to be kept such books, or to keep any book open for inspection as herein required, shall forfeit to the people the sum of fifty dollars for every day it shall so neglect or refuse. If any officer or agent of any such corporation shall wilfully neglect or refuse to make any proper entry in such book or books, or shall neglect or refuse to exhibit the same, or to allow them to be inspected and extracts taken therefrom as provided in this section, the corporation and such officer or agent shall each forfeit and

pay to the party injured a penalty of fifty dollars for every such neglect or refusal, and all damages resulting to him therefrom. It shall be a defense to any action for penalties under this section that the person suing therefor has within two years sold or offered for sale any list of stockholders of such corporation or of any other corporation, or has aided or abetted any person in procuring any stock list for any such purpose. Nothing herein impairs the power of the courts to compel by mandamus or judgment the production for examination by any stockholder of the stock books of a corporation.

§ 33. **Stock books of foreign corporations.** Every foreign stock corporation having an office for the transaction of business in this state, except moneyed and railroad corporations, shall keep therein a book to be known as a stock book, containing the names, alphabetically arranged, of all persons who are stockholders of the corporation, showing their places of residence, the number of shares of stock held by them respectively, the time when they respectively became the owners thereof, and the amount paid thereon. Such stock book shall be open daily, during business hours, for inspection by any judgment creditor of such corporation; by any officer of this state authorized by law to investigate the affairs of any such corporation; by any person who shall have been stockholder of record in such corporation for at least six months immediately preceding his demand; by any person holding stock of such corporation to an amount equal to five per centum of all of its outstanding shares; or by any person thereunto in writing authorized by the holders of stock of such corporation to an amount equal to five per centum of all of its outstanding shares. Persons so entitled to inspect stock books may make extracts therefrom. If any such foreign stock corporation has in this state a transfer agent, whether such agent shall be a corporation or a natural person, such stock book may be deposited in the office of such agent and shall be open to inspection at all times during the usual hours of transacting business, to any stockholder, judgment creditor or officer of the state authorized by law to investigate the affairs of such corporation. For any refusal to allow such book to be inspected, such corporation and the officer or agent so refusing shall each forfeit the sum of fifty dollars to be recovered by the person to whom such refusal was made. It shall be a defense to any person for penalties under this section that the person suing therefor has within two years sold or offered for sale any list of stockholders of such corporation or of any other corporation or has aided or abetted any person in procuring any stock list for any such purpose. Nothing herein impairs the power of the courts to compel by mandamus or judgment the production for examination by any stockholder of the stock books of a corporation.

§ 34. **Annual report to secretary of state.** Every domestic stock corporation and every foreign stock corporation doing business within this state, except moneyed and railroad corporations, shall annually, during the month of January, or if doing business without the United States, before the first day of May, make a report as of the first day of January, which will state:

1. The amount of its capital stock, and the proportion actually issued.
2. The amount of its debts or an amount which they do not exceed.
3. The amount of its assets or an amount which its assets at least equal.
4. The names and addresses of all the directors and officers of the company, and in the case of a foreign corporation, the name also of the person designated in the manner prescribed by the code of civil procedure, as a person upon whom process against the corporation may be served within this state.

Such report shall be made by the president or a vice-president or the treasurer or a secretary of the corporation and shall be filed in the office of the secretary of state. If such report be not so made and filed, any such officer who shall thereafter neglect or refuse to make and to file such report, within ten days after

written request so to do shall have been made by a creditor or by a stockholder of the corporation, shall forfeit to the people the sum of fifty dollars for every day he shall so neglect or refuse.

§ 35. **Liability of officers for false certificates, reports or public notices.** If any certificate or report made or public notice given by the officers or directors of a stock corporation shall be false in any material representation, the officers and directors signing the same shall jointly and severally be personally liable to any person who has become a creditor or stockholder of the corporation upon the faith of any such certificate, report, notice or any material representation therein to the amount of the debt contracted upon the faith thereof if not paid when due, or the damage sustained by any purchaser of or subscriber to its stock upon the faith thereof. The liability imposed by this section shall exist in all cases where the contents of any such certificate, report or notice or of any material representation therein shall have been communicated either directly or indirectly to the person so becoming a creditor or stockholder and he became such creditor or stockholder upon the faith thereof. No action can be maintained for a cause of action created by this section unless brought within two years from the time the certificate, report or public notice shall have been made or given by the officers or directors of such corporation.

§ 50. **Issue and transfers of stock.** The stock of every stock corporation shall be represented by certificates prepared by the directors and signed by the president or vice-president and secretary or treasurer and sealed with the seal of the corporation, and shall be transferable in the manner prescribed in this chapter and in the by-laws. No share shall be transferable until all previous calls thereon shall have been fully paid in.

§ 51. **Transfers of stock by stockholder indebted to corporation.** If a stockholder shall be indebted to the corporation, the directors may refuse to consent to a transfer of his stock until such indebtedness is paid, provided a copy of this section is written or printed upon the certificate of stock.

§ 52. **Purchase of stock of other corporations.** Any stock corporation, domestic or foreign, now existing or hereafter organized, except moneyed corporations, may purchase, acquire, hold and dispose of the stocks, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefore its stock, bonds or other obligations if authorized so to do by a provision in the certificate of incorporation of such stock corporation, or in any certificate amendatory thereof or supplementary thereto, filed in pursuance of law, or if the corporation whose stock is so purchased, acquired, held or disposed of, is engaged in a business similar to that of such stock corporation, or engaged in the manufacture, use or sale of the property, or in the construction or operation of works necessary or useful in the business of such stock corporation, or in which or in connection with which the manufactured articles, product or property of such stock corporation are or may be used, or is a corporation with which such stock corporation is or may be authorized to consolidate. When any such corporation shall be a stockholder in any other corporation, as herein provided, its president or other officers shall be eligible to the office of director of such corporation, the same as if they were individually stockholders therein and the corporation holding such stock shall possess and exercise in respect thereof, all the rights, powers and privileges of individual owners or holders of such stock.

§ 53. **Subscriptions to stock.** If the whole capital stock shall not have been subscribed at the time of filing the certificate of incorporation, the directors named in the certificate may open books of subscription to fill up the capital stock in such places and after giving such notices as they may deem expedient, and may continue to receive subscriptions until the whole capital stock is subscribed. At the time of subscribing, every subscriber, whose subscription is payable in money,

shall pay to the directors ten per centum upon the amount subscribed by him in cash, and no such subscription shall be received or taken without such payment.

§ 54. **Time of payment of subscriptions to stock.** Subscriptions to the capital stock of a corporation shall be paid at such times and in such instalments as the board of directors may by resolution require. If default shall be made in the payment of any instalment as required by such resolution, the board may declare the stock and all previous payments thereon forfeited for the use of the corporation, after the expiration of sixty days from the service on the defaulting stockholder, personally, or by mail directed to him at his last-known post-office address, of a written notice requiring him to make payment within sixty days from the service of the notice at a place specified therein, and stating that, in case of failure to do so, his stock and all previous payments thereon will be forfeited for the use of the corporation.

Such stock, if forfeited, may be reissued or subscriptions therefor may be received as in the case of stock not issued or subscribed for. If not sold for its par value or subscribed for within six months after such forfeiture, it shall be canceled and deducted from the amount of the capital stock. If by such cancellation, the amount of the capital stock is reduced below the minimum required by law, the capital stock shall be increased to the required amount within three months thereafter or an action may be brought or proceedings instituted to close up the business of the corporation as in the case of an insolvent corporation. If a receiver of the assets of the corporation has been appointed, all unpaid subscriptions to the stock shall be paid at such times and in such instalments as the receiver or the court may direct.

§ 55. **Consideration for issue of stock and bonds.** No corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purposes of such corporation. Any corporation may purchase any property authorized by its certificate of incorporation, or necessary for the use and lawful purposes of such corporation, and may issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this chapter; and in the absence of fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive; and in all statements and reports of the corporation, by law required to be published or filed, this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported as issued for property purchased.

§ 56. **Liabilities of stockholders.** Every holder of capital stock not fully paid, in any stock corporation, shall be personally liable to its creditors, to an amount equal to the amount unpaid on the stock held by him for debts of the corporation contracted while such stock was held by him. As to existing corporations the liability imposed by this section shall be in lieu of the liability imposed upon stockholders of any existing corporation, under any general or special law, excepting laws relating to moneyed corporations, and corporations and associations for banking purposes, on account of any indebtedness hereafter contracted or any stock hereafter issued; but nothing in this section contained shall create or increase any liability of stockholders of any existing corporation under any general or special law.

§ 57. **Liabilities of stockholders to laborers, servants or employees.** The stockholders of every stock corporation shall jointly and severally be personally liable for all debts due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation. Before such laborer, servant or employee shall charge such stockholder for such services, he shall give him notice in writing, within thirty days after the termi-

nation of such services, that he intends to hold him liable, and shall commence an action therefor within thirty days after the return of an execution unsatisfied against the corporation upon a judgment recovered against it for services.

§ 58. **Non-liability in certain cases.** No person holding stock in any corporation as collateral security, or as executor, administrator, guardian or trustee, unless he shall have voluntarily invested the trust funds in such stock, shall be personally subject to liability as a stockholder; but the person pledging such stock shall be considered the holder thereof and shall be liable as stockholder, and the estates and funds in the hands of such executor, administrator, guardian or trustee shall be liable in the like manner and to the same extent as the testator or intestate, or the ward or person interested in such trust fund would have been, if he had been living and competent to act and held the same stock in his own name, unless it appears that such executor, administrator, guardian or trustee voluntarily invested the trust funds in such stocks, in which case he shall be personally liable as a stockholder.

§ 59. **Limitation of stockholder's liability.** No action shall be brought against a stockholder for any debt of the corporation until judgment therefor has been recovered against the corporation, and an execution thereon has been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable, with costs against the stockholder. No stockholder shall be personally liable for any debt of the corporation not payable within two years from the time it is contracted, nor unless an action for its collection shall be brought against the corporation within two years after the debt becomes due; and no action shall be brought against a stockholder after he shall have ceased to be a stockholder, for any debt of the corporation, unless brought within two years from the time he shall have ceased to be a stockholder.

§ 60. **Partly paid stock.** The original or the amended certificate of incorporation of any stock corporation may contain a provision expressly authorizing the issue of the whole or of any part of the capital stock as partly paid stock, subject to calls thereon until the whole thereof shall have been paid in. In such case, if in or upon the certificate issued to represent such stock, the amount paid thereon shall be specified, the holder thereof shall not be subject to any liability except for the payment to the corporation of the amount remaining unpaid upon such stock, and for the payment of indebtedness to employees pursuant to sections fifty-seven, fifty-eight and fifty-nine of this chapter; and in any such case, the corporation may declare and may pay dividends upon the basis of the amount actually paid upon the respective shares of stock instead of upon the par value thereof.

§ 61. **Preferred and common stock.** Every domestic stock corporation may issue preferred stock and common stock and different classes of preferred stock, if the certificate of incorporation so provides, or

1. By the unanimous consent of the stockholders expressed in writing and filed in the office of the secretary of state and in the office of the clerk of the county in which the principal business office of the corporation is located, or

2. By the consent of the holders of record of two-thirds of the capital stock, given at a meeting called for that purpose upon notice such as is required for the annual meeting of the corporation. A certificate of the proceedings of such meeting, signed and sworn to by the president or a vice-president, and by the secretary or assistant secretary, of the corporation, shall be filed and recorded in the offices where the original certificate of incorporation of such corporation was filed and recorded; and the corporation may, upon the written request of the holders of any preferred stock, by a two-thirds vote of its directors, exchange the same for common stock, and issue certificates for common stock therefor, upon such valuation as may have been agreed upon in the certificate of organization

of such corporation, or the issue of such preferred stock, or share for share, but the total amount of such capital stock shall not be increased thereby.

§ 62. **Increase or reduction of capital stock.** Any domestic corporation may increase or reduce its capital stock in the manner herein provided, but not above the maximum or below the minimum, if any, prescribed by general law governing corporations formed for similar purposes. If increased, the holders of the additional stock issued shall be subject to the same liabilities with respect thereto as are provided by law in relation to the original capital; if reduced the amount of its debts and liabilities shall not exceed the amount of its reduced capital, unless an insurance corporation, in which case the amount of its debts and liabilities shall not exceed the amount of its reduced capital and other assets. The owner of any stock shall not be relieved from any liability existing prior to the reduction of the capital stock of any stock corporation. If a banking corporation, whether the capital be increased or reduced, its assets shall at least be equal to its debts and liabilities and the capital stock, as increased or reduced. A domestic railroad corporation may increase or reduce its capital stock in the manner herein provided, notwithstanding any provision contained herein, or in any general or special law fixing or limiting the amount of capital stock which may be issued by it.

§ 63. **Notice of meeting to increase or reduce capital stock.** Every such increase or reduction must be authorized either by the unanimous consent of the stockholders, expressed in writing and filed in the office of the secretary of state and in the office of the clerk of the county in which the principal business office of the corporation is located, or by a vote of the stockholders owning at least a majority of the stock of the corporation, taken at a meeting of the stockholders specially called for that purpose in the manner provided by law or by the by-laws. Notice of the meeting, stating the time, place and object, and the amount of the increase or reduction proposed, signed by the president or a vice-president and the secretary, shall be published once a week, for at least two successive weeks, in a newspaper in the county where its principal business office is located, if any is published therein, and a copy of such notice shall be duly mailed to each stockholder or member at his last-known post-office address at least two weeks before the meeting or shall be personally served on him at least five days before the meeting.

§ 64. **Conduct of such meeting; certificate of increase or reduction.** If, at the time and place specified in the notice, the stockholders shall appear in person or by proxy in numbers representing at least a majority of all the shares of stock, they shall organize by choosing from their number a chairman and secretary, and take a vote of those present in person or by proxy, and if a sufficient number of votes shall be given in favor of such increase or reduction, or if the same shall have been authorized by the unanimous consent of stockholders expressed in writing signed by them or their duly authorized proxies, a certificate of the proceedings showing a compliance with the provisions of this chapter, the amount of capital theretofore authorized, and the proportion thereof actually issued, and the amount of the increased or reduced capital stock, and in case of the reduction of capital stock the whole amount of the ascertained debts and liabilities of the corporation, shall be made, signed, verified and acknowledged by the chairman and secretary of the meeting, and filed in the office of the clerk of the county where its principal place of business shall be located, a duplicate thereof in the office of the secretary of state, and, if a corporation formed under or subject to the banking law, a triplicate thereof in the office of the superintendent of banks, and if an insurance corporation, a triplicate thereof in the office of the superintendent of insurance. In case of a reduction of the capital stock, except of a railroad corporation or a moneyed corporation, such certificate or consent hereinafter

provided for shall have indorsed thereon the approval of the comptroller, to the effect that the reduced capital is sufficient for the proper purpose of the corporation, and is in excess of its ascertained debts and liabilities; and in case of the increase or reduction of the capital stock of a railroad corporation or a moneyed corporation, the certificate or the unanimous consent of stockholders, as the case may be, shall have indorsed thereon the approval of the public service commission having jurisdiction thereof, if a railroad corporation; of the superintendent of banks, if a corporation formed under or subject to the banking law, and of the superintendent of insurance, if an insurance corporation. When the certificate herein provided for, or the unanimous consent of stockholders in writing, signed by them or their duly authorized proxies, approved as aforesaid, has been filed, the capital stock of such corporation shall be increased or reduced, as the case may be, to the amount specified in such certificate or consent. The proceedings of the meeting at which such increase or reduction is voted, or, if such increase or reduction shall have been authorized by unanimous consent without a meeting, then a copy of such consent shall be entered upon the minutes of the corporation. If the capital stock is reduced, the amount of capital over and above the amount of the reduced capital shall, if the meeting or consents so determine or provide, be returned to the stockholders pro rata, at such times and in such manner as the directors shall determine, except in the case of the reduction of the capital stock of an insurance corporation, as an alternative to make good an existing impairment.

§ 65. **Change in par value of shares.** The number of shares into which the capital stock of any stock corporation is divided may be increased or reduced by a two-thirds vote of all stock duly represented at a meeting held and conducted in like manner, and upon filing a like certificate, as required for the increase or reduction of its capital stock. If such increase or reduction of the number of shares be so authorized, the corporation shall issue to each stockholder certificates for as many shares of the new stock as equal in par value the shares of the old stock held by him, upon surrender and cancellation of such old stock. This section does not authorize the increase or reduction of the capital stock of such corporation.

§ 66. **Prohibited transfers to officers or stockholders.** No corporation which shall have refused to pay any of its notes or other obligations, when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid, except that laborers' wages for services shall be preferred claims and be entitled to payment before any other creditors out of the corporation assets in excess of valid prior liens or incumbrances. No corporation formed under or subject to the banking, insurance or railroad law shall make any assignment in contemplation of insolvency. Every person receiving by means of any such prohibited act or deed any property of the corporation shall be bound to account therefor to its creditors or stockholders or other trustees. No stockholder of any such corporation shall make any transfer or assignment of his stock therein to any person in contemplation of its insolvency. Every transfer or assignment or other act done in violation of the foregoing provisions of this section shall be void. No conveyance, assignment or transfer of any property of a corporation formed under or subject to the

banking law, exceeding in value one thousand dollars, shall be made by such corporation, or by any officer or director thereof, unless authorized by previous resolution of its board of directors, except promissory notes or other evidences of debt issued or received by the officers of the corporation in the transaction of its ordinary business, and except payments in specie or other current money or in bank bills made by such officers. No such conveyance, assignment or transfer shall be void in the hands of a purchaser for a valuable consideration without notice. Every director or officer of a corporation who shall violate or be concerned in violating any provisions of this section, shall be personally liable to the creditors and stockholders of the corporation of which he shall be director or an officer to the full extent of any loss they may respectively sustain by such violation.

§ 67. **Application to court to order issue of new in place of lost certificate of stock.** The owner of a lost or destroyed certificate of stock, if the corporation shall refuse to issue a new certificate in place thereof, may apply to the supreme court, at any special term held in the district where he resides, or in which the principal business office of the corporation is located, for an order requiring the corporation to show cause why it should not be required to issue a new certificate in place of the one lost or destroyed. The application shall be by petition, duly verified by the owner, stating the name of the corporation, the number and date of the certificate, if known, or if it can be ascertained by the petitioner; the number of shares named therein, to whom issued, and as particular a statement of the circumstances attending such loss or destruction as the petitioner can give. Upon the presentation of the petition the court shall make an order requiring the corporation to show cause, at a time and place therein mentioned, why it should not issue a new certificate of stock in place of the one described in the petition. A copy of the petition and order shall be served on the president or other head of the corporation, or on the secretary or treasurer thereof, personally, at least ten days before the time for showing cause.

§ 68. **Order of court upon such application.** Upon the return of the order, with proof of due service thereof, the court shall, in a summary manner, and in such mode as it may deem advisable, inquire into the truth of the facts stated in the petition, and hear the proofs and allegations of the parties in regard thereto, and if satisfied that the petitioner is the lawful owner of the number of shares, or any part thereof, described in the petition, and that the certificate therefor has been lost or destroyed, and can not after due diligence be found, and that no sufficient cause has been shown why a new certificate should not be issued, it shall make an order requiring the corporation, within such time as shall be therein designated, to issue and deliver to the petitioner a new certificate for the number of shares specified in the order, upon depositing such security, or filing a bond in such form and with such sureties as to the court shall appear sufficient to indemnify any person other than the petitioner who shall thereafter be found to be the lawful owner of the certificate lost or destroyed; but such provision requiring security to be deposited or bond filed is to be construed as excluding an application made by a domestic municipal corporation or by a public officer in behalf of such corporation; and the court may direct the publication of such notice, either before or after making such order as it shall deem proper. Any person claiming any rights under the certificates alleged to have been lost or destroyed shall have recourse to such indemnity, but in any application under the provisions of this chapter, in which a domestic municipal corporation or a public officer in behalf of such corporation, shall be by the foregoing provisions of this section excused from depositing security or filing a bond, such municipal corporation shall be liable for all damages that may be sustained by any person, in the same case and to the same extent as sureties to a bond or undertaking would have been, if such a bond or undertaking had been filed; and the corporation issuing such certificate shall

be discharged from all liability to such person upon compliance with such order; and obedience to the order may be enforced by attachment against the officer or officers of the corporation on proof of his or their refusal to comply with it.

§ 69. **Financial statement to stockholders.** Stockholders owning five per centum of the capital stock of any corporation other than a moneyed corporation, not exceeding one hundred thousand dollars, or three per centum where it exceeds one hundred thousand dollars, may make a written request to the treasurer or chief fiscal officer thereof, for a statement of its affairs, under oath, embracing a particular account of all its assets and liabilities, and the treasurer shall make such statement and deliver it to the person presenting the request within thirty days thereafter, and keep on file for twelve months thereafter a copy of such statement, which shall at all times during business hours be exhibited to any stockholder demanding an examination thereof; but the treasurer of such chief fiscal officer shall not be required to deliver more than one such statement in any one year. The supreme court, or any justice thereof, may upon application, for good cause shown, extend the time for making and delivering such certificate. For every neglect or refusal of the treasurer or other chief fiscal officer thereof to comply with the provisions of this section he shall forfeit and pay to the person making such request the sum of fifty dollars, and the further sum of ten dollars for every twenty-four hours thereafter until such statement shall be furnished.

§ 70. **Liabilities of officers, directors and stockholders of foreign corporations.** Except as otherwise provided in this chapter the officers, directors and stockholders of a foreign stock corporation transacting business in this state, except moneyed and railroad corporations, shall be liable under the provisions of this chapter, in the same manner and to the same extent as the officers, directors and stockholders of a domestic corporation, for:

1. The making of unauthorized dividends;
2. Unlawful loans to stockholders;
3. Making false certificates, reports or public notices;
4. An illegal transfer of the stock and property of such corporation, when it is insolvent or its insolvency is threatened;
5. The failure to file an annual report.

Such liabilities may be enforced in the courts of this state, in the same manner as similar liabilities imposed by law upon the officers, directors and stockholders of domestic corporations.

§ 80. **Laws repealed.** Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

§ 81. **When to take effect.** This chapter shall take effect immediately.

#### SCHEDULE OF LAWS REPEALED.

Laws of	Chapter	Section
1814.....	12.....	All (38th Sess.)
1825.....	325.....	1-3, 12
1828.....	20.....	15; ¶¶ 17, 18 (2d Meet.)
1828.....	21.....	1, ¶ 180 (2d Meet.)
1830.....	71.....	All
1848.....	145.....	All
1853.....	176.....	All
1853.....	425.....	All
1853.....	460.....	All
1869.....	742.....	7
1875.....	392.....	8
1884.....	434.....	All
1889.....	57.....	All

SCHEDULE OF LAWS REPEALED — *Continued*

Laws of	Chapter	Section
1890.....	564.....	All
1892.....	337.....	All
1892.....	688.....	All
1893.....	196.....	All
1893.....	638.....	All
1893.....	700.....	All
1894.....	346.....	All
1896.....	929.....	All
1896.....	932.....	1, pt. adding § 58 to L. 1892, c. 688
1897.....	384.....	All
1899.....	354.....	All
1899.....	696.....	All
1900.....	128.....	All
1900.....	164.....	All
1900.....	476.....	All
1901.....	130.....	All
1901.....	354.....	All
1902.....	80.....	All
1902.....	98.....	All
1902.....	286.....	All
1902.....	601.....	All
1903.....	320.....	All
1904.....	123.....	All
1904.....	307.....	All
1904.....	706.....	All
1905.....	35.....	All
1905.....	415.....	All
1905.....	489.....	All
1905.....	745.....	All
1905.....	750.....	All
1905.....	751.....	All
1906.....	238.....	All

## TAX LAW.

§ 1. Short title. This chapter shall be known as the "Tax Law."

§ 2. Definitions. 1. "Tax district" as used in this chapter, means a political subdivision of the state having a board of assessors authorized to assess property therein for state and county taxes.

2. "County treasurer" includes any officer performing the duties devolving upon such office under whatever name.

3. The terms "land," "real estate," and "real property," as used in this chapter, include the land itself above and under water, all buildings and other articles and structures, substructures and superstructures, erected upon, under or above, or affixed to the same; all wharves and piers, including the value of the right to collect wharfage, crantage or dockage thereon; all bridges, all telegraph lines, wires, poles and appurtenances; all supports and inclosures for electrical conductors and other appurtenances upon, above and under ground; all surface, underground or elevated railroads, including the value of all franchises, rights or permission to construct, maintain or operate the same in, under, above, on or through, streets, highways or public places; all railroad structures, substructures and superstructures, tracks and the iron thereon; branches, switches and other fixtures permitted or authorized to be made, laid or placed in, upon,

above or under any public or private road, street or ground; all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place for conducting steam, heat, water, oil, electricity or any property, substance or product capable of transportation or conveyance therein or that is protected thereby, including the value of all franchises, rights, authority or permission to construct, maintain or operate, in, under, above, upon, or through, any streets, highways or public places, any mains, pipes, tanks, conduits or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil or other substance, or electricity for telegraphic, telephonic or other purposes; all trees and underwood growing upon land, and all mines, minerals, quarries and fossils in and under the same, except mines belonging to the state. A franchise, right, authority or permission specified in this subdivision shall for the purpose of taxation be known as a "special franchise." A special franchise for taxation shall be deemed to include the value of the tangible property of a person, copartnership, association or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise. No property of a municipal corporation shall be subject to a special franchise tax.

4. The term "special franchise" shall not be deemed to include the crossing of a street, highway or public place outside the limits of a city or incorporated village where such crossing is less than two hundred and fifty feet in length, unless such crossing be the continuation of an occupancy of another street, highway or public place. This subdivision shall not apply to any elevated railroad.

5. The terms "personal estate," and "personal property," as used in this chapter, include chattels, money, things in action, debts due from solvent debtors, whether on account, contract, note, bond or mortgage; debts and obligations for the payment of money due or owing to persons residing within this state, however secured or wherever such securities shall be held; debts due by inhabitants of this state to persons not residing within the United States for the purchase of any real estate; public stocks, stocks in moneyed corporations, and such portion of the capital of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate.

§ 3. **Property liable to taxation.** All real property within this state, and all personal property situated or owned within this state, is taxable unless exempt from taxation by law.

§ 4. **Exemption from taxation.** The following property shall be exempt from taxation:

1. Property of the United States.
2. Property of this state other than its wild or forest lands in the forest preserve.
3. Property of a municipal corporation of the state held for a public use, including real property held or used for cemetery purposes, and all lots and plots therein conveyed by the municipal corporation as places for the burial of the dead, except the portion of municipal property not within the corporation.
4. The lands in any Indian reservation owned by the Indian nation, tribe or band occupying them.
5. All property exempt by law from execution, other than an exempt homestead. But real property purchased with the proceeds of a pension granted by the United States for military or naval services, and owned by the pensioner, or by his wife or widow, is subject to taxation as herein provided. Such property shall be assessed in the same manner as other real property in the tax districts. At the meeting of the assessors to hear the complaints concerning assessments, a verified application for the exemption of such real property from taxation may be presented to them by or on behalf of the owner thereof, which application

must show the facts on which the exemption is claimed, including the amount of pension money used in or toward the purchase of such property. No such exemption on account of pension money shall be allowed in excess of five thousand dollars. If the assessors are satisfied that the applicant is entitled to the exemption, and that the amount of pension money exempt to the extent authorized by the subdivision used in the purchase of such property equals or exceeds the assessed valuation thereof, they shall enter the word "exempt" upon the assessment roll opposite the description of such property. If the amount of such pension money exempt to the extent authorized by this subdivision used in the purchase of the property is less than the assessed valuation, they shall enter upon the assessment-roll the words "exempt to the extent of ..... dollars" (naming the amount), and thereupon such real property, to the extent of the exemption entered by the assessors, shall be exempt from state, county and general municipal taxation, but shall be taxable for local school purposes, and for the construction and maintenance of streets and highways. If no application for exemption be granted, the property shall be subject to taxation for all purposes. The entries above required shall be made and continued in each assessment of the property so long as it is exempt from taxation for any purpose. The provisions herein, relating to the assessment and exemption of property purchased with a pension, apply and shall be enforced in each municipal corporation authorized to levy taxes.

6. Bonds of this state or any civil division thereof.

7. The real property of a corporation or association organized exclusively for the moral or mental improvement of men or women, or for the religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, historical or cemetery purposes, or for the enforcement of laws relating to children or animals, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes, and the personal property of any such corporation shall be exempt from taxation. But no such corporation or association shall be entitled to any such exemption if any officer, member or employee thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof, except reasonable compensation for services in effecting one or more of such purposes, or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purpose be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association, or for any of its members or employees, or if it be not in good faith organized or conducted exclusively for one or more such purposes. The real property of any such corporation or association entitled to such exemption held by it exclusively for one or more of such purposes and from which no rents, profits or income are derived, shall be so exempt, though not in actual use therefor by reason of the absence of suitable buildings or improvements thereon, if the construction of such buildings or improvements is in progress, or is in good faith contemplated by such corporation or association; or if such real property is held by such corporation or association upon condition that the title thereto shall revert in case any building not intended and suitable for one or more of such purposes shall be erected upon said premises or some part thereof. The real property of any such corporation not so used exclusively for carrying out thereupon one or more of such purposes but leased or otherwise used for other purposes, shall not be exempt, but if a portion only of any lot or building of any such corporation or association is used exclusively for carrying out thereupon one or more such purposes of any such corporation or association, then such lot or building shall be so exempt only to the extent of the value of the portion so used, and the remaining or other portion, to the extent of the value of such remaining or other

portion, shall be subject to taxation; provided, however, that a lot or building owned and actually used for hospital purposes, by a free public hospital, depending for maintenance and support upon voluntary charity, shall not be taxed as to a portion thereof leased or otherwise used for the purposes of income; when such income is necessary for, and is actually applied to the maintenance and support of such hospital, and further provided that the real property of any fraternal corporation, association or body created to build and maintain a building or buildings for its meeting or meetings of the general assembly of its members, or subordinate bodies of such fraternity and for the accommodation of other fraternal bodies or associations, the entire net income of which real property is exclusively applied or to be used to build, furnish and maintain an asylum or asylums, a home or homes, a school or schools, for the free education or relief of the members of such fraternity, or for the relief, support and care of worthy and indigent members of the fraternity, their wives, widows or orphans, shall be exempt from taxation, and provided also that the real estate owned by a free public library, situate outside of a city, shall not be taxed as to that portion thereof leased or otherwise used for purposes of income, when such income is necessary for and actually applied to the maintenance and support of such library. Property held by any officer of a religious denomination shall be entitled to the same exemptions, subject to the same conditions and exceptions, as property held by a religious corporation.

8. Real property of an incorporated association of present or former volunteer fireman actually and exclusively used and occupied by such corporation and not exceeding in value fifteen thousand dollars.

9. All dwelling-houses and lots of religious corporations while actually used by the officiating clergymen thereof, but the total amount of such exemption to any one religious corporation shall not exceed two thousand dollars. Such exemption shall be in addition to that provided by subdivision seven of this section.

10. The real property of an agricultural society permanently used by it for exhibition grounds.

11. The real and personal property of a minister of the gospel or priest of any denomination being an actual resident and inhabitant of this state, who is engaged in the work assigned to him by the church or denomination to which he belongs, or who is disabled by impaired health from the performance of such duties, or over seventy years of age, and the property of the widow of such minister while she remains such and is an actual resident and inhabitant of this state, but the total amount of such exemption on account of both real and personal property, shall not exceed fifteen hundred dollars.

12. All vessels registered at any port in this state and owned by an American citizen, or association, or by any corporation, incorporated under the laws of the state of New York, engaged in ocean commerce between any port in the United States and any foreign port, are exempted from all taxation in this state, for state and local purposes; and all such corporations, all of whose vessels are employed between foreign ports and ports in the United States, are exempted from all taxation in this state, for state and local purposes, upon their capital stock, franchises and earnings, until and including December thirty-first, nineteen hundred and twenty-two.

13. A bond, mortgage, note, contract, account or other demand, belonging to any person not a resident of this state, sent to or deposited in this state for collection; the products of another state, owned by a nonresident of this state and consigned to his agent in this state for sale on commission for the benefit of the owner; moneys of a nonresident of this state, under the control or in the possession of his agent in this state, when transmitted to such agent for the purpose of investment or otherwise.

14. The deposits in any bank for savings which are due depositors, the accumulations in any domestic life insurance corporations, held for the exclusive benefit of the insured, other than real estate and stocks, now liable for taxation; the accumulations of any incorporated co-operative loan associations upon the shares of such association held by any person; certificates of investment or other evidences of indebtedness, together with any accumulations thereon, issued by any investment company organized pursuant to the provisions of article seven of the banking law and actually exercising the powers conferred by both subdivisions two and four of section two hundred and ninety-three of the banking law; and personal property of any corporation, person, company or association transacting the business of fire, casualty or surety insurance in this state equal in value to the unearned premiums required by the laws of this state, or the regulations of its insurance department, to be charged as a liability.

15. Moneys collected in the course of the business of any corporation, association or society doing a life or casualty insurance business or both, upon the co-operative or assessment plan, and which are to be used for the payment of assessments, or for death losses or for both benefits to disabled members.

16. The owner or holder of stock in an incorporated company liable to taxation on its capital, shall not be taxed as an individual for such stock.

17. The personal property in excess of one hundred thousand dollars of a mutual life insurance corporation incorporated in this state before April tenth, eighteen hundred and forty-nine.

18. Property real, from which no income is derived, and personal property, situated within any city of the first class and belonging to the medical society of any county, which county is either wholly or partly within such city and which society was heretofore incorporated under the provisions of chapter ninety-four, laws of eighteen hundred and thirteen, entitled "An act to incorporate medical societies for the purpose of regulating the practice of physic and surgery in this state," provided that such property is used for the purposes of such a society and not otherwise, and provided that such exemption of property for any society in the counties of Kings or New York shall not exceed one hundred and fifty thousand dollars, and in any other county affected hereby shall not exceed fifty thousand dollars.

19. Property real from which no rent is derived and personal property, situated within any city of the first class and belonging to any incorporated pharmaceutical society of any county which is either wholly or partly within such city, which society has heretofore been or may hereafter be authorized and empowered by act of the legislature to establish and which has established or may hereafter establish, a college of pharmacy in such city; provided that such property is used for the purposes of such college and not otherwise, and provided also that the exemption of such property for any society in the counties of Kings and New York shall not exceed one hundred thousand dollars, and in any other county affected hereby shall not exceed fifty thousand dollars.

20. The commissioners of the sinking fund of other chief financial board of any city of the first class, may, in their discretion, by resolution, exempt from taxation for local purposes the real and personal property, or any part of it, of a corporation or association organized to maintain an academy of music, if, in the opinion of such board, the interests of such city require the maintenance of such academy of music, and it shall appear that the property so exempted represents or was purchased with the proceeds of popular or general subscription for the erection of such academy of music. No property of such corporation or association shall be exempt, except the real property consisting of such academy of music and the furniture thereof, or personal property so subscribed and held for the purpose of constructing such academy of music. No such exemption shall be

made for any year unless it shall appear that, during the preceding year, the corporation or association has not earned a net annual income upon the net cost of such academy and the furniture thereof.

21. Household furniture and personal effects to the value of one thousand dollars.

§ 6. **The assessment of real and personal property.** All real and personal property subject to taxation shall be assessed at the full value thereof, provided, however, that the owner of personal property shall be allowed a deduction from the full value of all his taxable personal property to the extent of the just debts owing by him but no such deduction shall be allowed by reason of the indebtedness of the owner contracted or incurred in the purchase of non-taxable property or securities owned by him or held for his benefit, nor for or on account of any indirect liability as surety, guarantor, indorser or otherwise, nor for or on account of any debt or liability contracted or incurred for the purpose of evading taxation.

§ 7. **When property of nonresidents is taxable.** 1. Nonresidents of the state doing business in the state, either as principals or partners, shall be taxed on the capital invested in such business, as personal property, at the place where such business is carried on, to the same extent as if they were residents of the state.

2. The personal property of non-residents of the state having an actual situs in the state, and not forming a part of capital invested in business in the state, shall be assessed in the name of the owner thereof for the purpose of identification and taxed in the tax district where such property is situated, unless exempt by law. This subdivision shall not apply to money, or negotiable collateral securities, deposited, or debts owing to, such nonresidents nor shall it be construed as in any manner modifying or changing the law imposing a tax on real estate mortgage securities.

§ 11. **Place of taxation of property of corporations.** The real estate of all incorporated companies liable to taxation shall be assessed in the tax district in which the same shall lie, in the same manner as the real estate of individuals. All the personal estate of every incorporated company liable to taxation on its capital shall be assessed in the tax district where the principal office or place for transacting the financial concerns of the company shall be, or if such company have no principal office, or place for transacting its financial concerns, then in the tax district where the operations of such company shall be carried on. In the case of a toll bridge, the company owning such bridge shall be assessed in the tax district in which the tolls are collected; and where the tolls of any bridge, turnpike, or canal company are collected in several tax districts, the company shall be assessed in the tax district in which the treasurer or other officer authorized to pay the last preceding dividend resides.

§ 12. **Taxation of corporate stock.** The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment-roll or shall be exempt by law, together with its surplus profits or reserve funds exceeding ten per centum of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this state, shall be assessed at its actual value.

§ 15. **Report of exempt property.** It shall be the duty of the board of assessors of the several towns of this state, and the boards or officials charged with the duty of assessing property for the purposes of taxation in the several cities of the state, to furnish to the clerks of the boards of supervisors of their respective counties, or in the case of the city of New York, to the city clerk of that city, on or before the first day of September in each year, a full and complete

list and statement of all property situated within their respective districts exempt or partially exempt from taxation under the laws of this state. Such list and statement shall be made on blanks furnished by the tax commission, and in such form and to contain and set forth all the information relative to such property and the situation and value thereof, as may be required by the tax commission, and to be verified in the same manner as assessments of property for the purposes of taxation, and in the city of New York by the chief deputy of the department of taxes and assessments. The tax commission shall prepare and transmit to the clerk of the board of supervisors in each county and to the city clerk of the city of New York, a sufficient number of such blanks, on or before the first day of June in each year, and the clerks of the boards of supervisors and the city clerk of the city of New York shall forthwith, upon the receipt thereof, distribute the same among the boards of assessors for use in preparing the statement herein required. And it shall be the duty of the clerk of the board of supervisors of each county and of the city clerk of the city of New York, to transmit such completed lists or statements to the tax commission, on or before the first day of October in each year, and the tax commission shall tabulate such statements, and cause to be published in their annual report to the legislature, a complete tabulated statement, based upon the statements so transmitted to the tax commission, of all real estate in the several counties of the state which is exempt or partially exempt from taxation. Immediately upon the receipt of the completed reports by the various clerks of the boards of supervisors, and the city clerk of the city of New York, those officials shall prepare a tabulated statement of the returns received and shall post a copy thereof in a conspicuous place, and in all cities of the state cause a copy thereof to be published in the official paper or papers of said city twice, with an interval between publications of three weeks, except such cities which publish a complete assessment-roll. The expense of such publication shall be a city charge and shall be audited and paid in the same manner as charges for other city notices are audited and paid.

§ 20. **Ascertaining facts for assessment.** The assessors in each tax district shall annually between January first and July first, ascertain by diligent inquiry all the property and the names of all the persons taxable therein. The comptroller shall on or about April fifteenth in each year transmit to the assessors of each tax district a statement of all lands owned by the state in such district, and such statement shall be used by the assessors in making up their assessment-rolls and shall be considered by them as their authority to assess to the state such of the lands described thereon as are legally subject to taxation.

§ 21. **Preparation of assessment-roll.** 1. The assessors shall prepare an assessment-roll or rolls, the form of which shall be prescribed or approved by the tax commission, so classified and arranged with respect to number of parts and number of columns in each part and with such entries and descriptions as shall be sufficient to identify each separately assessed parcel or portion of real estate with the approximate quantity of the square feet, square rods or acres contained in such parcel or portion or a statement of the linear dimensions thereof; each special franchise and the names of all persons and corporations taxable on personal property, capital stock or capital invested in business and bank stock. Assessments of real property, other than special franchises, shall be carried in a separate part of the roll from the assessments of personal property.

2. The form of assessment-roll prescribed or approved by the tax commission shall provide for the indication thereon, in appropriate columns, of the name of the village, if in a village, the number of the school districts and the name or number of any special district in which a special tax is levied for district purposes, in which each parcel or portion of real property and each special franchise

described on such roll is situated or in which each person or corporation subject to taxation for personal property in the tax district pursuant to this chapter, resides, carries on business, has its principal place of business or in which its operations are carried on or where the personal property is located, as the case may be, and shall also provide for the entry of the assessments of real property, special franchises and personal property respectively, made pursuant to the chapter, and of the apportionments made pursuant to section forty of this chapter.

3. In all cities there shall be an additional column in the assessment-roll before the column in which is set down the value of real property, and in such additional column there shall be set down the value of the land exclusive of the buildings thereon. The total assessment only can be reviewed.

4. When a tax map has been approved by the tax commission, reference to the lot, block and section number or other identification numbers of any parcel on said map shall be deemed a sufficient description of said parcel on the assessment-roll.

5. A separate part shall be provided for the listing of property that is entirely exempt from taxation. If the property is partially exempt it shall be listed with the taxable property.

6. Provision shall also be made thereon for the entry of the amount of tax levied for state, county, city, town, highway or special district purposes, against each parcel or portion of real property, each special franchise and each person or corporation for personal property, together with the date of payment thereof and such other items and details as may be required.

7. The tax commission shall adopt regulations and rules for the preparation and use of the assessment-roll and shall advise with and instruct boards of assessors and other officers as to their duties in respect thereto.

§ 27. **Reports of corporations.** The president or other proper officer of every moneyed or stock corporation deriving an income or profit from its capital or otherwise shall, on or before June first, deliver to one of the assessors of the tax district in which the company is liable to be taxed a written statement in the form prescribed by the tax commission specifying:

1. The real property, if any, owned by such company, the tax district in which the same is situated and, unless a railroad corporation, the sums actually paid therefor.

2. The capital stock actually paid in and secured to be paid in, excepting therefrom the sums paid for real property and the amount of such capital stock held by the state and by any incorporated literary or charitable institution, and

3. The tax district in which the principal office of the company is situated or in case it has no principal office, the tax district in which its operations are carried on.

Such statement shall be verified by an officer of the corporation making the report to the effect that it is in all respects just and true. If such statement is not made within twenty days after the first day of June, or is insufficient, evasive or defective, the assessors may compel the corporation to make a proper statement by mandamus.

§ 28. **Penalty for omission to make statement.** In case of neglect to furnish such statements within thirty days after the time above provided, the company so neglecting shall forfeit to the people of this state for each statement so omitted to be furnished, the sum of two hundred and fifty dollars, and it shall be the duty of the attorney-general to prosecute for such penalty upon information which shall be furnished him by the tax commission. Upon such statement being furnished and the costs of the suit being paid, the tax commission, if it shall be satisfied that such omission was not wilful, may, in its discretion, discontinue such suit.

§ 29. **County clerks to furnish data respecting corporations.** Between the first and fifteenth days of June in each year the county clerk in each county of the state, excepting counties wholly situate within the corporate limits of a city, shall prepare from the records in his office and mail to each of the city and town clerks in his said county, a certified statement containing the names of every stock corporation, whose certificate of incorporation has been filed with him since his last preceding annual statements to said several city and town clerks, whose principal business office or chief place of business is designated in its certificate of incorporation as being in such city or town or in any village or hamlet therein, together with the fact of such designation and the names and addresses of the directors of each such corporation so far as said county clerk can discover the same from the certificate of incorporation or from the latest certificate of election of directors of such corporation filed in his office. Each city or town clerk receiving such statement shall forthwith file the same in his office and mail a notice of such filing to each of the assessors of his city or town.

§ 32. **Corporations, how assessed.** The assessors shall assess corporations liable to taxation in their respective tax districts upon their assessment-rolls in the following manner:

1. In the first column the name of each corporation, and under its name the amount of its capital stock paid in and secured to be paid in; the amount paid by it for real property then owned by it wherever situated; the amount of all surplus profits or reserve funds exceeding ten per centum of its capital, after deducting therefrom the amount of said real property and the amount of its stock, if any, belonging to the state and to incorporated literary and charitable institutions.

2. In the second column the quantity of real property except special franchises owned by such corporation and situated within their tax district.

3. In the third column the actual value of such real property, except special franchises.

4. In the fourth column the amount of the capital stock paid in and secured to be paid in, and of all of such surplus profits or reserve funds as aforesaid, after deducting the sums paid out for all the real estate of the company, wherever the same may be situated, and then belonging to it, and the amount of stock, if any belonging to the people of the state and to incorporated literary and charitable institutions.

5. In the fifth column the value of any special franchise owned by it as fixed by the state board of tax commissioners.

§ 34. **Assessment of omitted property.** The assessors of any tax district shall, upon their own motion, or upon the application of any taxpayer therein, enter in the assessment-roll of the current year any property shown to have been omitted from the assessment-roll of the preceding year, at the valuation of that year, or if not then valued, at such valuation as the assessors shall determine for the preceding year. Assessments of special franchises that were omitted shall be entered at the valuation fixed and equalized by the tax commission.

§ 36. **Notice of completion of assessment-roll.** The assessors shall complete the assessment-roll on or before the first day of August, and make out a copy thereof, to be left with one of their number, and forthwith cause a notice to be conspicuously posted in three or more public places in the tax district, stating that they have completed the assessment-roll, and that a copy thereof has been left with one of their number at a specified place, where it may be seen and examined by any person until the third Tuesday of August next following, and that on that day they will meet at a time and place specified in the notice to review their assessments. In any city the notice shall conform to the require-

ments of the law regulating the time, place and manner of revising assessments in such city. During the time specified in the notice the assessor with whom the roll is left shall submit it to the inspection of every person applying for that purpose.

§ 36-a. **Completion of assessment-roll; notice to non-residents.** The assessors shall between the first and fifth day of August mail a notice to each person and corporation non-resident of their tax district, who has filed with the city or town clerk, on or before the fifteenth day of June preceding, a written demand therefor. Such notice shall specify each parcel or portion of real property separately assessed to said non-resident person or corporation and the assessed valuation thereof. Upon application made on or before the third Tuesday of August by any non-resident owner of real estate, or by a corporation, having real property in more than one tax district in the county, the assessors shall fix a time subsequent to the third Tuesday in August, but not later than the thirty-first day of August, for a hearing and to review their assessment.

§ 37. **Hearing of complaints.** The assessors shall meet at the time and place specified in such notice, and hear and determine all complaints in relation to such assessments brought before them, and for that purpose they may adjourn from time to time. Such complainants shall file with the assessors a statement, under oath, specifying the respect in which the assessment complained of is incorrect, which statement must be made by the person assessed or whose property is assessed, or by some person authorized to make such statement, and who has knowledge of the facts stated therein. The assessors may administer oaths, take testimony and hear proofs in regard to any such complaint and the assessment to which it relates. If not satisfied that such assessment is erroneous, they may require the person assessed, or his agent or representative, or any other person, to appear before them and be examined concerning such complaint, and to produce any papers relating to such assessment with respect to his property or his residence for the purpose of taxation. The assessors shall, after said examination, fix the value of the property of the complainant and for that purpose may increase or diminish the assessment thereof. If any such person, or his agent or representative, shall wilfully neglect or refuse to attend and be so examined, or to answer any material question put to him, such person shall not be entitled to any reduction of his assessments. Minutes of the examination of every person examined by the assessors upon the hearing of any such complaint shall be taken and filed in the office of the town or city clerk.

§ 38. **Correction and verification of tax-roll.** When the assessors or a majority of them shall have completed their roll, they shall severally appear before any officer of their county authorized by law to administer oaths and shall severally make and subscribe before such officer an oath in the following form: "We, the undersigned, do severally depose and swear that we have set down in the foregoing assessment-roll all the real estate situated in the tax district in which we are assessors, according to our best information; and that, with the exception of those cases in which the value of the said real estate has been changed by reason of proof produced before us, and with the exception of those cases in which the value of any special franchise has been fixed by the state tax commission, we have estimated the value of the said real estate at the sums which a majority of the assessors have decided to be the full value thereof; and, also, that the said assessment-roll contains a true statement of the aggregate amount of the taxable personal estate of each and every person named in such roll over and above the amount of debts due from such persons, respectively, and excluding such stocks as are otherwise taxable, and such other property as is exempt by law from taxation, at the full value thereof, according to our

best judgment and belief," which oath shall be written or printed on said roll, signed by the assessors and certified by the officer.

§ 39. **Filing of roll and notice thereof.** In cities the assessment-roll when thus finally completed and verified shall be filed on or before September first, in the office of the city clerk, there to remain for fifteen days for public inspection. The assessors shall forthwith cause a notice to be posted conspicuously in at least three public places in the tax district and to be published in one or more newspapers, if any, published in the city, that such assessment-roll has been finally completed and stating that it has been so filed and will be open to public inspection. At the expiration of such fifteen days, the city clerk shall deliver such roll to a supervisor of the tax district embraced therein. In towns assessors shall prepare and verify the assessment-roll, and make and certify one copy thereof. When the assessment-roll shall have been thus finally completed and verified, and the copy thereof certified the assessors shall, on or before the fifteenth day of September, file the said certified copy in the office of the town clerk, to remain for public inspection until delivered by the town clerk to the supervisor of the town as hereinafter provided. The assessors shall forthwith cause a notice to be posted conspicuously in at least three public places in the tax district and to be published in one or more newspapers, if any, published in the town, that such assessment-roll has been finally completed and stating that such certified copy has been so filed. The original assessment-roll shall on or before the first day of October be delivered by the assessors to a supervisor of the tax district embraced therein. The certified copy of the assessment-roll on file in the town clerk's office, as heretofore provided, shall on the first day of November be delivered by the town clerk to a supervisor of the tax district embraced therein who shall make such corrections as may be made in the original roll by the board of supervisors and shall extend the tax thereon so that such roll shall be in all respects a copy of the original roll delivered to the collector and said certified copy shall thereafter be returned by the supervisor to the office of the town clerk there to remain as a public record. Notwithstanding the provisions of this section, the board of supervisors of any county may require additional copies of the assessment-rolls of the towns of such county to be made, and specify by whom such additional copies shall be made, the date when the certified copy of the town assessment-roll shall be filed in the office of the town clerk, and the date when the original assessment-roll shall be delivered to the supervisor of the town. [L. 1918, c. 279.]

§ 40. **Assessors to apportion valuation of railroad, telegraph, telephone, pipe line, water or gas companies and of special franchises among school and special districts.** The assessors of each town or city in which a railroad, telegraph, telephone, water pipe line, or gas company, including a company engaged in the business of supplying natural gas, is assessed by them or by the tax commission upon property lying in more than one school district or in one or more special districts in which a tax is levied for district purposes shall after the time fixed for hearing complaints and action thereon and prior to the final completion of the roll, pursuant to section thirty-nine of this chapter, apportion the assessed valuation of the property of each of such corporations so made by them or by the tax commission among such school and special districts. Such apportionments shall be entered by the assessors in the appropriate column of the assessment-roll and a certificate thereof signed by the assessors or a majority of them shall be filed with the town or city clerk within five days thereafter, and thereupon the valuations so apportioned shall become the valuations of such property in such districts for the purpose of taxation for the ensuing year. The town clerk shall furnish the trustees of school districts a certified statement of the valuations apportioned to their respective districts.

In case of the failure of the assessors to act, a supervisor of the town or city shall make such apportionment on request of either the trustee of any school district or the officers of any special district or the corporation assessed. In case of any alteration in any school district affecting the valuation of such property, the officer making the same shall fix and determine the valuations in the districts affected for the current year.

§ 41. **Neglect or omission of duty by assessors.** The assessors, in the execution of their duties, shall use the forms and follow the instructions and orders transmitted to them, from time to time, by the tax commission. If any assessor shall neglect or omit to perform any duty, the other assessors shall perform such duty and shall certify upon the assessment-roll the name of the delinquent assessor, stating therein the cause of such omission, and the assessment-roll, when otherwise made and completed in accordance with the requirements of or under this chapter shall be deemed to be the assessment-roll of the tax district. If the assessors shall neglect to meet for the purpose of hearing grievances any person aggrieved by the assessment may appeal to the board of supervisors at its next meeting, which shall have the same power to review and correct such assessment as the assessors have under this article. If any assessor shall refuse or neglect to perform any duty or do any act required of him by this chapter, he shall forfeit to the tax district the sum of fifty dollars, to be recovered by the tax commission.

§ 44. **Special franchise report to tax commission.** Every person, copartnership, association or corporation subject to taxation on a special franchise, shall, within thirty days after such special franchise is acquired, make a written report to the tax commission containing a full description of every special franchise possessed or enjoyed by such person, copartnership, association or corporation, a copy of the special law, grant, ordinance or contract under which the same is held, or if possessed or enjoyed under a general law, a reference to such law, a statement of any condition, obligation or burden imposed upon such special franchise, or under which the same is enjoyed, together with any other information relating to the value of such special franchise, required by the tax commission. The tax commission may require an annual report and from time to time a further or supplemental report from any such person, copartnership, association or corporation containing information and data upon such matters as it may specify. Every report required by this section shall have annexed thereto the affidavit of the president, vice-president, secretary or treasurer of the association or corporation, or one of the persons or one of the members of the copartnership making the same, to the effect that the statements contained therein are true. Such commission may prepare blanks to be used in making the reports required by this section. Every person, copartnership, association or corporation failing to make the report required by this section, or failing to make any special report required by the tax commission within a reasonable time specified by it, shall forfeit to the people of the state the sum of one hundred dollars for every such failure and the additional sum of ten dollars for each day that such failure continues, and shall not be entitled to review the assessment by certiorari, as provided by section forty-six of this chapter. Acknowledgment of receipt of blank reports which contain the penalty provisions of this section shall be deemed sufficient notice of such penalties.

§ 45. **Special franchise; full valuation and equalization by tax commission.** The tax commission shall annually fix and determine the full and actual valuation of each special franchise subject to assessment in each city, town or village; shall inquire into and ascertain as near as may be the percentage of the full and actual value at which other real property in the city, town or village for which such full valuation has been made, is being assessed, and by the rate of

equalization so established fix and determine the equalized valuation of each special franchise subject to assessment.

§ 45-a. **Hearing on special franchise valuations; notice.** On determining the full and actual valuation of a special franchise and the rate of equalization thereof the tax commission shall immediately give notice in writing to the person, copartnership, association or corporation affected, and to each city, town or village in which such special franchise is subject to assessment, stating in substance that such determinations have been made and the total full and actual valuation and the rate of equalization thereof in each city, town and village, and that the commission will meet at its office in the city of Albany on a day specified in such notice, to hear and determine any complaint concerning such full valuation and the rate of equalization. Such notice must be served at least ten days before the day fixed for the hearing; and it may be served on a copartnership, association or corporation by mailing a copy thereof to it at its principal office or place of business and on a person, either personally or by mailing it to him at his place of business or last known place of residence. In a town said statement shall specify the total amount of the assessment of such special franchise, and the amount thereof in any village or villages therein. Section thirty-seven of this chapter applies so far as practicable to a hearing by the tax commission under this section.

§ 45-b. **Special franchises; determination of final full and equalized valuation.** After hearing complaints as to such valuation and rate of equalization of the special franchise the commission shall fix and determine the final full value of each special franchise and ascertain the final rate of equalization and equalize the final full value of each special franchise to such an amount as in its judgment will place the special franchise on the same basis as the assessment of other real property in the city, town or village in which the special franchise is located. In ascertaining the basis of assessment of other real property or determining the final full and actual valuation of a special franchise, the tax commission may, in its discretion, take testimony and hear proof, under oath or otherwise, and may avail itself of all information on the subject appearing of record in its office and all information which it may acquire in the discharge of its duties, and may employ its experts, agents or other persons in procuring any information it may require for such purpose.

§ 45-c. **Certificate of special franchise valuations filed with localities.** After determining the final full and equalized valuation of a special franchise the tax commission shall file with the clerk of the city, town or village in which such special franchise is subject to assessment, a written statement duly certified by the secretary of the commission of the valuation of each special franchise assessed therein as finally fixed and equalized. In a town said statement shall specify the total amount of the assessment of each special franchise, and the amount thereof in any village or villages therein. In the city of New York said statement shall be filed with the department of taxes and assessments. Such statement shall be filed with the clerk of the village not later than the first day of October and with the clerk of the city, or the department of taxes and assessments in the city of New York, not later than thirty days before the final completion, verification and filing of the assessment-roll. The statement of special franchise valuations in towns shall be made in duplicate, one copy to be filed with the town clerk not later than August first, and the other copy with the clerk of the board of supervisors of the county not later than September first.

It shall be the duty of city, town and village clerks within five days after the final completion and filing of the assessment-roll, and the first posting or publication of the notice thereof as required by law in their respective municipal

corporations and of the clerks of the boards of supervisors in each county within five days after the final revision of the assessment-roll and the annexation of the warrant thereto to furnish the tax commission with said date or dates.

Each city clerk shall, within five days after the receipt by him of the statement of the equalized valuations of a special franchise as fixed by the tax commission, deliver a copy of such statement certified by him to the assessors or other officers charged with the duty of making local assessments in said city. Each town clerk shall, within five days after the receipt by him of the statement of equalized valuations, deliver copies of such statement certified by him to the supervisor of the town, and to the assessors of the town for which the assessments have been made. Each village clerk shall, within five days after the receipt by him of the statement of equalized valuations, deliver copies of such statement certified by him to the assessors, if any, and if not to the trustees of the village for which the assessments have been made.

The final equalized valuation of every special franchise in a city, town or village as so fixed and determined by the tax commission shall be entered by the assessors or other officers thereof in the proper part of the assessment-roll before the final revision and certification of such roll by them and become a part thereof with the same force and effect as if such assessment had been originally made by such assessors.

§ 45-d. **Special franchise; certification of final valuations to owners.** The tax commission, on filing said statement of the final equalized valuation of a special franchise, shall give to the person, copartnership, association or corporation affected written notice thereof, which notice shall contain a statement of the full and actual value of such special franchise as finally fixed and determined and the amount to which it has been equalized. In a town said statement shall specify the total amount of the assessment of each special franchise, and the amount thereof in any village or villages therein. Such notice may be served on a copartnership, association or corporation affected by mailing a copy thereof to it at its principal office or place of business, and on a person either personally or by mailing it to him at his place of business or last known place of residence.

§ 45-e. **Special franchise assessments subject to all taxes.** The final equalized valuation of every special franchise as fixed and determined by the tax commission shall be the assessed valuation on which all taxes, based on such special franchise for state, county, city, town, village, school, highway or other district purposes shall be levied for the ensuing year.

§ 45-f. **Information by local officers.** The assessors or other taxing officers, or other local officers in any city, town or village or district, or any state or county officer, shall on demand furnish to the tax commission any information required by them for the purpose of determining the full and equalized value of a special franchise.

It shall be the duty of city, town, and village clerks within twenty days after the taking effect of any law changing the boundaries of their respective municipal corporations to furnish the tax commission with a statement giving the details of and clearly showing said changes. Upon the granting of any franchise to use the streets, highways, public places or public waters by the proper officers of any city, town or village, it shall be the duty of the respective clerks of said municipalities to furnish a copy of the same to the tax commission.

§ 46. **Certiorari to review assessment.** An assessment of a special franchise by the tax commission may be reviewed in the manner prescribed by article thirteen of this chapter, and that article applies so far as practicable to such an assessment, in the same manner and with the same force and effect as if

the assessment had been made by local assessors; a petition for a writ of certiorari to review the assessment must be presented within fifteen days after the final completion and filing of the assessment-roll, and the first posting or publication of the notice thereof as required by law. Such writ must run to and be answered by said tax commission and no writ of certiorari to review any assessment of a special franchise shall run to any other board or officer unless otherwise directed by the court or judge granting the writ. In cities a copy of said writ and the petition for same shall be furnished to the corporation counsel or other law officer. An adjudication made in the proceeding instituted by such writ of certiorari shall be binding upon the local assessors and any ministerial officer who performs any duty in the collection of the taxes levied upon said assessment in the same manner as though said local assessors or officers had been parties to the proceeding. [L. 1918, c. 278.]

§ 47. **Tax commissioner to appear by counsel; employment of experts.** In any proceeding for the review of an assessment of a special franchise made by the state board of tax commissioners or the tax commission, said tax commission is authorized to appear by counsel to be designated by the attorney-general. The attorney-general or such counsel may employ experts and the compensation of such counsel and experts and their necessary and proper expenses and disbursements, incurred or made in such proceeding, and upon any appeal therein, shall when audited and allowed as are other charges against such tax district, be a charge upon the tax district upon whose rolls appears the assessment sought to be reviewed. Where, in one proceeding, there is reviewed the assessment of a special franchise in more than one tax district, separate accounts shall be rendered for said costs, expenses and disbursements to the proper officer of each of said tax districts and audited and allowed by him as aforesaid. For the purposes of this section, the city of New York shall be deemed one tax district. If provision shall not have been made for the payment of such expense in any year, then the officers who are empowered by law to make such provisions in any county, city, town or other political subdivision of the state, are hereby authorized and directed to raise money to such an amount as may be necessary, in any manner provided by law for meeting expenses in anticipation of the collection of taxes and to pay such expense therefrom. The amount so raised shall be included in the amount to be raised by tax in the ensuing year.

§ 48. **Deduction from special franchise tax for local purposes.** If, when the tax assessed on any special franchise is due and payable under the provisions of law applicable to the city, town or village in which the tangible property is located, it shall appear that the person, copartnership, association or corporation affected has paid to such city, town or village for its exclusive use within the next preceding year, under any agreement therefor, or under any statute requiring the same, any sum based upon a percentage of gross earnings, or any other income, or any license fee, or any sum of money on account of such special franchise, granted to or possessed by such person, copartnership, association or corporation, which payment was in the nature of a tax, all amounts so paid for the exclusive use of such city, town or village except money paid or expended for paving or repairing of pavement of any street, highway or public place, and except in a city of the first class car license fees or tolls paid for the privilege of crossing a bridge owned by the city, shall be deducted from any tax based on the assessment made by the state tax commission for city, town or village purposes, but not otherwise; and the remainder shall be the tax on such special franchise payable for city, town or village purposes. The chamberlain or treasurer of a city, the treasurer of a village, the supervisor of a town, or other officer to whom any sum is paid for which a person, copartnership,

association or corporation is entitled to credit as provided in this section, shall not less than five nor more than twenty days before a tax on a special franchise is payable, make and deliver to the collector or receiver of taxes or other officer authorized to receive taxes for such city, town or village, his certificate showing the several amounts which have been paid during the year ending on the day of the date of the certificate. On the receipt of such certificate the collector, receiver or other officer shall immediately credit on the tax-roll to the person, copartnership, association or corporation affected the amount stated in such certificate, on any tax levied against such person, copartnership, association or corporation on an assessment of a special franchise for city, town or village purposes only, but no credit shall be given on account of such payment or certificate in any other year, nor for a greater sum than the amount of the special franchise tax for city, town or village purposes, for the current year; and he shall collect and receive the balance, if any, of such tax as required by law.

§ 49. **Tax on special franchise not to affect other taxes.** The imposition or payment of a tax on a special franchise as provided in this chapter shall not relieve any association, copartnership or corporation from the payment of any organization tax or franchise tax or any other tax otherwise imposed by article nine of this chapter, or by any other provision of law; but tangible property situated in, upon, under or above any street, highway, public place, or public waters, subject to tax as special franchise as described in subdivision six of section two, shall not be taxable except upon the assessment made as herein provided by the tax commission.

§ 180. **Organization tax.** Every stock corporation incorporated under any law of this state shall pay to the state treasurer a tax of one-twentieth of one per centum upon the amount of capital stock which the corporation is authorized to have, and a like tax upon any subsequent increase. Provided, that in no case shall such tax be less than ten dollars. Such tax shall be due and payable upon the incorporation of such corporation or upon the increase of its capital stock. Except in the case of a railroad corporation neither the secretary of state nor the county clerk shall file any certificate of incorporation or article of association, or give any certificate to any such corporation or association until he is furnished a receipt for such tax from the state treasurer, and no stock corporation shall have or exercise any corporate franchise or powers, or carry on business in this state until such tax shall have been paid. And in case of a decrease of capital stock, upon which the tax required by law has been paid, and a subsequent increase thereof, a tax shall be paid only upon so much of such increase as exceeds the amount of capital stock upon which a tax has been before paid. In case of the consolidation of existing corporations into a corporation, such new corporation shall be required to pay the tax hereinbefore provided for only upon the amount of its capital stock in excess of the aggregate amount of capital stock of said corporations. This section shall not apply to state and national banks or to building, mutual loan, accumulating fund and co-operative associations. A railroad corporation need not pay such tax at the time of filing its certificate of incorporation, but shall pay the same before the public service commission shall grant a certificate, as required by the railroad law, authorizing the construction of the road as proposed in its articles of association, and such certificate shall not be granted by the public service commission until it is furnished with a receipt for such tax from the state treasurer. If the board of railroad commissioners or public service commission shall have heretofore granted or the public service commission shall hereafter grant, such certificate and upon an appeal from the determination of such board of railroad commissioners or public service commission, such certificate has been or may hereafter be denied the state treasurer shall refund the amount of tax so paid to the railroad cor-

poration or corporations by which such tax was paid, upon proof of payment being presented and appropriation being made therefor.

§ 181. **License tax on foreign corporations.** Every foreign corporation, except banking corporations, fire, marine, casualty and life insurance companies, co-operative fraternal insurance companies, and building and loan associations, doing business in this state, shall pay to the state treasurer, for the use of the state, a license fee of one-eighth of one per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital stock employed by it within this state, during the first year of carrying on its business in this state; which first payment shall not be less than ten dollars; and if any year thereafter any such corporation shall employ more than eight thousand dollars of its capital stock within this state on which a license fee has not been paid then a license fee at the rate of one-eighth of one per centum shall be due and payable upon any such increase. The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bear to the gross assets wherever employed in business. For purposes of taxation, the capital of the corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. The amount of capital upon which such license fees shall be paid shall be fixed by the state tax commission, which shall have the same authority to examine the books and records in this state of such foreign corporations, and the employees thereof as it has in the case of domestic corporations and the comptroller shall have the same power to issue his warrant for the collection of such license fees, as he now has with regard to domestic corporations. No action shall be maintained or recovery had in any of the courts in this state by such foreign corporation after thirteen months from the time of beginning such business within the state, without obtaining a receipt from the comptroller for the payment of the license fee upon the capital stock employed by it within this state during the first year of carrying on its business in this state.

§ 182. **Franchise tax on corporations.** For the privilege of exercising its corporate franchises in this state every domestic corporation, joint stock company or association, and for the privilege of doing business in this state, every foreign corporation, joint stock company or association, shall pay to the state treasurer annually, in advance, an annual tax to be computed upon the basis of the amount of its capital stock, employed during the preceding year within this state, and upon each dollar of such amount. The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bear to the gross assets wherever employed in business. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. If the dividends upon the capital stock amount to six, or more than six per centum upon the par value of the capital stock, during any year ending with the thirty-first day of October, the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the par value of the capital stock during said year. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, and

- (1) The assets do not exceed the liabilities, exclusive of capital stock, or
- (2) The average price at which such stock sold during said year did not equal or exceed its par value, or
- (3) If no dividend was declared,

Then each dollar of the amount of capital stock employed in this state, determined as hereinbefore provided, shall be taxed at the rate of three-fourths of one mill. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, and

(1) The assets exceed the liabilities, exclusive of capital stock, by an amount equal to or greater than the par value of the capital stock, or

(2) The average price at which such stock sold during said year is equal to or greater than the par value.

Then the amount of capital stock, determined as hereinbefore provided to be employed in this state, shall be taxed at the rate of one and one-half mills on each dollar of the valuation of the capital stock employed in this state, but such valuation shall not be less than

(1) The par value of such stock,

(2) The difference between the assets and liabilities, exclusive of capital stock,

(3) The average price at which such stock sold during said year.

If such corporation, joint stock company or association shall have more than one kind of capital stock, and upon one of such kinds of stock a dividend or dividends amounting to six or more than six per centum upon the par value thereon, has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the capital stock upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto a tax shall be charged upon the capital stock

(1) Upon which no dividend was made or declared, or

(2) Upon which the dividend or dividends made or declared did not amount to six per centum upon the par value

At the rate as hereinbefore provided for the taxation of capital stock upon which no dividend was made or declared, or upon which the dividend or dividends made or declared did not amount to six per centum on the par value.

All corporations not taxable under the preceding paragraphs of this section shall be taxed in an amount not less than would be produced by an assessment of one and one-half mills on each one dollar of the actual value of its capital stock, determined to be employed in this state as hereinbefore provided, or one and one-half mills upon each dollar of such capital stock at the average price at which said stock sold during the said year.

§ 183. **Certain corporations, exempt from tax on capital stock.** Banks, savings banks, institutions for savings, title guaranty, insurance or surety corporations, every trust company incorporated, organized or formed, under, by or pursuant to a law of this state, and any company authorized to do a trust company business, solely or in connection with any other business, under a general or special law of this state, laundering corporations, manufacturing corporations to the extent only of the capital actually employed in this state in manufacturing, and in the sale of the product of such manufacturing, mining corporations wholly engaged in mining ores within this state, agricultural and horticultural societies or associations, and corporations, joint-stock companies or associations owning or operating elevated railroads or surface railroads not operated by steam, or formed for supplying water or gas for electric or steam heating, lighting or power purposes, and liable to a tax under sections one hundred and eighty-five and one hundred and eighty-six of this chapter, shall be exempt from the payment of the taxes prescribed by section one hundred and eighty-two of this chapter. But such a laundering, manufacturing or

mining corporation shall not be exempted from the payment of such tax, unless at least forty per centum of the capital stock of such corporation is invested in property in this state and used by it in its laundering, manufacturing or mining business in this state.

§ 184. **Additional franchise tax on transportation and transmission corporations and associations.** Every corporation and joint-stock association formed for steam surface railroad, canal, steamboat, ferry, except a ferry company operating between any of the boroughs of the city of New York under a lease granted by the city, express, navigation, pipe line, transfer baggage express, telegraph, telephone, palace car or sleeping car purposes, and every other transportation corporation not liable to taxation under sections one hundred and eighty-five or one hundred and eighty-six of this chapter, shall pay for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, an annual excise tax or license fee which shall be equal to five-tenths of one per centum upon its gross earnings within this state, which shall include its gross earnings from its transportation or transmission business originating and terminating within this state, but shall not include earnings derived from business of an interstate character.

§ 185. **Franchise tax on elevated railroads or surface railroads not operated by steam.** Every corporation, joint stock company or association owning or operating any elevated railroad or surface railroad not operated by steam shall pay to the state for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity within this state an annual tax which shall be one per centum upon its gross earnings from all sources within this state, and three per centum upon the amount of dividends declared or paid in excess of four per centum upon the actual amount of paid up capital employed by such corporation, joint stock company or association. Any such railroad corporation whose property is leased to another railroad corporation shall only be required under this section to pay a tax of three per centum upon the dividends declared and paid in excess of four per centum upon the amount of its capital stock, except that where the property leased is operated by a receiver and the gross earnings are not included with the gross earnings of the lessee for the purposes of taxation under this section, then such receiver shall be required to pay the tax upon gross earnings as hereinbefore provided.

§ 186. **Franchise tax on water-works companies, gas companies, electric or steam heating, lighting and power companies.** Every corporation, joint-stock company or association formed for supplying water or gas, or for electric or steam heating, lighting or power purposes, shall pay to the state for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, an annual tax which shall be five-tenths of one per centum upon its gross earnings from all sources within this state, and three per centum upon the amount of dividends declared or paid in excess of four per centum upon the actual amount of paid-up capital employed by such corporation, joint-stock company or association. The term "gross earnings" as used in this section means all receipts from the employment of capital without any deduction.

§ 187. **Franchise tax on insurance corporations.** An annual state tax for the privilege of exercising corporate franchises or for carrying on business in their corporate or organized capacity within this state equal to one per centum on the gross amount of premiums received during the preceding calendar year for business done at any time in this state, which gross amount of premiums shall include all premiums received during such preceding calendar year on all policies, certificates, renewals, policies subsequently cancelled, insurance and

reinsurance during such preceding calendar year, and all premiums that are received during such preceding calendar year on all policies, certificates, renewals, policies subsequently cancelled, insurance and reinsurance executed, issued or delivered in all years prior to such preceding calendar year, whether such premiums were in the form of money, notes, credits, or any other substitute for money, but such gross amount of premiums shall not include premiums refunded to policyholders as dividends or on cancellation or return of policies nor amounts paid as reinsurance to such other companies as are subject to taxation under this section, shall be paid annually into the treasury of the state on or before the first day of June by the following corporations:

1. Every domestic insurance corporation, incorporated, organized or formed under, by or pursuant to a general or special law;

2. Every insurance corporation, incorporated, organized or formed under, by or pursuant to the laws of any other state of the United States, and doing business in this state, except a corporation doing a fire insurance business or a marine insurance business.

3. Every insurance corporation, incorporated, organized or formed under, by or pursuant to the laws of any state without the United States, or of any foreign country, except such a corporation doing a life, health or casualty insurance business, and doing business in this state; but the tax on gross premiums of a corporation so incorporated, organized or formed and doing a fire or marine insurance business within the state shall be equal to five-tenths of one per centum. This section does not apply to a fraternal beneficiary society, order or association, a corporation for the insurance of domestic animals, a town or county co-operative insurance corporation, nor to any corporation subject to the supervision of or required by or in pursuance of law to report to the superintendent of banks; but this section does apply to an individual, or partnership, or association of underwriters known as 'Lloyds' in so far as corporations doing the same kind of insurance business are subject to its provisions. The taxes imposed by this section shall be in addition to all other fees, licenses or taxes imposed by this or any other law, except that in assessing taxes under the reciprocal provisions of section thirty-four of the insurance law, credit shall be allowed for any taxes paid under this section. The term "insurance corporations" as used in this article, shall include a corporation, association, joint-stock company or association, person, society, aggregation or partnership by whatever name known doing an insurance business in this state.

§ 192. **Reports of corporations.** Corporations liable to pay a tax under this article shall report as follows:

1. Corporations paying franchise tax. Every corporation, association or joint stock company liable to pay a tax under section one hundred and eighty-two of this chapter shall, between the first day of November and the fifteenth day of December in each year, make a written report to the tax commission of its condition at the close of its business on October thirty-first preceding, stating the amount of its authorized capital stock, the amount of stock paid in, the date and rate per centum of each dividend declared by it during the year ending with such day, the entire amount of the capital of such corporation, and the capital employed by it in this state during such year. Upon written application the state tax commission may, in its discretion, extend the time in which to make report, but not beyond the fifteenth day of February succeeding.

2. Transportation and transmission corporations. Every transportation or transmission corporation, joint stock company or association liable to pay an additional tax under section one hundred and eighty-four of this chapter, shall also, on or before August first in each year, make a written report to the tax commission of its condition at the close of its business on June thirtieth preced-

ing, stating the amount of its gross earnings from all sources and the amount of its gross earnings from its transportation or transmission business originating and terminating within this state.

3. Elevated and surface railroad corporations. Every corporation, joint-stock company or association liable to pay a tax under section one hundred and eighty-five of this chapter shall, on or before August first of each year, make a written report to the tax commission of its condition at the close of its business on June thirtieth preceding, stating the amount of its gross earnings from business done in this state, the amount of dividends of every nature declared or paid during the year ending June thirtieth, the authorized capital of the company and the amount of capital stock actually issued and outstanding.

4. Water works, gas, electric, steam heating, lighting and power corporations. Every corporation, joint-stock company or association liable to pay a tax under section one hundred and eighty-six of this chapter, shall, on or before December first of each year, make a written report to the tax commission of its condition at the close of its business on October thirty-first preceding, stating the amount of its gross earnings from business done in this state, the amount of dividends of every nature declared or paid during the year ending with October thirty-first, the authorized capital of the company and the amount of capital stock actually issued and outstanding.

5. Insurance corporations. Every insurance corporation liable to pay a tax under section one hundred and eighty-seven of this chapter, shall, on or before March first in each year, make a written report to the tax commission of its condition at the close of its business on December thirty-first preceding, stating the gross amount of all premiums referred to in section one hundred and eighty-seven of this chapter, received during the preceding calendar year on business done thereby in this state during the year ending with such day and at all times prior thereto, whether the premiums were in money or in the form of notes, credits or other substitutes for money.

6. Foreign bankers. Every foreign banker liable to pay a tax under section one hundred and ninety-one of this chapter shall, on or before February first in each year, make a written report to the tax commission of the condition of his business on December thirty-first preceding, stating the amount of tax for which he is liable under this article, and giving in detail the facts required by the last preceding section for the purpose of ascertaining and computing the same.

7. Trust companies. Every company liable to pay a tax under section one hundred and eighty-eight of this chapter shall, on or before August first in each year, make a written report to the tax commission of its condition at the close of business on June thirtieth preceding, separately stating the amount of its capital stock, the amount of its surplus, and the amount of its undivided profits, and containing such other data, information or matter as the tax commission may require.

8. Saving banks. Every saving bank liable to pay a tax under section one hundred and eighty-nine of this chapter, shall on or before August first in each year, make a written report to the tax commission of its condition at the close of business on June thirtieth preceding, stating the par value of its surplus, and undivided earnings and containing such other data, information or matter as the tax commission may require.

9. Investment companies. Every investment company liable to pay a tax under section one hundred and eighty-eight-a of this chapter shall, on or before August first in each year, make a written report to the tax commission of its condition at the close of business on June thirtieth preceding, separately stating the amount of its capital stock, the amount of its surplus, and the amount of its undivided profits, and containing such other data, information or matter as the tax commission may require.

§ 193. **Value of stock to be appraised.** If the dividend or dividends amount to less than six per centum on the par value of the capital stock, or no dividend is declared, the president, treasurer or secretary of the company liable to pay a tax under the provisions of section one hundred and eighty-two of this chapter, shall, under oath, between the first and fifteenth days of November in each year, estimate and appraise the capital stock of such company at its actual value.

And shall forward the same to the tax commission with the report provided for in the last section. If the tax commission is not satisfied with the valuation so made and returned it is authorized and empowered to make a valuation thereof, and settle an account upon the valuation so made by it, and the taxes, penalties and interest to be paid the state.

§ 194. **Further requirements as to reports of corporations.** Every report required by this article shall have annexed thereto the affidavit of the president, vice-president, secretary or treasurer of the corporation, association or joint-stock company or of the person or one of the persons, or the members of the partnership making the same, to the effect that the statements contained therein are true. Such reports shall contain any other data, information or matter which the tax commission may require to be included therein, and it may prescribe the form in which such reports shall be made and the form of oath thereto. When so prescribed such forms shall be used in making the report. The commission may require at any time a further or supplemental report under this article, which shall contain information and data upon such matters as the commission may specify.

§ 195. **Powers of tax commission to examine into affairs of corporations.** In case any report required by any of the preceding sections of this article shall be unsatisfactory to the commission, or if any such report is not made as herein required, the commission is authorized to make an estimate of the dividends paid by such corporation and the value of the capital stock employed by it, from any such report or from any other data, and to order and state an account according to the estimate and value so made by it for the taxes, percentage and interest due the state from such corporation, association, joint-stock company, person or partnership. The commission shall also have power to examine or cause to be examined, in case of a failure to report or in case the report is unsatisfactory to it, the books and records of any such corporation, joint-stock association, company, foreign banker, person or partnership, and may hear testimony and take proofs material for its information, and may appoint a commissioner by a written appointment under its official seal for that purpose. Every commissioned so appointed shall be authorized to make such examination and take such testimony and hear such proofs and report the proofs and testimony so taken and the result of his examination so made and the facts found by him to the commission. The commission shall, therefrom, or from any other data which shall be satisfactory to it, order and state an account for the tax due the state, together with the expenses of such examination and the taking of such testimony and proofs. Such expenses shall be fixed and adjusted by the commission.

§ 196. **Notice of statement of tax; interest.** Upon auditing and stating every account for taxes under this article, the commission shall forthwith send notice thereof in writing to the person, partnership, company, association or corporation against whom the same is made, which notice may be mailed to the post-office address of such person, partnership, association, company or corporation. All accounts so audited and stated shall bear interest upon the total amount found due thereon to the state, for taxes, percentage, interest and other charges, from the expiration of thirty days after sending such notice until payment thereof shall be made and shall be added thereto and collected therewith by the comptroller.

§ 197. **Payment of tax and penalty for failure.** A tax imposed by section one hundred and eighty-two or one hundred and eighty-six of this chapter shall be due and payable into the state treasury on or before the fifteenth day of January in each year. A tax imposed by section one hundred and eighty-four of this chapter on a transportation or transmission corporation, or by section one hundred and eighty-five, on elevated railroads or surface railroads not operated by steam, shall be due and payable into the state treasury on or before the first day of August in each year. A tax imposed by section one hundred and eighty-seven of this chapter on an insurance corporation shall be due and payable into the state treasury on or before the first day of June in each year. A tax imposed by section one hundred and eighty-eight or one hundred and eighty-eight-a or one hundred and eighty-nine shall be due and payable into the state treasury on or before the first day of September in each year. A tax imposed by section one hundred and ninety-one of this chapter on a foreign banker shall be due and payable into the state treasury on or before February first in each year. If such tax in any case is not paid within thirty days after the same becomes due, or if the report of any such corporation is not made within the time required by this article, the corporation, association, joint-stock company, person or partnership, liable to pay the tax, shall pay into the state treasury, in addition to the amount of such tax, a sum equal to five per centum thereof, and one per centum additional for each month the tax remains unpaid, which sum shall be added to the tax and paid or collected therewith. Every corporation, association, joint-stock company, person or partnership failing to make the annual report required by this article, or failing to make any special report required by the commission, within any reasonable time to be specified by the commission, shall forfeit to the people of the state the sum of one hundred dollars for every such failure, and the additional sum of ten dollars for each day that such failure continues. Such tax shall be a lien upon and bind all the real and personal property of the corporation, joint-stock company or association liable to pay the same from the time when it is payable until the same is paid in full.

§ 198. **Revision and readjustment of accounts by tax commission.** If an application be filed with the commission by the party against whom the account is stated or by the attorney-general within one year from the time any such account shall have been audited and stated, the commission may at any time, upon notice thereof sent to the person, partnership, company, association or corporation against whom it is stated, revise and readjust such account and if it shall be made to appear upon any such application, by evidence submitted to it or otherwise, that any such account included taxes or other charges which could not have been lawfully demanded, or that payment has been illegally made or exacted of any such account, the commission shall resettle the same according to law and the facts, and charge or credit, as the case may require, the difference, if any, resulting from such revision or resettlement upon the accounts for taxes of or against any such person, partnership, company, association or corporation. Such credit, whether allowed before or after the passage of this chapter may be, by the person, partnership, company, association or corporation in whose favor it is allowed, assigned to a person, partnership, company, association or corporation liable to pay taxes under article nine of this chapter, and the assignee of the whole or any part of such credit on filing with the commission such assignment shall thereupon be entitled to credit on the books of the commission for the amount thereof on the current account for taxes of such assignee in the same way and with the same effect as though the credit had originally been allowed in favor of such assignee. The commission shall forthwith send written notice of its determination upon such application to the applicant, and to the attorney-general, which notice may be sent by mail to its post-office address.

§ 199. **Review of determination of tax commission by certiorari.** The determination of the commission upon any application made to it by any person, partnership, company, association or corporation for a revision and resettlement of any account, as prescribed in this article, may be reviewed both upon the law and the facts upon certiorari by the supreme court at the instance of any person, partnership, company, association or corporation affected thereby, and in the name and on behalf of the people of the state. For the purpose of such review the commission shall return, on such certiorari, the accounts and all the evidence before it on such application, and all the papers and proofs upon the original statement of such account and all proceedings thereon. If the original or resettled accounts shall be found erroneous or illegal, either in point of law or of fact, by the supreme court, upon any such review, the accounts reviewed shall then be corrected and restated, and from any determination of the supreme court upon any such review an appeal to the court of appeals may be taken by either party.

§ 200. **Regulations as to such writ of certiorari.** No certiorari to review any audit and statement of an account or any determination by the commission under this article shall be granted unless notice of application therefor is made within thirty days after the service of the notice of such determination. Eight days' notice shall be given to the commission of the application for such writ. The full amount of the taxes, percentage, interest and other charges audited and stated in such account must be deposited with the state treasurer before making the application and an undertaking filed with the commission, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such writ is dismissed or the determination of the commission affirmed, the applicant for the writ will pay all costs and charges which may accrue against him or it in the prosecution of the writ, including costs of all appeals.

§ 201. **Warrant for the collection of taxes.** After the expiration of thirty days from the sending by the commission of a notice of a statement of an account as provided in this article, unless the amount of such account shall have been paid or deposited with the state treasurer, if an appeal or other proceedings have been taken to review the same, and the undertaking given as provided in this article, the comptroller may issue a warrant under his hand and official seal, directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and personal property of the person, partnership, company, association or corporation against which such account is stated, found within his county for the payment of the amount thereof with interest thereon and costs of executing the warrant, and to return such warrant to the comptroller and pay to the state treasurer the money collected by virtue thereof, by a time to be therein specified, not less than sixty days from date of the warrant. Such warrant shall be a lien upon and shall bind the real and personal property of the person, partnership, company, association or corporation against which it is issued, from the time an actual levy shall be made by virtue thereof. The sheriff to whom any such warrant shall be directed shall proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner.

§ 202. **Information of delinquents.** It shall be the duty of any person having knowledge of the evasion of taxation under this article by any corporation, association, joint-stock company, partnership or person liable to taxation thereunder, or any omission on their part to make the reports required by this article, to make a written report thereof to the comptroller of the state, with such

information as may be in his possession as may lead to the recovery of any taxes due the state therefrom. If, in his opinion, the interests of the state require it, the comptroller may employ such person to assist in the collection and preparation of evidence and in the prosecution and trial of actions for such taxes, and so much of the same, not exceeding ten per centum thereof, as may be collected from any such delinquent corporation, association, company, partnership or person, by reason of such report and such services, as shall have been agreed upon between such person and the comptroller or attorney-general as a compensation therefor, shall be paid to such person, and nothing shall be paid to such person for such report or services unless there shall be a recovery of taxes by reason thereof.

§ 203. **Action for recovery of taxes; forfeiture of charter of delinquent corporations.** An action may be brought by the attorney-general, at the instance of the comptroller, in the name of the state, to recover the amount of any account audited and stated by the commission under the provisions of this article. If any such account shall remain unpaid at the expiration of one year after notice of the statement thereof has been sent as required by this article, and the comptroller is satisfied that the failure to pay the same is intentional, he shall so report to the attorney-general, who shall immediately bring an action, in the name of the people of the state, for the forfeiture of the franchise of any corporation, joint-stock company or association failing to make such payment, and if it is found that such failure was intentional, judgment shall be rendered in such action for the forfeiture of its franchise and for its dissolution, and thereafter such franchise shall be annulled.

§ 205. **Exemptions from other state taxation.** The personal property of every corporation, company, association or partnership, taxable under this article, other than for an organization tax, shall be exempt from assessment and taxation upon its personal property for state purposes, if all taxes due and payable under this article have been paid thereby. The personal property of every corporation taxable under section one hundred and eighty-eight of this article, or under section one hundred and eighty-eight-a of this article, other than for an organization tax, and as provided in the banking law, shall be exempt from assessment and taxation for all other purposes. The personal property of a private or individual banker, actually employed in his business as such banker, shall be exempt from taxation for state purposes, if such private or individual banker shall have paid all taxes due and payable under this article. Such corporation and private or individual banker shall in no other respect be relieved from assessment and taxation by reason of the provisions of this article. The owner and holder of stock in an incorporated trust company liable to taxation under the provisions of this chapter shall not be taxed as an individual for such stock. Personal property exempted from taxation by this section shall not include shares of stock of banks and banking associations taxable under the provisions of sections twenty-four to twenty-four-g, both inclusive, of this chapter.

§ 207. **Limitation of time.** The provisions of the code of civil procedure relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty prescribed by this article, and this section shall be construed as having been in effect as of date of the original enactment of the corporation tax law, provided, however, that as to real estate in the hands of persons who are owners thereof who would be purchasers in good faith but for such tax or penalty, and as to the lien on real estate of mortgages held by persons who would be holders thereof in good faith but for such tax or penalty, all taxes and penalties which have prior to April first, nineteen hundred and seventeen become due and payable pursuant to this article, and which have not been

referred to the attorney-general pursuant to section two hundred and three of this chapter, shall cease to be a lien on such real estate as against such purchasers or holders, after the expiration of ten years from the time when such tax became due and payable.

§ 208. **Definitions.** As used in this article. 1. The term "corporation" includes a joint-stock company or association;

2. The words "tangible personal property" shall be taken to mean corporal personal property, such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean money, deposits in bank, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt. [L. 1918, c. 417.]

§ 209. **Franchise tax on corporations based on net income.** For the privilege of exercising its franchise in this state in a corporate or organized capacity every domestic manufacturing and every domestic mercantile corporation, and for the privilege of doing business in this state, every foreign manufacturing and every foreign mercantile corporation, except corporations specified in the next section, shall annually pay in advance for the year beginning November first next preceding an annual franchise tax, to be computed by the tax commissioner upon the basis of its net income for its fiscal or the calendar year next preceding, as hereinafter provided, which income is presumably the same as the income upon which such corporation is required to pay a tax to the United States. [L. 1918, c. 276.] § 5. The sections of such chapter amended by this act shall be construed as having been in effect, as so amended, as of the date of the original enactment of article nine-a of the tax law, as added by chapter 726 of the laws of 1917.

§ 210. **Corporations exempt from article.** Corporations wholly engaged in the purchase, sale and holding of real estate for themselves, holding corporations whose principal income is derived from holding the stocks and bonds of other corporations and corporations liable to a tax under sections one hundred and eighty-four to one hundred and eighty-nine inclusive of this chapter, banks, saving banks, institutions for savings, title guaranty, insurance or surety corporations, shall be exempt from the payment of the taxes prescribed by this article. [L. 1918, c. 417.]

§ 211. **Reports of corporations to tax commission.** Every corporation taxable under this article as well as foreign corporations having officers, agents or representatives within the state shall annually on or before July first, or within thirty days after the making of its report of net income to the United States treasury department for any fiscal or calendar year, transmit to the tax commission a report in the form prescribed by the tax commission specifying:

1. The name and location of the principal place of business of such corporation, the state under the laws of which organized, and the date thereof; the amount of its issued capital stock and the kind of business transacted. [L. 1918, c. 417.]

2. The amount of its net income for its preceding fiscal or the preceding calendar year as shown in the last return of annual net income made by it to the United States treasury department, and if the corporation shall claim that such return is inaccurate, the amount claimed by it to be the net income for such period. [L. 1918, c. 276.]

3. The average monthly value for the fiscal or calendar year of its real property and tangible personal property in each city, village or portion of a town outside of a village within the state, and the average monthly value of all its real property and tangible personal property wherever located.

4. The average monthly value for the fiscal or calendar year of bills and accounts received for (a) personal property sold by the corporation from merchandise manufactured by it within this state; (b) personal property sold by

the corporation from merchandise owned by it and located within the state at the time of the acceptance of the order, but not manufactured by it within this state; and (c) services performed, based on all orders received at offices maintained by the corporation within this state, excluding bills and accounts receivable arising from sales made from a stock of merchandise or other property located at a place of business maintained by the reporting corporation within this state. Also the average total monthly value for the fiscal or calendar year of bills and accounts receivable for (a) personal property sold by the corporation from merchandise manufactured by it; within and without the state (b) personal property sold by the corporation from merchandise owned by it at the time of the acceptance of the order but not manufactured by it; and (c) services performed, based on orders received at offices maintained by the corporation, excluding bills and accounts receivable on orders filled from a stock of merchandise or other property maintained by the reporting company. In case of a corporation organized under the laws of another country a statement shall be made showing its entire net income. [L. 1918, c. 417.]

5. The average total value for the fiscal or calendar year of the stock of other corporations owned by the corporation, and the proportion of the average value of the stock of such other corporations within the state of New York, as allocated pursuant to section two hundred and fourteen of this chapter.

6. If the corporation has no real or tangible personal property within the state, the city, village or portion of a town outside of a village in the state in which is located the office in which its principal financial concerns within the state are transacted.

7. Such other facts as the tax commission may require for the purpose of making the computation required by this article.

8. Any corporation taxable hereunder may omit from its report the statements required by subdivisions four and five by incorporating in its report a consent to be taxed upon its entire net income. [L. 1918, c. 417.]

§ 212. **Reports by corporation on basis of fiscal year.** A corporation which reports to the United States treasury department on the basis of its fiscal year, may report to the tax commission upon the same basis.

§ 213. **Reports to be sworn to; forms.** Every report required by this article shall have annexed thereto the affidavit of the president, vice-president, secretary or treasurer of the corporation to the effect that the statements contained therein are true. Blank forms of report shall be furnished by the tax commission, on application, but failure to secure such a blank shall not release any corporation from the obligation of making a report herein required. The commission may require a further or supplemental report under this article to contain further information and data necessary for the computation of the tax herein provided.

§ 214. **Computation of tax.** If the entire business of the corporation be transacted within the state, the tax imposed by this article shall be based upon the entire net income of such corporation for such fiscal or calendar year as returned to the United States treasury department subject, however, to any correction thereof for fraud, evasion or error, as ascertained by the state tax commission.

If the entire business of such corporation be not transacted within the state, the tax imposed by this article shall be based upon a proportion of such ascertained net income, to be determined in accordance with the following rules:

The proportion of the net income of the corporation upon which the tax under this article shall be based, shall be such portion of the entire net income as the aggregate of

1. The average monthly value of the real property and tangible personal property within the state.

2. The average monthly value of bills and accounts receivable for (a) personal property sold by the corporation from merchandise manufactured by it within this state; (b) personal property sold by the corporation from merchandise owned by it and located within the state at the time of the acceptance of the order, but not manufactured by it within this state; and (c) services performed within this state, excluding bills and accounts receivable arising from sales made from a stock of merchandise or other property located at a place of business maintained by the reporting corporation without this state.

3. The proportion of the average value of the stocks of other corporations owned by the corporation, allocated to the state as provided by this section, but not exceeding ten per centum of the real and tangible personal property segregated to this state under this article, bears to the aggregate of

4. The average monthly value of all the real property and personal property of the corporation, wherever located.

5. The average total value of bills and accounts receivable for (a) personal property sold by the corporation from merchandise manufactured by it within and without this state; (b) personal property sold by the corporation from merchandise owned by it at the time of acceptance of the order but not manufactured by it; and (c) services performed both within and without this state, based on orders received at offices maintained by the corporation, excluding bills and accounts receivable on orders filled from a stock of merchandise or other property maintained by the corporation.

6. The average total value of stocks of other corporations owned by this corporation, but not exceeding ten per centum of the aggregate real and tangible personal property set up in this report.

Real property and tangible personal property shall be taken at its actual value where located. The value of share stock of another corporation owned by a corporation liable hereunder shall for purposes of allocation of assets be apportioned in and out of the state in accordance with the value of the physical property in and out of the state representing such share stock.

It is further provided that every domestic corporation exercising its franchise in this state and every foreign corporation doing business in this state, other than those exempted by section two hundred and ten of this chapter, shall be subject to a minimum tax of not less than ten dollars and not less than one mill upon each dollar of the apportionment of the face value of its issued capital stock apportioned to this state, which shall be determined by dividing the amount of the real and tangible personal property in this state by the entire amount of the real and tangible personal property as shown in the report, and multiplying the quotient by the face value of the issued capital stock. If such a corporation has stock without par value, then the base of the tax shall be on such a portion of its paid in capital as its real and tangible personal property in this state bears to its entire real and tangible personal property. [L. 1918, c. 417.]

§ 214-a. **Taxation of merged or consolidated corporations.** If any corporation shall take over by merger or consolidation the assets or franchise of another corporation doing business in this state during the year ending with the thirty-first day of October, such corporation shall make a consolidated report for all the corporations so merged or consolidated as though the merged or consolidated corporation had existed and done business as an entity throughout the year for which the report is made and shall be taxed for the year to ensue upon the basis of such report, and as hereinbefore provided in this article. [L. 1918, c. 292, which says section "shall be construed as having been in effect as of the date of the original enactment of article nine-a of the tax law, as added by chapter 726, L. 1917."]

§ 215. **Rate of tax.** The tax imposed by this article shall be at the rate of three per centum of the net income of the corporation or portion thereof taxable within the state, determined as provided by this article.

§ 216. **Penalty for failure to report.** Any corporation which fails to make any report required by this article shall be liable to a penalty of not more than five thousand dollars to be paid to the state, to be collected in a civil action, at the instance of the tax commission; and any officer of any such corporation who makes a fraudulent return or statement with intent to defeat or evade the payment of the taxes prescribed by this article shall be liable to a penalty of not more than one thousand dollars, to be collected in like manner. All moneys recovered as penalties, for a failure to report or for making fraudulent reports shall be paid to the state comptroller.

§ 217. **Powers of tax commission.** The tax commission may for good cause shown extend the time within which any corporation is required to report by this article. If any report required by this article be not made as herein required, the tax commission is authorized to make an estimate of the net income of such corporation and of the amount of tax due under this article, from any information in its possession, and to order and state an account according to such estimates for the taxes, penalties and interest due the state from such corporation. If the tax imposed upon any corporation under this article is based upon an estimate as provided in this section, the tax commission shall notify such corporation of a time and place at which opportunity will be given to the corporation to be heard in respect thereof. Such notice shall be mailed to the post-office address of the corporation. All the authority and powers conferred on the tax commission by the provisions of section one hundred and ninety-five of the tax law shall have full force and effect in respect of corporations which may be liable hereunder.

§ 218. **Revision and readjustment of accounts by tax commission.** If an application for revision be filed with the commission by a corporation against which an account is audited and stated within one year from the time any such account shall have been audited and stated, the commission shall grant a hearing thereon and if it shall be made to appear upon any such hearing by evidence submitted to it or otherwise, that any such account included taxes or other charges which could not have been lawfully demanded, or that payment has been illegally made or exacted of any such account, the commission shall resettle the same according to law and the facts, and adjust the account for taxes accordingly, and shall send notice of its determination thereon to the corporation and state comptroller forthwith.

§ 219. **Review of determination of tax commission by certiorari and regulations as to writ.** The determination of the commission upon any application made to it by any corporation for revision and resettlement of any account, as prescribed in this article, may be reviewed in the manner prescribed by and subject to the provisions of section one hundred and ninety-nine of this chapter. No certiorari to review any audit and statement of an account or any determination by the commission under this article shall be granted unless notice of application therefor is made within thirty days after the service of the notice of such determination. Eight days' notice shall be given to the commission of the application for such writ. The full amount of the taxes, percentage, interest and other charges audited and stated in such account must be deposited with the state comptroller before making the application and an undertaking filed with the commission, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such writ is dismissed or the determination of the commission affirmed, the applicant for the writ will pay all costs and charges which may accrue against it in the prosecution of the writ, including costs of all appeals. [L. 1918, c. 417.]

§ 219-a. **Audit and statement of tax.** On or before the first day of November in each year the tax commission shall audit and state the account of each corporation known to be liable to a tax under this article, for its preceding fiscal or the preceding calendar year, and shall compute the tax thereon and forthwith notice the same to the state comptroller for collection. The tax commission shall determine the portion of such tax to be distributed to the several counties and the amounts to be credited to the several cities or towns thereof, when the same is collected, and shall indicate such determination in noticing such tax to the state comptroller. If the corporation has real property or tangible personal property located in a village, or if it has no real or tangible personal property in the state but the office in which its principal financial concerns within the state are transacted is located in a village, the tax commission shall indicate such facts to the state comptroller, with the name of the village in which such office or property is located.

§ 219-b. **Notice of tax.** Every report required by section two hundred and eleven of this chapter shall contain the post-office address of the corporation and lines or spaces upon which the corporation shall enter the portion of its net income which it believes to be the basis upon which the tax shall be imposed under this article, and the amount of such tax. Notice of tax assessment shall be sent by mail to the post-office address given in the report, and the record that such notice has been sent shall be presumptive evidence of the giving of the notice and such record shall be preserved by the tax commission.

§ 219-c. **When tax payable.** The tax hereby imposed shall be paid to the state comptroller on or before the first day of January of each year or within thirty days after notice of the tax has been given as provided in section two hundred and nineteen-b of this chapter if such notice is given subsequent to the first day of December of the year for which such tax is imposed. If such tax be not so paid or in the case of additional taxes, if not paid within thirty days after notice of such additional tax has been given as provided in section two hundred and nineteen-d of this chapter and such notice of additional tax is given subsequent to the first day of December of the year for which such additional tax is imposed, the corporation liable to such tax shall pay to the state comptroller, in addition to the amount of such tax, or additional tax, the per centum of such amount, plus one per centum for each month the tax or additional tax remains unpaid. No such penalty or charge shall be added to the amount of such tax or additional tax imposed for the year beginning November first, nineteen hundred and seventeen, if such tax or additional tax is paid within thirty days after the passage of this act. Each such tax or additional tax shall be a lien upon and binding upon the real and personal property of the corporation liable to pay the same from the time when it is payable until the same is paid in full. [L. 1918, c. 271.]

§ 219-d. **Corrections and changes.** If the amount of the net income for any year of any corporation taxable under this article as returned to the United States treasury department is changed or corrected by the commissioner of internal revenue or other officer of the United States or other competent authority, such corporation, within ten days after receipt of notice of such change or correction, shall make return under oath or affirmation to the tax commission of such changed or corrected net income, and shall concede the accuracy of such determination or state wherein it is erroneous.

The tax commission shall ascertain, from such return and any other information in the possession of the commission, the net income of such corporation for the fiscal or calendar year for which such change or correction has been made by such commissioner of internal revenue or other officer or authority. All the authority conferred on the tax commission by the provisions of section one hundred and ninety-five of this chapter is hereby granted to it in respect to the

ascertainment of such net income. The tax commission shall thereupon reaudit and restate the account of such corporation for taxes based upon the net income for such fiscal or calendar year, such reaudit to be according to the net income so ascertained by the tax commission. The proceedings and determination of the tax commission in the making of such reassessment may be revised and readjusted and reviewed in the manner provided by sections two hundred and eighteen and two hundred and nineteen of this chapter, as in the case of an original assessment of the tax. If from such reassessment it appears that such corporation shall have paid under this article an excess of tax for the year for which such reassessment is made, the tax commission shall return a statement of the amount of such excess to the comptroller, who shall credit such corporation with such amount. Such credit may be assigned by the corporation in whose favor it is allowed to a corporation liable to pay taxes under this article, and the assignee of the whole or any part of such credit on filing with the commission such assignment shall thereupon be entitled to credit upon the books of the comptroller for the amount thereof on the current account for taxes of such assignee in the same way and with the same effect as though the credit had originally been allowed in favor of such assignee. If from such reassessment it appears that an additional tax is due from such corporation for such year, such corporation shall, within thirty days after notice has been given as provided in section two hundred and nineteen-b of this chapter by the tax commission, pay such additional tax. [L. 1918, c. 276, which adds that this and the other sections amended by it "shall be construed as having been in effect, as so amended, as of the date of the original enactment of article nine-a of the tax law," as added by ch. 726, L. 1917].

§ 219-e. **Warrant for the collection of taxes.** If the tax imposed by this article be not paid within thirty days after the same becomes due, unless an appeal or other proceeding shall have been taken to review the same, the comptroller may issue a warrant under his hand and official seal directed to the sheriff of any county of the state commanding him to levy upon and sell the real and personal property of the corporation owning the same, found within his county, for the payment of the amount thereof, with the added penalties, interest and the cost of executing the warrant, and to return such warrant to the comptroller and pay to him the money collected by virtue thereof by a time to be therein specified, not less than sixty days from the date of the warrant. Such warrant shall be a lien upon and shall bind the real and personal property of the corporation against whom it is issued from the time an actual levy shall be made by virtue thereof. The sheriff to whom any such warrant shall be directed shall proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner.

§ 219-f. **Action for recovery of taxes; forfeiture of charter by delinquent corporations.** Action may be brought at any time by the attorney-general at the instance of the comptroller, in the name of the state, to recover the amount of any taxes, penalties and interest due under this article. If such taxes be not paid within one year after the same be due, and the comptroller is satisfied that the failure to pay the same is intentional he shall so report to the attorney-general, who shall immediately bring an action in the name of the people of the state, for the forfeiture of the charter or franchise of any corporation failing to make such payment, and if it be found that such failure was intentional, judgment shall be rendered in each action for the forfeiture of such charter and for its dissolution if a domestic corporation and if a foreign corporation for the annulment of its franchise to do business in this state.

§ 219-g. **Deposit of revenues collected.** The state comptroller shall deposit all taxes, interest and penalties collected under this article in responsible banks,

banking houses or trust companies in the state which shall pay the highest rate of interest to the state for such deposit, to the credit of the state comptroller on account of the franchise tax. And every such bank, banking house or trust company shall execute and file in his office an undertaking to the state, in the sum, and with such sureties, as are required and approved by the comptroller, for the safe keeping and prompt payment on legal demand therefor of all such moneys held by or on deposit in such bank, banking house or trust company, with interest thereon on daily balances at such rate as the comptroller may fix. Every such undertaking shall have indorsed thereon, or annexed thereto, the approval of the attorney-general as to its form. The state comptroller shall on the first day of each month make a verified return to the state treasurer of all revenues received by him under this article during the preceding month, stating by whom and when paid, and shall credit himself with all payments made to county treasurers since his last previous return pursuant to section two hundred and nineteen-h of this chapter.

§ 219-h. **Disposition of revenues collected.** The state comptroller shall on or before the twenty-fifth day of each month pay into the state treasury to the credit of the general fund all interest and penalties and two-thirds of all taxes received by him under this article during the preceding calendar month, as appears from the return made by him to the state treasurer. The balance of all taxes collected and received by him under this article from any corporation, as appears from the return made by him to the state treasurer, shall, on or before the twenty-fifth day of April, July, October and January, for the quarter ending with the last day of the preceding month, be distributed and paid by him to the treasurers of the several counties of the state and disposed of by such treasurers, in accordance with the following rules:

1. If the corporation has no tangible personal property within the state, such payment shall be made to the county treasurer of the county in which is located the office at which its principal financial concerns within the state are transacted;

2. If the corporation has tangible personal property, as shown by its report pursuant to section two hundred and eleven, in but one city or town of the state, such payment shall be made to the county treasurer of the county in which such city or town is located;

3. If the corporation has tangible personal property in more than one city or town of the state, as shown by its report pursuant to section two hundred and eleven, such payment shall be made to the county treasurers of the counties in which such cities or towns are located in the proportion that the average monthly value of the tangible personal property of such corporation in the cities and towns of such county bears to the average monthly value of all its real property and tangible personal property within the state;

4. In making such payment to a county treasurer, the state comptroller shall indicate the portion thereof to be credited to any city or town within the county on account of the location therein of its principal financial office or property as determined by the preceding subdivisions, and if such principal financial office or property is located in a village shall indicate the village in which it is located; if such principal financial office or property is located in a city or town outside of a village, the whole of such portion shall be paid to such city or town as hereinafter provided; if such principal financial office or property is located in a village, there shall be paid to such village as hereinafter provided such a part of the entire amount credited to the town as the entire amount of taxes raised by said village, or portion thereof in said town, during the preceding calendar year for village and town purposes bears to the aggregate amount so raised by the town and village during the preceding calendar year for town and village purposes.

5. As to any county wholly included within a city such payment shall be made to the chamberlain or other chief fiscal officer of such city and be paid into the general fund for city purposes;

6. As to any county not wholly included within a city the county treasurer shall within ten days after the receipt thereof pay to the fiscal officer of a city or to the chief fiscal officer of a village or to the supervisor of a town the portion of a money received by him from the state comptroller to which such city, village or town is entitled, which shall be credited by such officer to general city, village or town purposes. [L. 1918, c. 417.]

§ 219-i. **Secrecy required of officials; penalty for violation.** 1. Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for any tax commissioner, agent, clerk or other officer or employee to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any report under this article. Nothing herein shall be construed to prohibit the publication of statistics so classified as to prevent the identification of particular reports and the items thereof, or the publication of delinquent lists showing the names of taxpayers who have failed to pay their taxes at the time and in the manner provided by section two hundred and nineteen-c together with any relevant information which in the opinion of the comptroller may assist in the collection of such delinquent taxes; or the inspection by the attorney-general or other legal representatives of the state of the report of any corporation which shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted in accordance with the provisions of section two hundred and sixteen or two hundred and nineteen-f of this article.

Reports shall be preserved for three years, and thereafter until the state tax commission orders them to be destroyed.

2. Any offense against the foregoing provisions shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court and if the offender be an officer or employee of the state he shall be dismissed from office and be incapable of holding any public office in this state for a period of five years thereafter.

§ 219-j. **Exemptions from certain other taxation.** After this article takes effect, corporations taxable thereunder shall not be assessed on any personal property or capital stock, as provided for in section twelve of this chapter, except for taxes levied for the fiscal year ending December thirty-first, nineteen hundred and seventeen, in taxing districts in which the fiscal year is coterminous with the calendar year; and where taxes are required by law to be levied for local purposes for a fiscal year beginning in nineteen hundred and seventeen and ending in nineteen hundred and eighteen, such corporations shall not be assessed on any personal property or capital stock, as provided for in section twelve of this chapter, except for taxes levied for such fiscal year.

If, in any taxing district, by reason of the provisions of this section as originally enacted by chapter seven hundred and twenty-six of the laws of nineteen hundred and seventeen, the assessment of the personal property or capital stock of any such corporation has been omitted from the assessment-roll for the fiscal year specifically referred to in the first paragraph of this section, the assessors of such district shall enter the same in the assessment-roll first prepared after this act goes into effect, at the valuation of such fiscal year, or if not then valued, at such valuation as the assessors shall determine for such year. Before finally fixing such valuation the assessors shall give to such corporation a notice of at least five days and an opportunity to be heard with reference thereto. Such property shall be taxed at the rate per centum of the fiscal year in which it was omitted from the assessment-roll. The whole amount of tax so imposed on the personal property or capital stock of such corporations shall be deducted from

the aggregate of taxation otherwise to be levied on such taxing district for the current year, before such tax is levied.

After this article taxes effect corporations taxable thereunder shall not be required to pay the franchise tax imposed by section one hundred and eighty-two of this chapter, or to make the reports called for in sections twenty-seven and one hundred and ninety-two of this chapter, except that, for the purpose of assessing the personal property or capital stock of such corporations as specifically provided in this section, such corporations may be required to make the report called for in such section twenty-seven. Nothing herein shall be construed to impair the obligation to pay franchise taxes due on or before the fifteenth day of January, nineteen hundred and seventeen, or taxes on personal property or capital stock assessed as specifically provided in this section, whether such taxes have been or may hereafter be assessed. But if any corporation taxed under this article shall have paid or shall hereafter pay taxes on personal property or capital stock assessed as specifically provided in this section, for any part of the calendar year nineteen hundred and eighteen, such corporation shall be entitled to credit, with interest, as hereinafter provided, for the amount of such part of the taxes so paid locally as the portion of the year nineteen hundred and eighteen for which such taxes shall have been paid bears to the entire calendar year. And if, in any taxing district, by reason of the provisions of this section as originally enacted by chapter seven hundred and twenty-six of the laws of nineteen hundred and seventeen, any such corporation shall have paid or shall hereafter pay taxes on personal property or capital stock for the year ending December thirty-first, nineteen hundred and eighteen, such corporation shall be entitled to credit, with interest, as hereinafter provided, for the amount of taxes so paid locally.

Such credits shall be granted by the tax commission on the submission of satisfactory proofs that the corporation is entitled thereto. The tax commission shall forthwith notify the corporation and the comptroller of any credit so granted. Such credit may be used by the corporation entitled thereto in the payment of taxes charged against it under this article, or such credit or any part thereof may be assigned by the corporation in whose favor it is allowed to a corporation liable to pay taxes under this article, and the assignee of the whole or any part of such credit on filing with the comptroller such assignment shall thereupon be entitled to credit upon the books of the comptroller for the amount thereof on the account for taxes of such assignee in the same way and with the same effect as though the credit had originally been allowed in favor of such assignee.

The comptroller is authorized and directed to charge such credits against the several taxing districts in which the taxes credited were originally paid, and to deduct such amount or amounts from any taxes thereafter found due to such taxing districts under the provisions of this article. If the amount so charged against a taxing district is in excess of the amount in the possession of the comptroller to be returned to such taxing district under this article, the comptroller shall enter such excess of credits upon his books against the state's share of the taxes collected under this article and not previously accounted for to the state treasurer. The comptroller shall advise the state treasurer of all such proceedings and shall retain from any funds subsequently found due to any such taxing district under this article a like amount which shall be deposited with the state treasurer with an accounting therefor. [L. 1918, c. 271.]

[§ 2. Section two hundred and nineteen-j of such chapter as amended by this act shall be construed as having been in effect, as so amended, as of the date of original enactment of article nine-a of the tax law, as added by chapter seven hundred and twenty-six of the laws of nineteen hundred and seventeen. [L. 1918, c. 271].]

§ 219-k. **Limitation of time.** The provisions of the code of civil procedure relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty prescribed by this article.

§ 219-l. **Personal property defined.** The term "personal property," for the purposes of the exemption from assessment and taxation thereon locally as granted by section two hundred and nineteen-j of this chapter, shall include such machinery and equipment affixed to the building as would not pass between grantor and grantee as a part of the premises if not specifically mentioned or referred to in the deed, or as would, if the building were vacated or sold, or the nature of the work carried on therein changed, be moved, except boilers, ventilating apparatus, elevators, gas, electric and water power generating apparatus and shafting. An owner of a building is entitled to the same exemption under this section as a lessee and every assessment of real property made subsequent to June fourth, nineteen hundred and seventeen, shall be subject to the provisions of this section as amended hereby. [L. 1918, c. 271.]

§ 250. **Definitions.** The term "real property" as used in this article, in addition to the definition thereof contained in section two of this chapter, includes everything a conveyance or mortgage of which can be recorded as a conveyance or mortgage of real property under the laws of the state. The term "mortgage" as used in this article includes every mortgage or deed of trust which imposes a lien on or affects the title to real property, notwithstanding that such property may form a part of the security for the debt or debts secured thereby. Executory contracts for the sale of real property under which the vendee has or is entitled to possession shall be deemed to be mortgages for the purposes of this article and shall be taxable at the amount unpaid on such contracts. A contract or agreement by which the indebtedness secured by any mortgage is increased or added to, shall be deemed a mortgage of real property for the purpose of this article, and shall be taxable as such upon the amount of such increase or addition.

§ 251. **Exemption from local taxation.** All mortgages of real property situated within the state which are taxed by this article and the debts and the obligations which they secure, together with the paper writings evidencing the same, shall be exempt from other taxation by the state, counties, cities, towns, villages, school districts and other local subdivisions of the state, except that such mortgages shall not be exempt from the taxes imposed by sections twenty-four to twenty-four-g, both inclusive, one hundred and eighty-seven, one hundred and eighty-eight, one hundred and eighty-nine and article ten of this chapter.

§ 252. **Exemptions.** No mortgage of real property situated within this state shall be exempt, and no person or corporation owning any debt or obligation secured by mortgage of real property situated within this state shall be exempt, from the taxes imposed by this article by reason of anything contained in any other statute, or by reason of any provision in any private act or charter which is subject to amendment or repeal by the legislature, or by reason of nonresidence within this state or for any other cause.

§ 253. **Recording tax.** A tax of fifty cents for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is, or under any contingency may be secured at the date of the execution thereof or at any time thereafter by a mortgage on real property situated within the state recorded on or after the first day of July, nineteen hundred and six, is hereby imposed on each such mortgage, and shall be collected and paid as provided in this article. If the principal debt or obligation which is or by any contingency may be secured by such mortgage recorded on or after the first day

of July, nineteen hundred and seven, is less than one hundred dollars, a tax of fifty cents is hereby imposed on such mortgage, and shall be collected and paid as provided in this article.

§ 254. **Optional tax on prior mortgages.** Whenever any mortgage other than a mortgage specified in section two hundred and sixty-four has been recorded prior to July first, nineteen hundred and six, the record owner thereof may file with the recording officer of the county in which the real property, or any part thereof, on which said mortgage is a lien, is situated, a written statement under oath verified by the record owner or the agent or officer of such record owner describing such mortgage by giving the date of the same and the liber and page of the record thereof together with the names of the parties thereto, specifying the amount then remaining unpaid on the debt or obligation secured thereby, and electing that it shall become subject to the tax prescribed by section two hundred and fifty-three of this chapter. Whenever any unrecorded mortgage has been executed and delivered prior to July first, nineteen hundred and six, the owner thereof may record the same upon filing with the recording officer a similar statement and paying the tax as herein prescribed. A tax shall thereupon be computed, levied and collected upon the amount of the principal debt or obligation unpaid at the time of the filing of such statement, or of the recording of such mortgage and filing of such statement. On the payment of such tax as herein provided, the recording officer shall note on the margin of the record of such mortgage the fact of such statement and of the amount of the tax paid, attested by his signature, whereupon such mortgage and the debt or obligation secured thereby shall be entitled to the exemptions and immunities conferred by this article, and all of the provisions of this article shall thereafter be applicable to said mortgage. Whenever the original mortgage is presented to the clerk together with the statement he shall also note on said original mortgage the fact of the filing of the said statement and also the amount of the tax paid duly attested by his signature, which indorsement shall be conclusive evidence of the payment of such tax.

§ 255. **Supplemental mortgages.** If subsequent to the recording of a mortgage on which all taxes, if any, accrued under this article have been paid, a supplemental instrument or mortgage is recorded for the purpose of correcting or perfecting any recorded mortgage, or pursuant to some provision or covenant therein, or an additional mortgage is recorded imposing the lien thereof upon property not originally covered by or not described in such recorded primary mortgage for the purpose of securing the principal indebtedness which is or under any contingency may be secured by such recorded primary mortgage, such additional instrument or mortgage shall not be subject to taxation under this article, unless it creates or secures a new or further indebtedness or obligation other than the principal indebtedness or obligation secured by or which under any contingency may be secured by the recorded primary mortgage, in which case, a tax is imposed as provided by section two hundred and fifty-three of this chapter on such new or further indebtedness or obligation, and shall be paid to the proper recording officer at the time such instrument or additional mortgage is recorded. If at the time of recording such instrument, or additional mortgage any exemption is claimed under this section, there shall be filed with the recording officer and preserved in his office a statement under oath of the facts on which such claim for exemption is based. The determination of the recording officer upon the question of exemption shall be reviewable by the tax commission.

§ 256. **Mortgages for indefinite amounts or for contract obligations.** If the principal indebtedness secured or which by any contingency may be secured by a mortgage is not determinable from the terms of the mortgage, or if a

mortgage is given to secure the performance by the mortgagor or any other person of a contract obligation other than the payment of a specific sum of money and the maximum amount secured or which by any contingency may be secured by the mortgage is not expressed therein, such mortgage shall be taxable under section two hundred and fifty-three of this chapter upon the value of the property covered by the mortgage, which shall be determined by the recording officer to whom such mortgage is presented for record, unless at the time of presenting such mortgage for record the owner thereof shall file with the recording officer a sworn statement of the maximum amount secured or which under any contingency may be secured by the mortgage. If such maximum amount is expressed in the mortgage or in a sworn statement filed as required by this section, such amount shall be the basis for assessing the tax imposed by this article. A statement filed by the owner of a mortgage pursuant to this section shall thereafter at all times be binding upon and conclusive against such owner, the holders of any bonds or obligations secured by such mortgage and all persons claiming through the mortgagee any interest in the mortgage or the mortgaged premises. If the maximum amount secured or which by any contingency may be secured by the mortgage is not expressed in the mortgage or in a sworn statement as authorized by this section, the recording officer at the time such mortgage is offered for record may require the mortgagor or mortgagee to furnish him with proofs as to such facts as he deems necessary for the purpose of computing the value of the property covered by the mortgage and such proofs shall include an affidavit of appraisal of the value of the property made by at least two competent, disinterested persons and shall be preserved in his office. His determination and copies of the proofs as to the basis for computing the tax on such mortgage shall be forwarded to and subject to review by the state tax commission. Such mortgage shall not be recorded until the statement is filed or the proofs are furnished as required by this article.

§ 257. **Payment of taxes.** The taxes imposed by this article shall be payable on the recording of each mortgage of real property subject to taxes thereunder. Such taxes shall be paid to the recording officer of any county in which the real property or any part thereof is situated. It shall be the duty of such recording officer to indorse upon each mortgage a receipt for the amount of the tax so paid. Any mortgage so indorsed may thereupon or thereafter be recorded by any recording officer and the receipt for such tax indorsed upon each mortgage shall be recorded therewith. The record of such receipt shall be conclusive proof that the amount of tax stated therein has been paid upon such mortgage.

§ 258. **Effect of nonpayment of taxes.** No mortgage of real property shall be recorded by any county clerk or register, unless there shall be paid the tax imposed by and as in this article provided. No mortgage of real property which is subject to the taxes imposed by this article shall be released, discharged or record or received in evidence in any action or proceeding, nor shall any assignment of or agreement extending any such mortgage be recorded unless the taxes imposed thereon by this article shall have been paid as provided in this article. No judgment or final order in any action or proceeding shall be made for the foreclosure or the enforcement of any mortgage which is subject to the tax imposed by this article or of any debt or obligation secured by any such mortgage, unless the taxes imposed by this article shall have been paid as provided in this article; and whenever it shall appear that any mortgage has been recorded or that any advance has been made on a prior advance mortgage or on a corporate trust mortgage without payment of the tax imposed by this article there shall be paid in addition to the amount of the tax a sum equal to one per

centum thereof for each month the tax remains unpaid, which sum shall be added to the tax and paid or collected therewith.

§ 259. **Trust mortgages.** In the case of mortgages made by corporations in trust to secure payment of bonds or obligations issued or to be issued thereafter, if the total amount of principal indebtedness which under any contingency may be advanced or accrue or which may become secured by any such mortgage which is subject to this article has not been advanced or accrued thereon or become secured thereby before such mortgage is recorded, it may contain at the end thereof a statement of the amount which at the time of the execution and delivery thereof has been advanced or accrued thereon, or which is then secured by such mortgage; thereupon the tax payable on the recording of the mortgage shall be computed on the basis of the amount so stated to have been so advanced or accrued thereon or which is stated to be secured thereby. Such statement shall thereafter at all times be binding upon and conclusive against the mortgagee, the holders of any bonds or obligations secured by such mortgage and all persons claiming through the mortgagee any interest in the mortgage or in the mortgaged premises. Whenever a further amount is to be advanced under the original mortgage, or shall accrue thereon or become secured thereby, the corporation making such mortgage shall pay the tax on such amount at or before the time when such amount is to be advanced, accrues or becomes secured and shall, at the time of paying such tax, file in the office of the recording officer where such mortgage has been or is first recorded and with the tax commission a statement, verified by the secretary, treasurer or other proper officer, of said corporation of the amount of principal indebtedness to be so advanced, accruing or becoming secured, and the certification of any bond or bonds by the trust mortgagee shall be deemed an advance under this article. Such additional tax shall be paid to the recording officer where such mortgage has been or is first recorded and a receipt therefor shall be endorsed upon the mortgage and payment therefor shall be noted in the margin of the record of such mortgage and if requested a duplicate receipt for such payment shall also be given to the party paying such tax and the note of such payment or additional payment or such receipt shall have the same force and effect as the record of receipt of the tax which under this article is payable at or before the recording of the mortgage. If such additional tax is not paid as required by this section, the trust mortgagee shall not certify any bond or other obligation issued on account thereof. The corporation making such mortgage or the owner of the property which secures the mortgage debt shall annually within thirty days after July first, and until it shall appear by such statement that the maximum amount of principal indebtedness secured by such mortgage has been advanced, has accrued or become secured and the tax thereon paid, file in the office of the tax commission and the recording officer where such mortgage has been or is first recorded a statement, verified by the secretary, treasurer or other proper officer of said corporation, showing:

1. The name of the mortgagor and the mortgagee;
2. The date of the mortgage and the county where first recorded;
3. The maximum amount of principal debt or obligation which under any contingency may be secured by such mortgage;
4. The amount advanced on such mortgage during the year, ending June thirtieth preceding, with the date and amount of each advancement;
5. In the case of a mortgage recorded prior to July first, nineteen hundred and six, the first annual statement filed under this section as hereby amended, shall state the total amount advanced prior to July first, nineteen hundred and six, and the date and the amount of each subsequent advancement to the end of the period covered by the statement.

A failure to file any statement required by this section within the specified time shall subject the corporation or other person required to file such statement to a penalty of not less than one dollar nor more than one hundred dollars for each one thousand dollars of the maximum amount of principal indebtedness which is or under any contingency may become secured by the mortgage, which penalty in the aggregate shall not exceed the sum of five thousand dollars recoverable by the attorney-general in an action brought in the name of the people of the state of New York.

§ 264. **Tax on prior advance mortgages.** Whenever any part of the amount of the principal indebtedness which is or under any contingency may be secured by a mortgage recorded prior to July first, nineteen hundred and six, is advanced after July first, nineteen hundred and six, the tax prescribed by section two hundred and fifty-three of this article is hereby imposed on the amount of principal indebtedness so advanced, which tax shall be payable at the same time and in the same manner as taxes imposed by section two hundred and fifty-nine of this article, and all the provisions of section two hundred and fifty-nine in relation to the time and manner of paying such tax, the filing of statements in relation to the time and amount of such advances, and penalties for failure to file the same shall apply to advances made under this section and the payment of a tax thereon, except that if the mortgagor is not a corporation, such statements shall be filed by the owner of the mortgage, who, for failure to do so, shall be subject to the penalties prescribed by such section. In case said mortgage was given to secure the payment of a series of bonds, the mortgagor may, at the time of paying such tax, present to the recording officer, the bonds representing the portion of the principal indebtedness secured by said mortgage upon which the tax is to be paid, and also file with said recording officer a statement verified by the mortgagor or an officer or duly authorized agent or attorney of the mortgagor specifying that said bonds, so presented, are the bonds representing that portion of the principal indebtedness secured by said mortgage upon which the tax is to be paid and that said bonds are secured by a mortgage recorded in said office stating the date of said mortgage and the liber and page of the record of the same. It shall be the duty of such recording officer to indorse upon each of said bonds, so presented to him, a statement signed by him to the effect that the tax imposed by this article on that portion of the principal indebtedness secured by said mortgage represented by said bonds has been paid, and said statement shall be conclusive proof of such payment. Notwithstanding the exception contained in section two hundred and fifty-four, the record owner of any mortgage recorded prior to July first, nineteen hundred and six, other than a corporate trust mortgage, may file in the office of the recording officer where such mortgage is first recorded a statement in form and substance as required by section two hundred and fifty-four of this article, except that it shall specify and state the amount of all advancements made thereon prior to said date, giving the date and amount of each advancement and the amount of such prior advancements remaining unpaid, and thereby elect that the same be taxed under this article; and any mortgagor or mortgagee under a corporate trust mortgage given to secure a series of bonds or the owner of any such bond or bonds secured thereby may file in the office of the recording officer where such mortgage is first recorded a statement in form and substance as required by section two hundred and fifty-four of this article, except that it shall specify the serial number, the date and amount of each bond and otherwise sufficiently describe the same to identify it as being secured by such mortgage, and thereby elect that such bond or bonds be taxed under this article, and such bond or bonds shall be taxed upon the whole amount thereof notwithstanding the provisions of section two hundred and sixty of this article.

A tax shall thereupon, in the case of mortgages other than corporate trust mortgages, be computed, levied and collected upon the amount of the principal debt or obligation represented by said unpaid prior advancements at the time of filing such statement, or, in the case of a corporate trust mortgage, upon the amount of the bond or bonds specified in the statement filed, at the rate prescribed by section two hundred and fifty-three of this article. Said bonds representing prior advancements under corporate trust mortgages and taxed as herein provided may be presented to the recording officer, whose duty it is to collect said tax, for indorsement and he shall thereupon indorse upon each of said bonds a statement, attested by his signature, of the payment of the tax as provided in this section in respect to bonds representing subsequent advancements, and the record owner of any other mortgage taxed upon prior advancements as herein provided may present said mortgage to the recording officer and thereupon such officer shall note upon the same the filing of the statement and the amount of the tax paid, attested by his signature. In all such cases the recording officer shall note on the margin of the record of such mortgage the filing of such statement and the amount of the tax paid, and, in case of bonds secured by corporate trust mortgages, the serial number of each such bond. The word "bond" and "bonds" as used in this section shall be deemed to embrace all notes or other evidences of indebtedness secured by mortgages taxable under this section. In case of any mortgage taxable under this section, the portion of the indebtedness secured thereby upon which the tax imposed by this section is paid, and such portion only, shall be exempt from taxation under the provisions of section two hundred and fifty-one of this article. Whenever the tax imposed by section two hundred and sixty-four of this article as said section existed prior to May thirteenth, nineteenth hundred and seven, has been paid with respect to any mortgage, no additional tax shall accrue on such mortgage under this section as hereby enacted and such mortgage and the debt or obligation secured thereby, shall continue to be entitled to the exemptions and immunities conferred by this article and all of the provisions of this article shall remain applicable to such mortgage. All taxes imposed by or which became due, payable or collectible on or before the thirtieth day of June, nineteen hundred and six, pursuant to chapter seven hundred and twenty-nine of the laws of nineteen hundred and five, and all taxes which under section two hundred and fifty-eight of this chapter became due and payable on the thirtieth day of July, nineteen hundred and six, and all other taxes, if any, which were imposed by chapter seven hundred and twenty-nine of the laws of nineteen hundred and five on any mortgage recorded prior to the first day of July, nineteen hundred and six, in respect to any period ending on or before the first day of July, nineteen hundred and six, shall be imposed, become due, be payable and collectible and shall be paid over and distributed in the same manner, and with the same force and effect as if this article had not been enacted; and for the purpose of collecting, paying over, distributing and enforcing any such taxes, chapter seven hundred and twenty-nine of the laws of nineteen hundred and five shall be deemed to be in force, and the lien for such taxes shall attach and such taxes shall be levied and collected as provided in chapter seven hundred and twenty-nine of the laws of nineteen hundred and five, anything herein contained to the contrary notwithstanding.

§ 265. **Tax a lien; exceptions.** The tax in this article imposed shall be deemed and is hereby declared to be a lien upon the mortgage upon which such tax is imposed and upon the debt or obligation secured thereby, except that upon mortgages recorded prior to July first, nineteen hundred and six, such lien shall extend only to that portion thereof represented by the amount advanced subsequently to such date and to the debt or obligation secured by such advance-

ment, and for the purpose of enforcing the payment of the tax in this article imposed, such mortgage and the debt thereby secured shall be deemed to be property within this state notwithstanding that such mortgage may be owned by or be in the possession of a person or corporation outside the state, and a copy thereof duly certified by the recording officer of any county in which such mortgage is recorded shall, for the purpose of enforcing the payment of such tax, be deemed to be, and shall have the same force and effect as the original mortgage and may be sold to satisfy such tax and upon a sale of the whole or any part thereof, shall carry with it and transfer to the purchaser all the rights, interests and obligations of the mortgagee therein named or his assignee or successor in interest in and to such mortgage and the debt secured thereby, or the part thereof to which such lien attaches, together with interest and costs.

§ 266. **Enforcement; procedure.** In case the tax imposed by this article is not paid as in this article provided, the tax commission may notify the attorney-general of such failure or refusal to pay and it shall then be the duty of the attorney-general to enforce the payment of such tax, and for that purpose he may maintain an action in the name of the people of the state of New York, in any court of competent jurisdiction, either to sell such mortgage; or, he may maintain an action against the mortgagee or his assignee or successor in interest personally; or, where by stipulations contained in such mortgage it is made the duty of the mortgagor to pay such tax, then against the mortgagor or his successor in interest personally; or, in the case of a trust mortgage against the trust mortgagee, personally; or, he may pursue either, any or all such remedies. All actions instituted by the attorney-general, as herein provided, shall, if the amount involved is fifty dollars or more, be brought in the county of Albany. Where, in any action, a recovery is had there shall be added to the amount of such tax and included in the judgment, interest at the rate of one per centum per month on the amount of such tax, to be computed from the date on which such tax became due and payable, except that in the case of taxable mortgages heretofore recorded and upon which the tax imposed by this article has not been paid, and where, in such case, no penalty is prescribed by law for the nonpayment of such tax, interest shall be added at the rate of six per centum per annum. In any action brought as herein provided, where the judgment provides for the sale of the mortgage, such judgment shall also prescribe the time, place and manner of such sale and of the notice thereof to be given, and, in the discretion of the court, may direct that such sale be made by or under the direction of the comptroller or the recording officer of the county in which such mortgage was first recorded, and all money recovered in such action shall be paid by the attorney-general to the proper recording officer in satisfaction of such tax, and all costs recovered therein shall be paid into the state treasury.

§ 267. **Idem.; where recovery is had against trust mortgagee.** In every case where recovery is had personally against a trust mortgagee as herein provided, and payment of the amount recovered has been made by such trust mortgagee, or where such trust mortgagee has voluntarily paid such tax, he shall be deemed to have and possess and to have become subrogated to all the rights and interests in and to the tax lien imposed by section two hundred and sixty-five hereof, and may enforce the repayment of any such sum so paid by him with interest at the rate of six per centum per annum and for that purpose may maintain an action in his own name in any court in the state having jurisdiction, against any person, association or corporation liable to pay such tax, or for the sale of such mortgage and the debt secured thereby to which such lien attaches.

§ 270. **Amount of tax.** There is hereby imposed and shall immediately accrue and be collected a tax, as herein provided, on all sales, or agreements to sell, or memoranda of sales of stock, and upon any and all deliveries or transfers

of shares or certificates of stock, in any domestic or foreign association, company or corporation, made after the first day of June, nineteen hundred and five, whether made upon or shown by the books of the association, company or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of sale or transfer, whether intermediate or final, and whether investing the holder with the beneficial interest in or legal title to said stock, or merely with the possession or use thereof for any purpose, or to secure the future payment of money, or the future transfer of any stock, on each hundred dollars of face value or fraction thereof, two cents, except in cases where the shares or certificates of stock are issued without designated monetary value, in which cases the tax shall be at the rate of two cents for each and every share of such stock. It shall be the duty of the person or persons making or effectuating the sale or transfer to procure, affix and cancel the stamps and pay the tax provided by this article. It is not intended by this act to impose a tax upon an agreement evidencing the deposit of stock certificates as collateral security for money loaned thereon, which stock certificates are not actually sold, nor upon such stock certificates so deposited, nor upon mere loans of stock or the return thereof. The payment of such tax shall be denoted by an adhesive stamp or stamps affixed as follows: In the case of a sale or transfer, where the evidence of the transaction is shown only by the books of the association, company or corporation, the stamp shall be placed upon such books, and it shall be the duty of the person making or effectuating such sale or transfer to procure and furnish to the association, company or corporation the requisite stamps, and of such association, company or corporation to affix and cancel the same. Where the transaction is effected by the delivery or transfer of a certificate, the stamp shall be placed upon the surrendered certificate and canceled; and in cases of an agreement to sell, or where the sale is effected by delivery of the certificate assigned in blank, there shall be made and delivered by the seller to the buyer, a bill or memorandum of such sale to which the stamp provided for by this article shall be affixed and canceled. Every such bill or memorandum of sale or agreement to sell shall show the date of the transaction which it evidences, the name of the seller, the stock to which it relates, and the number of shares thereof. All such bills or memoranda of sale shall bear a number upon the face thereof and no more than one such bill or memorandum of sale made by the seller on any given day shall bear the same number. The aforesaid identification number of the bill or memorandum of sale shall in all cases be entered and recorded in the book of account required to be kept by section two hundred and seventy-six of this chapter; and no further tax is hereby imposed upon the delivery of the certificate of stock, or upon the actual issue of a new certificate when the original certificate of stock is accompanied by the duly stamped memorandum of sale as herein provided.

§ 271. **Stamps, how prepared and sold.** Adhesive stamps for the purpose of paying the state tax provided for by this article shall be prepared by the state comptroller, in such form, and of such denominations and in such quantities as he may from time to time prescribe, and shall be sold by him to the person or persons desiring to purchase the same; he shall make provision for the sale of such stamps by such persons, in such places and at such times as in his judgment he may deem necessary.

He may from time to time and as often as he deems advisable provide for the issuance and exclusive use of stamps of a new design and forbid the use of stamps of any other design. In order to effect such a change and to discontinue the use of stamps of a former design he shall publish or cause to be published once in each week for each of three months immediately preceding the time for taking effect of such change, in one or more daily newspapers

published in each of the first and second class cities of the state, a notice to the effect that after a certain day, which shall be at least three months after the first publication of said notice, none other than the new issue or design of stamps shall be accepted or made use of in payment of the tax provided for by this article. After such date it shall be unlawful for any person to make use of any other than the new issue or design of stamps in payment of such tax. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

Any person lawfully in possession of unused stamps of an old or superseded issue or design may, within ninety days from the time when such change becomes effective as aforesaid, surrender the same to the comptroller together with a sworn statement setting forth the name and address of the owner and party surrendering said stamps, how, when and from whom the same were acquired and such other pertinent information as the comptroller may require; whereupon the comptroller shall redeem such unused and surrendered stamps by exchanging therefor stamps of a like denomination of the new issue or design. Failure or refusal of the comptroller to redeem the same by such an exchange may be enforced by mandamus.

§ 271-a. **Sale of stamps.** No person, firm, company, association or corporation other than a corporation organized under the banking law of this state or under the national bank act of the United States, or a duly authorized agent of the comptroller, shall sell or expose for sale, traffic in, trade, barter or exchange any stamp issued pursuant to this article, and purchased or acquired by him after the time when this section as hereby amended takes effect, without first obtaining from the comptroller his written consent to sell, traffic in, trade, barter or exchange such stamps, except that in connection with a sale of or agreement to sell stock a broker or agent of the principal making such sale or agreement to sell may supply and affix the stamp or stamps required by this article. No person shall sell or expose for sale any stamp so purchased or acquired for a sum less than the face value thereof without the written consent of the comptroller. Any person lawfully in possession of unused stamps may request the comptroller for his consent to sell or dispose of the same. He shall present to the comptroller, if so required, a sworn statement setting forth the name and address of the owner and the party desiring to sell or dispose of said stamps, how, when and from whom the same were acquired and the name and address of the person or persons to whom it is proposed to sell or dispose of the same, and such other pertinent and relevant information as the comptroller may require. Thereupon the comptroller may give his written consent to sell the same. Upon the failure or refusal of the comptroller to give such consent the same may be enforced by mandamus. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not less than five hundred nor more than one thousand dollars, or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court.

§ 272. **Penalty for failure to pay tax.** Any person or persons liable to pay the tax by this article imposed, and any one who acts in the matter as agent or broker for such person or persons, who shall make any sale, transfer or delivery of shares or certificates of stock, without paying the tax by this article imposed, and any person who shall in pursuance of any sale, transfer or agreement, deliver any stock or evidence of the sale or transfer of or agreement to sell any stock, or bill or memorandum thereof, or who shall transfer or cause the same to be transferred upon the books or records of the association, company or corporation, and any association, company or corporation whose stock is sold or transferred, which shall transfer or cause the same to be transferred upon its books, without

having the stamps provided for in this article affixed thereto, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned for not more than six months or by both such fine and imprisonment, in the discretion of the court.

§ 273. **Canceling stamps; penalty for failure.** In every case where an adhesive stamp shall be used to denote the payment of the tax provided by this article, the person using or affixing the same shall write or stamp thereupon the initials of his name and the date upon which the same shall be attached or used, and shall cut or perforate the stamp in a substantial manner, so that such stamp cannot be again used; and if any person makes use of an adhesive stamp to denote the payment of the tax imposed by this article, without so effectually canceling the same, such person shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than two hundred nor more than five hundred dollars or be imprisoned for not less than six months, or both, in the discretion of the court.

§ 274. **Contracts for dies; expenses how paid.** The state comptroller is hereby directed to make, enter into and execute for and in behalf of the state such contract or contracts for dies, plates and printing necessary for the manufacture of the stamps provided for by this article, and provide such stationery and clerk hire together with such books and blanks as in his discretion may be necessary for putting into operation the provisions of this article; he shall be the custodian of all stamps, dies, plates or other material or thing furnished by him and used in the manufacture of such state tax stamps, and all expenses incurred by him and under his direction in carrying out the provisions of this article shall be paid to him by the state treasurer from any moneys appropriated for such purpose.

§ 275. **Illegal use of stamps; penalty.** Any person who shall willfully remove or alter or knowingly permit to be removed or altered the canceling or defacing marks of any stamp provided for by this article with intent to use such stamp, or who shall knowingly or willfully buy, prepare for use, use, have in his possession or suffer to be used any washed, restored or counterfeit stamp, and any person who shall intentionally remove or cause to be removed or knowingly permit to be removed any stamp, affixed pursuant to the requirements of this article, shall be guilty of a misdemeanor and on conviction thereof shall be liable to a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned for not more than one year, or by both such fine and imprisonment, at the discretion of the court.

§ 275-a. **Registration; penalty for failure.** Every person, firm, company, association or corporation engaged in whole or in part in the making or negotiating of sales, agreements to sell, deliveries or transfers of shares or certificates of stock, or conducting or transacting a stock brokerage business, and every stock association, company or corporation which shall maintain a principal office or place of business within the state or which shall keep or cause to be kept within the state of New York a place for the sale, transfer or delivery of its stock, shall within ten days after the amendment to this section shall take effect if such a certificate shall not have been theretofore filed, or if at the time this act shall take effect, not engaged in such business or maintaining such principal office or place of business or such a place for the sale or transfer of its stock, within ten days after engaging in such business or after establishing such principal office or place of business or such a place for the sale or transfer of its stock, as the case may be, file in the office of the comptroller a certificate setting forth the name under which such business is, or is to be conducted or transacted, and the true or real full name or names of the person or persons conducting or transacting

the same, with the postoffice address or addresses of said person or persons, unless the party so certifying be a corporation, in which event it shall set forth its said principal office or place of business and when and where incorporated. Said certificate shall be executed and duly acknowledged by the person or persons so conducting or intending to conduct said business or by the president or secretary of the corporation as the case may be.

In the event of a change in the persons composing such firm, company or association or of the address of any such person, firm, company, association or corporation, or termination of such business or relationship, a like certificate setting forth the facts with respect to such change or termination shall within ten days thereafter be filed in the office of the comptroller.

Any such person, firm, company, association or corporation who shall fail to comply with the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than one hundred dollars nor more than five hundred dollars or be imprisoned for not more than six months or by both such fine and imprisonment, in the discretion of the court.

§ 276. Power of state comptroller. Every person, firm, company, association or corporation, engaged in whole or in part in the making or negotiating of sales, agreements to sell, deliveries or transfers of shares or certificates of stock, or conducting or transacting a brokerage business, shall keep or cause to be kept at some accessible place within the state of New York, a just and true book of account, in such form as may be prescribed by the comptroller, wherein shall be plainly and legibly recorded in separate columns, the date of making every sale, agreement to sell, delivery or transfer of shares or certificates of stock, the name of the stock and the number of shares thereof, the face value of the stock, the name of the seller or transferer, the name of the purchaser or transferee and the number and face value of the adhesive stamps affixed and the identifying number of the bill or memorandum of sale used as provided for by section two hundred and seventy of this chapter.

Every association, company or corporation shall keep or cause to be kept at some accessible place within the state of New York, a stock certificate book and a just and true book of account, transfer ledger or register, in such form as may be prescribed by the comptroller, wherein shall be plainly and legibly recorded in separate columns the date of making every transfer of stock, the name of the stock and the number of shares thereof, the serial number of each surrendered certificate, the name of the party surrendering such certificate, the serial number of the certificate issued in exchange therefor, the number of shares covered by said certificate, the name of the party to whom said certificate was issued and evidence of the payment of the tax provided for by section two hundred and seventy of this chapter, which evidence, however, shall be provided in one of the following manners and not otherwise, to wit:

(a) By attaching to the stock certificate surrendered for transfer, the stamps required for such transfer, or

(b) If the stamps are not attached to the certificate, but are attached to the bill or memorandum of sale effecting or evidencing the transfer of such certificate, by attaching to said certificate the said bill or memorandum of sale with stamps attached, or

(c) If the stamps covering the transfer are attached to a bill or memorandum effecting a transfer of one or more certificates or to one or more certificates included in said transfer, a notation must be made upon such certificates, bill or memorandum, as the case may be, clearly specifying and identifying the certificate or certificates of stock to the sale or transfer of which the said stamps apply, or

(d) If the bill or memorandum bearing such stamps is not attached to the surrendered certificate or certificates to which it applies, a notation must be

made upon such bill or memorandum stating the serial number or numbers of the certificates to which said bill or memorandum applies, as provided by section two hundred and seventy of this chapter. It shall also retain and keep all surrendered or canceled shares or certificates of its stock and all memoranda relating to the sale or transfer of any thereof. All such books of account, transfer, ledgers, registers and stock certificate books, shall be retained and kept as aforesaid for a period of at least two years subsequent to the date of the last entry made therein as herein required; and all such surrendered or canceled shares or certificates of stock and memoranda relating to the sale or transfer of stock, shall be retained and kept for a period of at least two years from the date of the delivery thereof. For the purpose of ascertaining whether the tax imposed by this article has been paid, all such books of account, transfer ledgers, registers, stock certificate books, surrendered or canceled shares or certificates of stock and memoranda relating to the sale or transfer thereof, shall at all times between the hours of ten o'clock in the forenoon and three o'clock in the afternoon, except Saturdays, Sundays and legal holidays, be open to examination by the comptroller or his duly authorized representative.

The comptroller may enforce his right to examine such books of account and bills or memoranda of sale or transfer; and such transfer ledger, register and stock certificate books and surrendered or canceled shares or certificates of stock by mandamus. If the comptroller ascertains that the tax provided for in this article has not been paid, he shall bring an action in his name as such comptroller, in any court of competent jurisdiction for the recovery of such tax and for any penalty incurred by any person under the provisions of this article.

Every person, firm, company, association or corporation who shall fail to keep such book of account or bills or memoranda of sale or transfer, or transfer ledger, register or stock certificate book or surrendered or canceled shares or certificates of stock as herein required, or who alters, cancels, obliterates or destroys any part of said records, or makes any false entry therein, or who shall refuse to permit the comptroller or any of his authorized representatives freely to examine any of said books, records or papers at any of the times herein provided, or who shall in any other respect violate any of the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall for each and every such offense pay a fine of not less than five hundred dollars nor more than five thousand dollars, or be imprisoned not less than three months nor more than two years, or both in the discretion of the court.

§ 277. **Civil penalties; how recovered.** Any person, firm, company, association or corporation who shall violate any of the provisions of section two hundred and seventy or section two hundred and seventy-two of this chapter shall in addition to the penalty herein provided forfeit to the people of the state a civil penalty of ten dollars for each and every share of stock so sold or transferred, or transferred or entered upon the books of the corporation, as the case may be, without the payment of the tax by this article imposed thereon. Any person who shall violate any of the other provisions of this article shall in addition to the penalties hereinbefore provided forfeit to the people of the state a civil penalty of five hundred dollars for each and every such violation.

The state comptroller shall bring an action in his name as such comptroller in any court of competent jurisdiction for the recovery of any civil penalty; and all moneys collected by him shall be paid into the state treasury. In an action against a corporation or its transfer agent to recover a penalty because of its transfer of stock upon the books or records of the corporation without requiring the payment of the tax by this article imposed, the failure of the corporation or its transfer agent, on the demand of the comptroller or his duly authorized representative, to produce the surrendered certificate or memoranda

of sale with the required stamps attached, shall constitute *prima facie* proof of the nonpayment of the tax imposed by section two hundred and seventy of this chapter.

§ 278. **Effect of failure to pay tax.** No transfer of stock made after June first, nineteen hundred and five, on which a tax is imposed by this article, and which tax is not paid at the time of such transfer, shall be made the basis of any action or legal proceedings, nor shall proof thereof be offered or received in evidence in any court in this state.

§ 279. **Application of taxes.** The taxes imposed under this article and the revenues thereof shall be paid by the state comptroller into the state treasury and be applicable to the general fund, and to the payment of all claims and demands which are a lawful charge thereon.

§ 280. **Refund of tax erroneously paid.** If any stamp or stamps shall have been erroneously affixed to any book, certificate of stock, or bill or memorandum of sale, the comptroller may, upon presentation of a claim for the amount of such stamp or stamps and upon the production of evidence satisfactory to him that such stamp or stamps was or were so erroneously affixed so as to cause loss to the person or persons making such claim, pay such amount, or such part thereof as he may allow, to such claimant out of any moneys appropriated for that purpose. Such claims shall be presented to the comptroller in writing, duly verified, and shall state the full name and address of the claimant, the date of such erroneous affixing, the face value of such stamp or stamps and shall describe the instrument to which the stamp or stamps were affixed and contain such evidence as may be available upon which the demand for such refund is based. Such claims shall be presented within ninety days after such erroneous affixing unless such affixing shall have taken place prior to the date on which this act shall take effect, in which case such claim shall be presented within ninety days after the date on which this act shall take effect. If the comptroller rejects a claim or any part thereof, the claimant may file a claim for the recovery of such sum as the comptroller shall have refused to allow, with the court of claims, which shall constitute a private claim against the state and shall be subject to all the provisions of law governing such claims, except that all claims so presented shall be filed with the court of claims within ninety days from the date on which such claim shall be rejected by the comptroller. For the purposes of this section, the comptroller's decision shall be deemed to have been made at the time of the depositing of a copy of such decision in the post-office inclosed in a duly post-paid wrapper and directed to the person making such claim at the address contained in the verified claim presented to the comptroller as hereinbefore provided.

§ 290. **Contents of petition.** Any person assessed upon any assessment-roll, claiming to be aggrieved by any assessment for property therein, may present to the supreme court a petition duly verified setting forth that the assessment is illegal, specifying the grounds of the alleged illegality, or if erroneous by reason of overvaluation, stating the extent of such overvaluation, or if unequal in that the assessment has been made at a higher proportionate valuation than the assessment of other property on the same roll by the same officers, specifying the instances in which such inequality exists, and the extent thereof, and stating that he is or will be injured thereby. Such petition must show that the application has been made in due time to the proper officers to correct such assessment. Two or more persons assessed upon the same roll who are affected in the same manner by the alleged illegality, error or inequality, may unite in the same petition.

§ 291. **Allowance of writ of certiorari.** Such petition must be presented to a justice of the supreme court or at a special term of the supreme court in the

judicial district in which the assessment complained of was made, within fifteen days after the completion and filing of the assessment-roll and the first posting or publication of the notice thereof as required by this chapter. Upon the presentation of such petition, the justice or court may allow a writ of certiorari to the officers making the assessment, to review such assessment, and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than ten days, and may be extended by the court or a justice thereof. Such writ shall be returnable to a special term of the supreme court of the judicial district in which the assessment complained of was made. The allowance of the writ shall not stay the proceedings of the assessors or other persons to whom it is directed or to whom the assessment is delivered, to be acted upon according to law.

§ 292. **Return to writ.** The officers making a return to such writ shall not be required to return the original assessment-roll or other original papers acted upon by them, but it shall be sufficient to return certified or sworn copies of such roll or papers, or of such portions thereof as may be called for by such writ. The return must concisely set forth such other facts as may be pertinent and material to show the value of the property assessed on the roll and the grounds for the valuation made by the assessing officers and the return must be verified.

§ 293. **Proceedings upon return.** If it shall appear upon the return to any such writ that the assessment complained of is illegal or erroneous or unequal for any of the reasons alleged in the petition, the court may order such assessment, if illegal, to be stricken from the roll, or if erroneous or unequal, it may order a reassessment of the property of the petitioner, or the correction of his assessment upon the roll, in whole or in part, in such manner as shall be in accordance with law, or as shall make it conform to the valuations and assessments of other property upon the same roll and secure equality of assessment. If upon the hearing it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or may appoint a referee to take such evidence as it may direct, and report the same to the court, with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. Upon such hearing the parties to the proceeding may mutually agree upon the number of pieces of property to be valued and the number of witnesses to be sworn on the subject of the value of such properties. But in case the parties fail to so agree, then upon application of either party the court shall determine the number of witnesses to be sworn and the number of pieces of property to be valued and shall limit the same to such number as the court shall deem reasonable.

§ 293-a. **Special proceedings concerning special franchise tax assessments.** When the writ is obtained to review a special franchise assessment made pursuant to the provisions of article two of this chapter, upon the filing of the return to the writ the court may take such evidence as it may deem necessary, or may appoint a referee to take evidence and to hear, try and determine all questions raised by the petition and the return thereto and to make his findings and determination therein, or, on motion of either party, the court may direct the place of trial changed to the county in which the special franchise under review is situated, and on an order duly entered granting such motion, the place of trial shall be deemed changed to the county designated and the papers and proceedings shall be certified to that county in the manner now provided by law in the case of a change in the place of trial of an action and all subsequent proceedings shall be had in the county so designated, as if the special proceedings had been originally instituted in that county, and the court may, upon the application of the attorney-general, upon cause shown, vacate any reference

heretofore made in any proceeding instituted to review a special franchise assessment, made pursuant to the provisions of article two of this chapter. The governor may, upon the application of the attorney-general, upon cause shown, appoint extraordinary terms of the supreme court to be held in any judicial district and designate a justice to preside thereat, to try such special franchise cases. Such extraordinary term shall have jurisdiction over all special franchise cases arising in any tax district within the judicial district for which the term is appointed, without regard to the county in which the term is being held, and either party to a proceeding to review a special franchise assessment may at any time bring the proceeding on for a hearing or trial before said extraordinary term by serving upon the other party sixteen days' notice thereof by mail or fourteen days' notice personally. A new assessment or correction of an assessment made by order of the court shall have the same force and effect as if it had been so made by the proper officers within the time prescribed by law for making such assessment.

§ 294. **Costs.** Costs shall not be allowed against the officers whose proceedings may be reviewed under any such writ unless it shall appear to the court that they acted with gross negligence or in bad faith or with malice in making the assessment complained of. If the writ shall be quashed or the assessment confirmed, or if the assessment complained of shall be reduced by an amount less than half the reduction claimed before the assessing officers, costs and disbursements shall be awarded against the petitioner. If the assessment shall be reduced by an amount greater than half the reduction claimed before the assessing officers, costs and disbursements shall be awarded against the tax district represented by the officers whose proceedings may be reviewed. The costs and disbursements shall not exceed those taxable in an action upon the trial of an issue of fact in the supreme court, except that if evidence shall be taken there shall be included in the taxable costs and disbursements the expense of furnishing to the court or to the referee a copy of the stenographer's minutes of the evidence taken.

§ 295. **Appeals.** An appeal may be taken by either party from an order, judgment or determination under this article as from an order, and it shall be heard and determined in like manner as appeals in the supreme court from orders. All issues and appeals in any proceeding under this article shall have preference over all other civil actions and proceedings in all courts.

§ 296. **Refund of tax paid upon illegal, erroneous or unequal assessment.** If in a final order in any such proceeding it has been or shall be ordered or adjudged or determined that the assessment complained of was illegal, erroneous or unequal, and correcting or directing correction thereof, and such order shall not be made in time to enable the assessors or other officers to make a new or corrected assessment for the use of the board of supervisors or for the use of the town, village, city, school or special district officers levying any tax upon such property, the assessment of which has been or shall be so ordered or adjudged or determined to be illegal, erroneous or unequal, then any tax collected or to be collected upon such illegal, erroneous or unequal assessment shall be refunded as follows:

1. When such tax upon such illegal, erroneous or unequal assessment shall have been levied by the board of supervisors, then at an annual session of the board of supervisors held after the order for such correction has been granted and entered there shall be audited and allowed to the petitioner or other person who shall have paid such tax, and included in the tax levy of the town, village, city or special district in which the property is situated, made next after the entry of such order, and paid to the petitioner, or other person paying the tax, the amount paid by him, in excess of what the tax would have been if the

assessment had been made as ordered, adjudged or determined by such order of the court, together with the interest thereon from the date of payment. In case the amount deducted from such assessment by such order exceeds ten thousand dollars, so much of the tax as shall be refunded by reason of such corrected assessment, other than the proportion or percentage thereof collected for such town, village, city or special district purposes, shall be levied upon the county at large and paid with interest, to the petitioner or other person paying the tax without further audit; and the board of supervisors shall audit and levy upon such town, village, city or special district, the proportion or percentage of such excess of tax collected for such town, village, city or special district purposes, which shall be collected and paid with interest to the petitioner, or other person paying the tax, without other or further audit.

2. When a tax, or any part thereof upon such illegal, erroneous or unequal assessment shall have been levied by the proper officers of any city or village, solely for the benefit and purposes of such city or village, then the common council or other auditing officer or officers of such city or village shall immediately after such correction audit and allow, to the petitioner or other person who shall have paid such tax, or the part thereof levied solely for the benefit and purposes of such city or village, and include in the tax levy of such city or village in which the property is situated made next after the entry of such order and cause to be paid to such petitioner or other person paying such tax, or the part thereof levied solely for the benefit and purposes of such city or village, the amount paid by him in excess of what the tax or the part thereof levied solely for the benefit and purposes of such city or village, would have been if the assessment had been as ordered, adjudged or determined by such order of the court, together with interest thereon from the date of the payment.

3. When a tax shall have been levied and collected in any school district of this state upon any property within such district on any assessment value thereof which shall have been ascertained from a town assessment-roll and which assessment upon such town roll shall have been ordered, adjudged or determined by order of the court as aforesaid to have been illegal, erroneous or unequal and which assessment though made by town assessors was adopted and was used in such district for the purpose of taxation for school purposes, then and in such case the trustees of such school district shall audit and allow and cause to be paid to the petitioner, or other person who shall have paid such tax, the amount paid by him in excess of what the school tax would have been in such case if the assessment had been made as ordered, adjudged or determined by such order of the court together with interest thereon from the date of the payment.

Application to the proper officer for the audit and allowance of such moneys must be made by the petitioner or other person paying such tax within three years after the entry of the final order ordering or adjudging or determining such assessment to have been illegal, erroneous or unequal; provided that the time of the pendency of any appeal in any such proceeding or from any such order shall not be deemed any part of such three years.

§ 297. When county court may apportion tax. When the premises of one person shall have been wrongfully assessed and taxed in with the premises of another, the person aggrieved thereby may, upon application to the county court of the county in which the property is situated, on petition duly verified, and on eight days' notice to the assessors of the town in which the premises are situated, and to the party whose premises are included in such wrongful assessment, have such assessment and tax apportioned by such county court. The county court shall take such evidence as may be necessary to determine the facts, and shall fix and specify the amount of the assessment and tax properly chargeable

to the petitioner's property, and to the other party chargeable therewith. The collector of the town, upon receiving a copy of the order of the county court, shall forthwith change the assessment-roll and tax to conform to such order, and shall receive the amount apportioned upon the premises of the petitioner in full for the tax upon such property.

§ 298. **Application to county court where taxpayer has removed from the county.** If it shall satisfactorily appear by affidavit to the county court of any county that a tax legally levied therein can not be collected because of the removal of the person taxed to any other county of the state, such court shall, upon application of the collector of any tax district or of the county treasurer of the county, grant an order, directed to the sheriff of the county where such person may be, to collect the same out of his personal property, with interest at the rate of eight per centum per annum from the date of said order. Such order shall be filed in the office of the clerk of the county in which it is granted, and a certified copy thereof delivered to the constable or sheriff of the county where the person liable for the tax may be, and such constable or sheriff, on receiving the same shall execute it, and make a like return, and be entitled to the same fees and subject to the same liabilities and penalties for neglect as upon execution from any court of record. The sheriff receiving such moneys shall pay the same to the county treasurer of the county where it was levied, to the credit of the town in which it was assessed.

§ 299. **Supplementary proceedings to collect tax.** If a tax exceeding ten dollars in amount levied against a person or corporation is returned by the proper collector uncollected for want of personal property out of which to collect the same, the supervisor of the town or ward, or the county treasurer or the president of the village, if it is a village tax, may, within one year thereafter, apply to the court for the institution of proceedings supplementary to execution, as upon a judgment docketed in such county, for the purpose of collecting such tax and fees, with interest thereon from the fifteenth day of February after the levy thereof. Such proceedings may be taken against a corporation, and the same proceedings may thereupon be had in all respects for the collection of such tax as for the collection of a judgment by proceedings supplementary to execution thereon against a natural person, and the same costs and disbursements may be allowed against the person or corporation examined as in such supplementary proceedings but none shall be allowed in his or its favor. The tax, if collected in such proceeding, shall be paid to the county treasurer or to the supervisor of the town, and if a village tax, to the treasurer of the village. The costs and disbursements collected shall belong to the party instituting the proceedings, and shall be applied to the payment of the expense of such proceeding. The president of a village and a county treasurer shall have no compensation for any such proceeding. A supervisor shall have no other compensation except his per diem pay for time necessarily spent in the proceeding.

§ 300. **No fine or imprisonment for nonpayment of tax.** Neglect or refusal to pay any tax shall not be punishable as a contempt or as misconduct; and no fine shall be imposed for such nonpayment, nor shall any person be imprisoned or otherwise punishable on account of nonpayment of any tax, or of any fine imposed for refusal or neglect to pay such tax. This section shall not apply to proceedings supplementary to execution upon judgments recovered for taxes.

§ 301. **Dismissal of suits or proceedings.** Where the person or corporation against whom a proceeding or suit is brought to collect a personal tax in arrears is unable for want of property to pay the tax in whole or in part, or where for other reasons upon the facts as they existed either before or after the assessment was made it appears to the court just that said tax should not be paid, the court may dismiss such suit or proceeding absolutely, without costs, or on

payment of such part of the tax as may be just or on payment of costs, and may direct the cancellation or reduction of the tax.

§ 302. **Cancellation of personal tax where it is void for want of jurisdiction.** If a personal tax, levied against a person or corporation, or the property of a person or corporation, is void for want of jurisdiction of such person or corporation and has been returned by the proper collector uncollectible for want of personal property out of which to collect the same, the person or corporation against whom or against whose property the said tax was levied may then apply to the supreme or county court in the county in which is located the tax district where said tax was levied, for an order cancelling the said tax, and upon notice to the president of the village, county treasurer, supervisor of the town or, in the case of a city, upon notice to its attorney or to the corporation counsel, and upon satisfactory proof by affidavit, the court shall make an order directing the cancellation of said tax from the assessment roll by the county treasurer, comptroller, or other officer in whose custody and control the said roll may be. [L. 1918, c. 530.]

§ 303. **Power of county court when collector fails to pay over.** If any collector shall neglect or refuse to pay over the moneys collected by him, to any of the persons to whom he is required to pay the same by his warrant, or to account for the same as unpaid, the county court, on proof of such fact by affidavit, on application of the county treasurer, shall make an order directed to the sheriff of the county, commanding him to levy such sum as shall remain unpaid by such collector out of his property, personal and real, and pay the same to the county treasurer, within sixty days from the date of such order. The sheriff shall cause the same to be executed, and pay to the county treasurer the money levied by virtue thereof, deducting for his fees the same compensation that the collector would have been entitled to retain. If the whole sum due from the collector, or if a part only, or if no part thereof, shall be collected, the sheriff shall state the fact in his return, which shall be made as in the case of an execution, and the county treasurer shall give notice to the supervisor of the town, city or division thereof, of any amount which may remain due from such collector. If the sheriff shall neglect to execute the order, or to pay over the money collected thereon, within the time limited thereby, he shall be liable therefor as in case of an execution, and the county treasurer shall immediately prosecute such sheriff and his sureties for the sum due from him, which sum when collected shall be paid into the county treasury.

§ 304. **Payment of moneys collected.** The county treasurer shall pay over the moneys received from the sheriff upon such order in the manner directed by the warrant to the collector. If the whole amount of moneys due from the collector shall not be collected on such warrant, or otherwise, the county treasurer shall first retain the amount which ought to have been paid to him before making any payment to the town officers.

§ 305. **Collection of deficiency from collector's bondsmen.** If it appears that the whole or any part of the moneys due from the collector has not been thus collected, the county treasurer shall forthwith give notice to the supervisor of the town or ward of the amount still due from such collector. The supervisor shall forthwith cause the undertaking of the collector to be prosecuted, and shall be entitled to recover thereon the sum due from the collector with costs of the action. The moneys received shall be applied and paid by the supervisor in the same manner as they should have been by the collector.

§ 306. **Attorney-general to bring action for sequestration.** It shall be the duty of the attorney-general, on being informed by the comptroller, tax commission or by the county treasurer of any county that any incorporated company refuses or neglects to pay the taxes imposed upon it, pursuant to articles one.

and two of this chapter, to bring an action in the supreme court for the sequestration of the property of such corporation and the court may so sequester the property of such corporation for the purpose of satisfying taxes in arrears, with the cost of prosecution, and may, also, in its discretion, enjoin such corporation and further proceedings under its charter until such tax and the costs incurred in the action shall be paid. The attorney-general may recover such tax with costs from such delinquent corporation by action in any court of record.

§ 307. **Settlement of conflicting claims to surplus of tax sale.** Whenever a surplus from the sale of any property for unpaid taxes in the hands of the supervisor of a town shall be claimed by any person other than the person for whose tax such property was sold, and such claim shall not be settled by a stipulation filed with the supervisor, as provided by this chapter, such claimant may maintain an action against such person, or such person may maintain an action against such claimant, to recover such money and, for the purposes of such action, the defendant shall be deemed to be in possession of the surplus in the hands of the supervisor. Upon the production of a certified copy of a final judgment, rendered in favor of either party, the supervisor shall pay such surplus to the party recovering the same. No other cause of action shall be joined, nor any set-off or counterclaim be allowed in an action brought pursuant to this section, and if an execution issue on a judgment rendered in such action, it shall direct that the costs only of such judgment be levied thereon.

§ 330. **Definitions.** The word "investments," as used in this article, shall include:

Any bond, note, debt, debenture, equipment bond or note, or written or printed obligation, forming part of a series of similar bonds, notes, debts, debentures, written or printed obligations, which by their terms are payable one year or more from their date of issue and which are either secured by a mortgage, pledge, deposit, or deed of trust, of real or personal property, or both, or which are not secured at all; excepting bonds of this state or any civil division thereof and such bonds, notes, debts, debentures, written or printed obligations, which are secured by a deed of trust or mortgage recorded in the state of New York on real property situated wholly within the state of New York; excepting also such bonds, notes, debts, debentures, written or printed obligations held as collateral to secure the payment of investments taxable under this article or of bonds taxable under article eleven of this chapter; and excepting also such proportion of a bond, note, debt, debenture or written or printed obligation, secured by deed of trust or mortgage recorded in the state of New York of property or properties situated partly within and partly without the state of New York as the value of that part of the mortgaged property or properties situated within the state of New York shall bear to the value of the entire mortgaged property or properties.

§ 331. **Payment of tax on investments.** After this article takes effect, any person may take or send to the office of the comptroller of this state any investment, and may pay to the state a tax at the rate of twenty cents per year on each one hundred dollars or fraction thereof of the face value of such investment for one or more years not exceeding five, under such regulations as the comptroller may prescribe, and the comptroller shall thereupon affix stamps hereinafter provided for, to such investment, which stamps shall be duly signed by the comptroller or his duly authorized representative and dated as of the date of the payment of such tax. The comptroller shall keep a record of such investment together with the name and address of the person presenting the same and the date of payment of the tax.

All such investments shall thereafter be exempt from all taxation in the state or any of the municipalities or local divisions of the state except as pro-

vided in sections twenty-four to twenty-four-g, both inclusive, one hundred and eighty-seven, one hundred and eighty-eight and one hundred and eighty-nine of this chapter, and in articles ten and twelve of this chapter, for the period of years from the payment of such tax for which such tax shall have been paid and such stamps affixed.

§ 332. **Stamps; how prepared and used.** Adhesive stamps for the purpose of indicating the payment of the tax provided for by this article shall be prepared by the comptroller, in such form, and of such denominations and in such quantities as he may from time to time prescribe. Upon the payment of the tax provided by this article upon any investment the comptroller shall affix stamps of the proper denominations, equal in face value to the amount of tax paid, to the investment, and shall cancel the same by the seal of his office or by such other canceling device as he may prescribe.

§ 333. **No exemption unless stamps are affixed and canceled.** The payment of the tax upon any investment, as provided in this article, shall not exempt such investment from taxation, as provided in section three hundred and thirty-one, unless stamps to the proper amount are affixed and canceled, as provided in the preceding section.

§ 334. **Contract for dies; New York city office; expenses, how paid.** The state comptroller is hereby directed to make, enter into and execute for and in behalf of the state such contract or contracts for dies, plates and printing necessary for the manufacture of the stamps provided for by this article, and provide such stationery and clerk hire, together with such books and blanks as in his discretion may be necessary for putting into operation the provisions of this article; he shall be the custodian of all stamps, dies, plates or other material or thing furnished by him and used in the manufacture of such state tax stamps. In addition to the receipt of taxes payable as provided in this article at his office in the city of Albany, the comptroller shall maintain an office for the receipt of such taxes in the city of New York. He shall appoint, and may at pleasure remove, such assistants, clerks and other persons as may be necessary to carry out the provisions of this article and shall fix and determine their salaries. All expenses incurred by him and under his direction in carrying out the provisions of this article shall be paid to him by the state treasurer from any moneys appropriated for such purpose.

§ 335. **Illegal use of stamps; penalty.** Any person who shall wilfully remove or cause to be removed, alter or cause to be altered the canceling or defacing marks of any adhesive stamp provided for by this article with intent to use the same, or to cause the use of the same after it shall have been used, or shall knowingly or wilfully sell or buy any washed or restored stamp, or offer the same for sale, or give or expose the same to any person for use, or knowingly use the same or prepare the same with intent for the further use thereof, or shall wilfully use any counterfeit stamp or any forged stamp with intent to defraud the state of New York, shall be guilty of a misdemeanor and on conviction thereof shall be liable to a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned for not more than six months, or by both such fine and imprisonment at the discretion of the court.

§ 336. **No deduction of debts against taxable investment.** The owner of any investment, on which the tax provided for in this article has not been paid, shall be assessed upon such investment in the taxing district in which he resides, upon the fair market value of such investment and no deduction for the just debts owing by him shall be allowed against the assessed value of such investment, as provided in section six of this chapter or elsewhere in this chapter or in any other law of this state except that the deduction from the taxable property permitted by section six of this chapter shall be allowed to any person.

in respect of any investment which for the purpose of his business, as herein-after described and not for or as an investment, shall be temporarily owned and held for sale by such person then actually engaged in the bona fide purchase and sale of such investments as a business, and who then shall have and maintain an office or place of business in this state for the carrying on of the actual bona fide business of purchasing and selling such investments as distinguished from the purchase thereof for investment, but such deduction shall not be allowed in respect of investments owned and held for a longer period than eight months.

§ 337. **Application of taxes.** The taxes imposed under this article and the revenues thereof shall be paid by the state comptroller into the state treasury and be applicable to the general fund, and to the payment of all claims and demands which are a lawful charge thereon.

§ 338. **Exemption where tax has been paid on secured debts before May first, nineteen hundred and fifteen.** If a tax shall have been paid upon a secured debt pursuant to former article fifteen of the tax law prior to May first, nineteen hundred and fifteen, or prior to April first, nineteen hundred and seventeen, under article eleven of this chapter, such debt shall be exempt from taxation hereunder and from all taxation in the state or any of the municipalities or local divisions of the state, except as provided in sections twenty-four to twenty-four-g, both inclusive, one hundred and eighty-seven, one hundred and eighty-eight and one hundred and eighty-nine of this chapter and in articles ten and twelve of this chapter.

§ 339. **Exemption where tax has been paid on secured debts between May first, nineteen hundred and fifteen and December thirty-first, nineteen hundred and sixteen.** If a tax shall have been paid upon a secured debt pursuant to former article fifteen of the tax law, between May first, nineteen hundred and fifteen, and December thirty-first, nineteen hundred and sixteen, such secured debt shall be exempt from taxation hereunder, and from all taxation in the state or any of the municipalities or local divisions of the state, for the period of five years from the date of the payment of such tax, except as provided in sections twenty-four to twenty-four-g, both inclusive, one hundred and eighty-seven, one hundred and eighty-eight and one hundred and eighty-nine, of this chapter, and in articles ten and twelve of this chapter.

§ 340. **Apportionment of value of investment secured by mortgage of property situated partly within and partly without the state.** If a bond, note, debt, debenture, equipment bond or note, or written or printed obligation be secured by mortgage or deed of trust recorded in the state of New York of property or properties, situated partly within and partly without the state of New York, and a proportion of such bond, note, debt, debenture, equipment bond or note, written or printed obligation constitutes an investment as provided by section three hundred and thirty, the holder of such investment may apply to the comptroller for a determination of the proportion of such bond, note, debt, debenture, equipment bond or note, or written or printed obligation which is taxable as an investment under this article, and the comptroller shall, as soon as practicable thereafter, furnish to such applicant a determination upon which the tax imposed by this article on such investment shall be based, which determination shall be in the manner provided for in section two hundred and sixty of this chapter made in respect of the apportionment of the value of such mortgaged property in connection with the recording within the state of New York of the mortgage or other indenture by which such investment may be secured; or may waive such determination and pay the tax upon the full amount of such investment, and thereafter the whole amount of such investment shall be

exempt from taxation under the provisions of section three hundred and thirty-one of this chapter.

Session Law, 1918, c. 240.

Section 1. That during the continuance of the war any corporation organized under the laws of this state may co-operate with other corporations and with natural persons in the creation and maintenance of instrumentalities conducive to the winning of the war, and its directors or trustees may appropriate and expend for such purposes such sum or sums as they may deem expedient and as, in their judgment, will contribute to the protection of the corporate interests, provided that whenever the expenditures for such purposes in any calendar year shall in the aggregate amount to one per centum on the capital stock outstanding, then, before any further expenditure is made during such year for such purposes by the corporation, ten days' notice shall be given to the stockholders in such manner as the directors or trustees may direct of the intention to make such further expenditure, specifying the amount thereof, and if written objection be made by stockholders holding twenty-five per centum or more of the stock of the corporation, such further expenditure shall not be made until it shall have been authorized at a stockholders' meeting.

## CONSTITUTIONS AND FEDERAL STATUTES

### NEW YORK CONSTITUTION

#### ARTICLE III.

§ 6. **Compensation of members of legislature.** Each member of the legislature shall receive for his services an annual salary of one thousand five hundred dollars. The members of either house shall also receive the sum of one dollar for every ten miles they shall travel in going to and returning from their place of meeting, once in each session on the most usual route. Senators, when the Senate alone is convened in extraordinary session, or when serving as members of the Court for the Trial of Impeachments, and such members of the Assembly, not exceeding nine in number, as shall be appointed managers of an impeachment, shall receive an additional allowance of ten dollars a day.

§ 15. **Manner of passing bills.** No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the Governor, or the acting Governor, shall have certified to the necessity of its immediate passage, under his hand and the seal of the State; nor shall any bill be passed or become a law, except by the assent of the majority of the members elected to each branch of the Legislature; and upon the last reading of a bill, no amendment thereof shall be allowed, and the question upon its final passage shall be taken immediately thereafter, and the yeas and nays entered on the journal.

§ 16. **Private or local bills limited to one subject to be expressed in title.** No private or local bill, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title.

§ 18. **Cases in which private or local bills shall not be passed; general laws to provide for enumerated cases; restrictions on laws governing street railroads.** The Legislature shall not pass a private or local bill in any of the following cases:

Changing the names of persons.

Laying out, opening, altering, working or discontinuing roads, highways or alleys, or for draining swamps or other low lands.

Locating or changing county seats.

Providing for changes of venue in civil or criminal cases.

Incorporating villages.

Providing for election of members of boards of supervisors.

Selecting, drawing, summoning or impaneling grand or petit jurors.

Regulating the rate of interest on money.

The opening and conducting of elections or designating places of voting.

Creating, increasing or decreasing fees, percentages or allowances of public officers, during the term for which said officers are elected or appointed.

Granting to any corporation, association or individual the right to lay down railroad tracks.

Granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever.

Granting to any person, association, firm or corporation, an exemption from taxation on real or personal property.

Providing for building bridges, and chartering companies for such purposes, except on the Hudson river below Waterford, and on the East river, or over the waters forming a part of the boundaries of the State.

The Legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which in its judgment, may be provided for by general laws. But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the Appellate Division of the Supreme Court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners.

§ 20. **Appropriation of public property for local or private purposes; two-thirds vote required.** The assent of two-thirds of the members elected to each branch of the Legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes.

§ 1. **Corporations, how formed.** Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.

§ 2. **Dues from corporations.** Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law.

§ 3. **Corporation; term defined; actions by and against corporations.** The term corporations as used in this article shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons.

§ 2. **Election or appointment of officers when not provided for by constitution.** All county officers whose election or appointment is not provided for by this Constitution, shall be elected by the electors of the respective counties or appointed by the boards of supervisors, or other county authorities, as the Legislature shall direct. All city, town and village officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of

such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the Legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this Constitution, and all officers, whose offices may hereafter be created by law, shall be elected by the people, or appointed as the Legislature may direct.

## UNITED STATES CONSTITUTION

### ARTICLE I.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

### ARTICLE IV.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

## FEDERAL STATUTES AGAINST MONOPOLIES

§ 1. Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (Act of July 2, 1890, c. 647; 26 Stat. L. 209.)

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (*Id.*)

§ 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (*Id.*)

§ 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. (*Id.*)

§ 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof. (*Id.*)

§ 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law. (*Id.*)

§ 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee. (*Id.*)

§ 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. (*Id.*)

§ 73. That every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or here-

after shall be engaged in the importation of goods or of any commodity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months. (Act of Feb. 12, 1913, c. 40, 402; 37 Stat. L. 667.)

§ 74. That the several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of section seventy-three of this Act; and it shall be the duty of the several district attorneys of the United States in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petitions setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. Where the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. (Act of Aug. 27, 1894, c. 349; 28 Stat. L. 570.)

§ 75. That whenever it shall appear to the court before which any proceeding under the seventy-fourth section of this act may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof. (*Id.*)

§ 76. That any property owned under any contract or by any combination, or pursuant to any conspiracy, and being the subject thereof, mentioned in section seventy-three of this Act, imported into and being within the United States or being in the course of transportation from one State to another, or to or from a Territory or the District of Columbia, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law. (Act of Feb. 12, 1913, c. 40; 37 Stat. L. 667.)

§ 77. That any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of the suit, including a reasonable attorney's fee. (Act of Aug. 27, 1894, c. 349; 28 Stat. L. 570.)

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## FORM NO. 1.

*Acknowledgment by Corporation.*

(§ 309, Real Prop. L.)

State of ..... }  
 County of ..... } ss.:

On the ..... day of ....., in the year ....., before me personally came ....., to me known, who, being by me duly sworn, did depose and say that he resides in .....; that he is the ..... (president, or other officer) of the ..... (name of corporation), the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

(Signature and office of officer taking acknowledgment.)

[If such corporation have no seal, that fact must be stated in place of the statements required respecting the seal.]

## FORM NO. 2.

*Beginning of Affidavit.*

State of ..... }  
 County of ..... } ss.:

....., being duly sworn, deposes and says:  
 (or, if two or more affiants),  
 ..... and ....., being severally and duly sworn,  
 each for himself [or, herself], says:

## FORM NO. 3.

*Ending of Affidavit, or Jurat.*

Sworn to before me this ..... day of ....., 191..

(Signature and official character of official before whom oath is taken.)

## FORM NO. 4.

*Affidavit of Personal Service on Domestic Corporation.*

..... COURT, ..... COUNTY.

<i>Title of Action.</i>
-------------------------

STATE OF NEW YORK,	}	ss.:
County of .....		

....., being duly sworn, says that he is a clerk in the office of  
 ....., the attorneys for the plaintiff, and that on the ..... day of  
 ....., 191., at ....., deponent being then more than 21 years of  
 age, he served the annexed summons and complaint, personally, on the above-  
 named ..... Company, the defendant herein, by delivering copies  
 thereof to ....., personally, and leaving the same with him, and that  
 he knew said ..... to be at that time the ..... (*president*)  
 of the said ..... Company, and knew the corporation so served to be  
 the company mentioned and described in the said summons as the defendant in  
 this action.

Sworn to before me this .....  
 day of ....., 191...

## FORM NO. 5.

*Affidavit of Personal Service on Foreign Corporation.*

..... COURT, ..... COUNTY.

<i>Title of Action.</i>
-------------------------

STATE OF NEW YORK,	}	ss.:
County of .....		

....., being duly sworn, says that he is a clerk in the office of  
 ....., the attorneys for the plaintiffs, and that on the ..... day of  
 ....., 191., at ....., deponent being then more than 21 years  
 of age, he served the annexed summons and complaint, personally, on the  
 above-named ..... Company, the defendant herein, by delivering copies  
 thereof to ....., personally, and leaving the same with him, and that  
 he knew said ..... to be at that time the ..... (*treasurer*)  
 of the said ..... Company, and knew the corporation so served to be the  
 company mentioned and described in the said summons as the defendant in this  
 action.

Sworn to before me this .....  
 day of ....., 191...

## FORM NO. 6.

*Affidavit of Service by Mailing Pursuant to Order for Service by Publication and Mailing.*

SUPREME COURT, ..... COUNTY.

....., Plaintiff, }  
                     *against* }  
 ....., Defendant. }

State of ..... }  
 County of ..... } ss.:

....., being duly sworn, says:

I am plaintiff's attorney and over twenty-one years of age. On the .... day of ....., 191.., at ..... o'clock in the .....noon, I deposited in the General Office of the United States Post Office for the City of New York, which backs on the City Hall Park in the Borough of Manhattan, two sets of the summons and complaint and order for service thereof dated ....., ....., herein, each set contained in a securely closed post-paid wrapper and directed to ....., and one set to ....., and the other set to .....

Sworn to before me this ..... day of April, 191..

## FORM NO. 7.

*Affidavit of Service Outside State Personally.*

(Title and caption as in Form No. 6, continuing:—)

State of ..... }  
 County of ..... } ss.:

being duly sworn, says:

I am and at the time of service herein mentioned was an attorney and counsellor at law duly qualified to practice in the State of ....., where said service was made. I am over 21 years of age and reside at ..... On the ..... day of ....., 1918, at ..... o'clock in the .....noon, I served the summons and complaint herein, together with a copy of the order of the Court herein dated the ..... day of ....., 191.., and of the statutory notice signed by plaintiff's attorney annexed to said summons, upon ....., the defendant herein, by delivering a true copy of said summons with notice, complaint and order to said defendant, personally, at No. ....., State of ....., and leaving the same with him. I knew said ..... so served to be the defendant herein, and the person named and described in said summons and complaint as said defendant.

Sworn to before me this ..... day of ....., 191..

## FORM NO. 8.

*Verification by Domestic Corporation.*

..... (name of officer of corporation), being duly sworn, says: That he is the ..... (e. g., president, treasurer, etc.) of ..... (name of corporation), the corporation which executed the foregoing instrument; that he has read the foregoing ..... (e. g., petition, complaint, instrument, etc.) and knows the contents thereof; and that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and that as to these matters deponent believes it to be true.

.....  
(Signature of person signing instrument.)

Sworn to before me this ..... day of ....., 191..

.....  
(Signature and office of official before whom oath is taken.)

## FORM NO. 9.

*Verification by Resident Attorney When Neither the Corporate Client Nor an Officer Thereof is in the County Where the Attorney Resides.*

STATE OF NEW YORK, }  
County of ..... } ss.:

....., being duly sworn, says: That he is one of the attorneys for the plaintiff in the above-entitled action, and resides at ....., State of New York. That he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Deponent further says that the grounds of his belief as to all matters therein not stated upon his knowledge, are as follows: (*Correspondence with the plaintiff and books and documents in his possession together with letters, likewise in his possession from the defendant to the plaintiff, wherein the defendant acknowledges his liability and statements made by the employees of plaintiff to deponent.*)

Deponent further says that the reason why this verification is not made by the said plaintiff is that the said plaintiff is a domestic corporation, having its principal place of business located at ....., and that the plaintiff and each of the officers of the plaintiff is not within the said County of ....., the county where deponent resides.

.....  
Sworn to before me this .....  
day of ....., 191...

.....

## FORM NO. 10.

*Verification by Resident Attorney When Neither Corporate Client Nor Officer Thereof is in County Where the Attorney Resides and Capable of Making the affidavit.*

STATE OF NEW YORK, }  
County of ..... } ss.:

....., being duly sworn, says: That he is one of the attorneys for the plaintiff in the above-entitled action and resides at ....., State of New York. That he has read the foregoing complaint and knows the contents thereof; and that the same is true to deponent's knowledge except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Deponent further says that the grounds of his belief as to all matters therein not stated upon his knowledge, are as follows: (*Correspondence between deponent and the plaintiff; books and documents of the plaintiff, letters from the defendant to the plaintiff, wherein the defendant acknowledges his liability, now in deponent's possession, and statements made by the employees of plaintiff to deponent.*)

Deponent further says that the reason why this verification is not made by the said plaintiff is that the said plaintiff is a domestic corporation, having its principal place of business located at ....., and that the plaintiff and each of the officers of the plaintiff is not within the said county of ....., the county where deponent resides.

Sworn to before me this .....  
day of ....., 191...

## FORM NO. 11.

*Verification by Non-resident Attorney When Officer Not in County Where Attorney Has Office and Capable of Making Affidavit.*

STATE OF NEW YORK, }  
County of ..... } ss.:

....., being duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the above-entitled action, and resides at ....., State of ....., and has his office at ....., State of New York; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Deponent further says that the grounds of his belief as to all matters therein not stated upon his own knowledge are as follows: (*Correspondence with the plaintiff; books and documents of the plaintiff; letters from the defendant to the plaintiff wherein the defendant acknowledges his liability, now in deponent's possession, and statements made by the employees of plaintiff to deponent.*)

Deponent further says that the reason why this verification is not made by the said plaintiff is that the said plaintiff is a domestic corporation having its principal place of business located at ....., State of New York, and that the plaintiff, and each of the officers of the plaintiff, is not within the County of ....., the county where deponent has his office.

Sworn to before me this .....  
day of ....., 191...

## FORM NO. 12.

*Verification by Officer of Foreign Corporation.*

STATE OF NEW YORK, }  
County of ..... } ss..

....., being duly sworn, deposes and says:

That he is the Secretary of the ..... Company, the defendant in the above-entitled action, that he read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by the party and is made by him is that the defendant is a foreign corporation; and the sources of deponent's information and the grounds of his belief as to all matters not therein stated upon his knowledge are as follows: (*statements and reports of other officers and employees of the defendant company, and documents and correspondence in the possession of deponent.*)

Sworn to before me this .....  
day of ....., 191...

## FORM NO. 13.

*Verification by Attorney for Foreign Corporation.*

STATE OF NEW YORK, }  
County of ..... } ss..

....., being duly sworn, says:

That he is one of the attorneys for the ..... Company, the plaintiff above-named, and that he has read the foregoing complaint and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true; and the reason that this verification is not made by the plaintiff and is made by deponent, is that the plaintiff is a foreign corporation. Deponent further says, that the sources of his information and the grounds of his belief as to all matters therein not stated upon his knowledge

are as follows: (*Letters received from plaintiff and defendant and personal interviews had with officers of the plaintiff company.*)

Sworn to before me this .....

day of ....., 191...

.....

#### FORM NO. 14.

*Summons with Notice When Service Had by Publication, etc.*

(*Caption and Title as in Form No. 6, continuing:—*)

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, Judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, ....., 191..

.....

Plaintiff's Attorney, Office & P. O. Address, .....

To ....., defendant: .

The foregoing summons is served upon you by publication (*or*, without the State of New York) pursuant to an order of the Hon. ...., Justice of the Supreme Court, County of ....., dated the ..... day of ....., 191., and filed with the complaint in the office of the Clerk of the County of ....., at the County Court House, .....

.....

Plaintiff's Attorney.

Office and P. O. Address, *etc.*

#### FORM NO. 15.

*Order for Service by Publication, Mailing or Outside the State.*

(*Title and caption as in Form No. 6, continuing:—*)

UPON the summons filed herein ....., 191., the complaint herein duly verified ....., 191., now presented to me, showing a sufficient cause of action against the defendant, and upon the affidavit of ....., verified herein ....., 191., and the affidavit of ....., verified herein ....., 191., by which plaintiff has made proof to my satisfaction that defendant is not a resident of this State, and is of full age, (*or, that defendant is foreign corporation, etc.*) and that plaintiff has been and will be unable with due diligence to make personal service of the summons on defendant within this State,

NOW ON MOTION of ....., attorney for plaintiff,

ORDERED that service of the summons herein upon the defendant be made by publication thereof in two newspapers, to wit, ....., and ....., published in the county of ....., and hereby designated as most likely to give notice to defendant, for not less than once a week for six successive

weeks, which is the time deemed by me reasonable, and by deposit by plaintiff on or before the day of the first publication in a post office, branch post office or post office station of one or more sets of the said summons and said complaint and this order, each contained in a securely closed post-paid wrapper, directed to said defendant as follows:

One set to ..... and another set to ....., or by personal service of a copy of said summons and complaint with the notice subscribed by plaintiff's attorney in the form required by statute annexed to said summons.

Dated, ....., 191...

.....  
Justice of the Supreme Court.

FORM NO. 16.

*Complaint for Goods Sold and Delivered by Foreign Corporation.*

..... COURT, ..... COUNTY.

*Title of Action.*

The plaintiff above-named, by ....., its attorney, complaining of the above-named defendants, alleges:

*First.*—Upon information and belief, that at all the times hereinafter mentioned the plaintiff was and still is a foreign corporation, duly organized by and under the laws of the State of ....., and doing business in the State of New York, having its principal place of business at .....; that prior to the making of the contract hereinafter alleged and prior to the ..... day of ....., 191., the plaintiff duly complied with all the provisions of section 15 of the General Corporation Law and obtained a Certificate in the State of New York of authority to do business within said State, and had, prior to said ..... day of ....., 191., duly complied with all the provisions of section 181 of the Tax Law and duly paid the license tax imposed by said section on foreign corporations doing business in the State of New York, and duly obtained a receipt therefor and had and has in all respects complied with all the laws of the State of New York permitting a foreign corporation to make contracts in this State and to maintain actions in the courts of this State.

*Second.*—Upon information and belief, that said defendants were at all times hereinafter mentioned engaged in business as copartners under the firm name and style of ..... and .....

*Third.*—Upon information and belief, that at ....., between the ..... day of ....., 191., and the ..... day of ....., 191, the plaintiff, at the special instance and request of said defendants, sold and delivered to the said defendants goods, wares and merchandise of the reasonable value of ..... dollars, which sum defendants agreed to pay therefor.

*Fourth.*—Upon information and belief, that the said sum has not been paid nor any part thereof except the sum of ..... dollars, although payment of the balance was duly demanded, on or about the ..... day of ....., 191...

Wherefore, plaintiff demands judgment against the defendants for the sum of ..... dollars, with interest thereon from the ..... day of ....., 191.., with the costs and disbursements of this action.

.....  
Plaintiff's Attorney.

Office and P. O. Address, etc.

(Verification.)

# FORM NO. 17.

## *Order for Security for Costs by Plaintiff Foreign Corporation.*

At a Special Term (Part ..... ) of the (Supreme)  
Court held in and for the County of .....,  
at the Court House thereof in ....., on  
the ..... day of ....., 191..

### PRESENT:

Hon. ....,  
Justice.

*Title of Action.*

On reading and filing the affidavit of ....., verified the ..... day of ....., 191.., whereby it appears that the plaintiff is and was at the commencement of this action a foreign corporation created by and under the laws of the State of ....., it is

Ordered, That the plaintiff within ten (10) days after the service upon its attorney of a copy of this order, either pay into this court the sum of Two Hundred and Fifty Dollars (\$250) to be applied to the payment of costs, if any, awarded against it, or at its election, file with the Clerk of this Court, an undertaking to be executed to the defendant with sufficient sureties, to be approved by the Court, to the effect that they will pay upon demand to the defendant all costs which may be awarded to it in this action, not exceeding Two Hundred Fifty Dollars (\$250) and shall also within the time aforesaid serve a written notice of such payment or filing upon the defendant's attorney; and it is further .

Ordered, That all proceedings on the part of the plaintiff herein be and they hereby are stayed except to review or vacate this order until the payment of said money, or filing of such undertaking and notice thereof and also if an undertaking shall be given, until the allowance of the same.

Enter

.....  
J. S. C.

## FORM NO. 18.

*Order Directing Trial in Action Against Corporation on a Note.*

..... COURT, ..... COUNTY.

<i>Title of Action.</i>
-------------------------

Upon the complaint herein, and upon the annexed answer (*or* demurrer) of the defendant corporation and the affidavit of ....., verified the ..... day of ....., 191..., and upon motion of ....., attorney for said defendant, it is

Ordered, That the issues presented by said pleadings be tried.

Dated, ....., 191...

.....  
Justice of the ..... Court.

## FORM NO. 19.

*Affidavit to Obtain Order Directing Trial in Action Against Corporation on a Note.*

..... COURT, ..... COUNTY.

<i>Title of Action.</i>
-------------------------

STATE OF NEW YORK, }  
County of ..... } ss..

....., being duly sworn, deposes and says:

He is the attorney for the defendant herein, and has entire charge of this action. That he has been retained to defend this action for the defendant herein and has an office at ....., in ..... That ..... is the ..... (*president*) of the said defendant and is entirely acquainted with the facts of the case; that said ..... has fully and fairly stated the facts of the case to deponent, and after such statement so made, deponent verily believes, and has so advised said ....., that the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint; and that defendant intends to defend this action in good faith and thereupon and to that end deponent prepared the amended (*answer*).

That the summons and complaint were served upon the defendant on the ..... day of ....., 191..., and the same are now on file, and that the time for defendant to answer or demur will expire on the ..... day of ....., 191...

[Add any other facts not shown on face of answer why defendant has a right to defend.]

That the answer (or demurrer) hereto annexed is intended to be served herein and an order is asked for as provided in section 1778 of the Code of Civil Procedure to accompany said pleading.

That no previous application for an order has been made.

Sworn to before me this .....  
day of ....., 191...

FORM NO. 20.

*Affidavit of Plaintiff's Attorney to Obtain Judgment by Default Under U. S.  
"Soldiers' and Sailors' Civil Relief Act."*

(Title and caption as in Form No. 6, continuing:—)

State of ..... }  
County of ....., } ss.:

....., being duly sworn, says:

I am an attorney and represent the plaintiff in the above entitled action, and I am making this affidavit pursuant to the provisions of section 200 of an Act of Congress approved March 8, 1918, and entitled the "Soldiers' and Sailors' Civil Relief Act."

I have made an investigation as fully set forth in the affidavit of ....., which is hereto attached and made part hereof, to ascertain if the defendant in the above entitled action is in the military service of the United States, as defined in section 101 of said act. From said investigation and from the accompanying affidavit made a part of this affidavit, I am convinced that the defendant in this action is not in the military service of the United States. I further state that I have read and am familiar with the Act of Congress known as the "Soldiers' and Sailors' Civil Relief Act," approved by the President on March 8, 1918, and am particularly familiar with section 101 of said act which defines persons in the military service of the United States.

Sworn to before me this ..... day of ....., 191...

FORM NO. 21.

*Affidavit of Investigation to Obtain Judgment by Default Under U. S. "Soldiers' and Sailors' Civil Relief Act."*

(Title and caption as in Form No. 6, continuing:—)

State of ..... }  
County of ....., } ss.:

I, ....., being duly sworn, depose and say: that I reside at ..... Street, in the County of ..... and State of California.

That on ..... day of ..... at ..... hour I called on  
....., the defendant in the above entitled action at .....  
Street, and from the following information gained, I state the following facts:  
.....  
.....  
.....

From the facts as above set forth, I am convinced that the above named  
defendant is not in the military service of the United States.

I further state that I have read what is known as the "Soldiers' and Sailors'  
Civil Relief Act" passed by the Congress of the United States and approved by  
the President on March 8, 1918, and am particularly familiar with section 101  
of said act and fully understand what is known by the term "Persons in  
Military Service," as defined in the aforementioned section of said act.

Sworn to before me this ..... day of ....., 191...

.....

FORM NO. 22.

*Certificate of Incorporation.*

We, ....., three (or more) natural persons of full age, at  
least two-thirds citizens of the United States, and at least one a resident of the  
State of New York, do become a stock corporation (for lawful business purposes  
other than a moneyed corporation, or a corporation provided for by the banking,  
the insurance, the railroad and the transportation corporations laws, or an  
educational institution or corporation which may be incorporated as provided  
in the education law), and do make, sign, acknowledge and file this certificate  
of incorporation.

- 1. The name of the proposed corporation is.....
- 2. The purposes for which it is to be formed are:

*(Here insert specific purposes of corporation.)*

3. The amount of the capital stock is ..... dollars  
(.....).

4. The number of shares of which the capital stock shall consist is .....  
....., of which ..... shares shall be of the par value of one hun-  
dred dollars (\$100) each and shall be preferred stock, and of which .....  
shares shall be without nominal or par value and shall be common stock. [The  
preference accorded to holders of preferred stock should be stated. Examples  
are given in forms 23 and 24.]

5. The amount of capital with which the corporation will begin business is ..... [not less than 500] dollars.

6. The city (*village* or *town*) in which its principal business office is to be located is .....; and (*if it is to be located in the city of New York*) the borough therein in which it is to be located is .....

7. Its duration is to be ..... years (or perpetual).

8. The number of its directors is to be three (*or more*) [and directors need not be stockholders] [and meetings of the board of directors are to be held only within this State].

9. The names and post-office addresses of the directors for the first year are:

<i>Names.</i>	<i>Post Office Addresses.</i>
.....,	.....
.....,	.....
.....,	.....

10. The names and post-office addresses of the subscribers to this certificate, and a statement of the number of shares of stock which each agrees to take in the corporation, are:

<i>Names.</i>	<i>Post Office Addresses.</i>	<i>Number of Shares.</i>
.....	.....	.....
.....	.....	.....
.....	.....	.....

Witness our execution of this certificate as aforesaid in duplicate [*if not in duplicate, a copy of the only original must be certified by the Secretary of State for filing with the proper County Clerk*], the ..... day of ....., 191...

.....  
.....  
.....

[Add acknowledgments by subscribers.]

FORM NO. 23.

*Clauses in Certificates of Incorporation Giving Preferences to Holders of Preferred Stock.*

The holders of the preferred stock shall be entitled to receive or to have set apart, out of the surplus or net profits of the corporation, as and when declared

by the board of directors, a dividend at the rate of, but never exceeding, seven per centum per annum, cumulative, on all such preferred stock outstanding at the time, which dividend shall be payable yearly, half-yearly or quarterly as the board of directors may, from time to time fix and determine, and before any dividend shall be set apart for or paid on the common stock. Provided, however, that if the preferred stock shall hereafter be increased, the rate of dividend upon such increase shall be at such rate, not exceeding seven per centum per annum, as shall be fixed by the resolution of the stockholders of the corporation authorizing such increase. Whenever a dividend is declared or paid on the preferred stock and all prior dividends on the outstanding shares of such stock shall have been paid or set apart, the board of directors may, if in its judgment the surplus or net profits, after deducting the amount of dividends to accrue on the said outstanding preferred stock during the current year, shall be sufficient for such purposes, then or thereafter declare and pay dividends on the common stock payable yearly, half-yearly or quarterly, and payable then or thereafter out of any remaining surplus or net profits of the year then current or last past and of any previous year in which full dividends shall have been paid on the preferred stock.

In case of a liquidation or dissolution or winding up (whether voluntary or involuntarily) of the corporation, the holders of the preferred stock shall receive cash to the amount of the par value of such preferred stock, together with all accrued and unpaid dividends thereon (but no more) before any payment is made to the holders of the common stock, and the holders of the common stock shall be solely entitled to the entire assets of the Company, or the proceeds thereof, remaining after the payment in full, at its par value, of the preferred stock then outstanding, together with all dividends thereon accrued and unpaid.

#### FORM NO. 24.

##### *Clause in Certificate of Incorporation for Retiring Preferred Stock.*

The company may retire the preferred stock at any time by paying to the holders of record thereof the sum of one hundred and five dollars in cash per share, in addition to dividends accrued thereon, but only out of surplus profits applicable to dividends; and such retirement may only be effected on thirty days' notice mailed to each holder of record of preferred stock at his, her or its address as the same shall appear on the books of the corporation.

#### FORM NO. 25.

##### *Brokerage Business.*

To manufacture, purchase or otherwise acquire, hold, own, pledge, sell or otherwise deal in, for its own account or as agent, goods, wares, merchandise and personal property of any kind and description.

To act as mill agents, factors and brokers, and to do all things necessary or incidental to the carrying out of a general trading and commission business and to conduct the business of warehousemen.

To loan and advance moneys, securities and credit upon mortgages of real property and pledges of personal property, including merchandise and warehouse receipts for the same.

To purchase or otherwise acquire, hold, own, exchange, pledge, assign, sell or otherwise deal in and dispose of contracts, claims, accounts receivable, bills receivable, promissory notes and other securities, choses in action, obligations or evidences of indebtedness of any person, firm or corporation; make advances upon such securities; receive, hold and collect moneys for goods sold, labor performed or services rendered.

To loan and advance its moneys, securities and credit upon contracts, claims, accounts and bills receivable, promissory notes, stocks, bonds, debentures, choses in action, obligations or other securities of any person, firm or corporation, domestic or foreign. *Provided, however,* that nothing in this paragraph contained shall be construed to empower it to guarantee the bonds of any other corporation otherwise than in conformity with section 8 of the Stock Corporation Law.

To purchase or otherwise acquire, hold, own, sell, exchange, pledge or otherwise dispose of and deal in government, municipal, railroad, industrial and other bonds, stocks, debentures, obligations or securities of corporations, firms or individuals, and generally to carry on the business of stock and bond brokers.

To borrow upon its corporate bonds and debentures secured by mortgage or unsecured, upon notes, outstanding accounts or otherwise, from time to time, such moneys, securities or credits as may be required for the purposes of its business.

To purchase or otherwise acquire, hold, own, sell, and otherwise dispose of stocks, bonds and other evidences of indebtedness of any other corporation, domestic or foreign, and pay for the same in cash or otherwise; including issuing in exchange therefor its stocks, bonds and other obligations; and while owner of such stocks, bonds and other obligations, to possess and exercise in respect thereto all the rights, powers and privileges of individual holders or owners thereof.

To acquire the good will, rights and property of any person, firm or corporation, and to pay for the same in cash, in stock or bonds of this corporation or otherwise, and to hold, own, manage and in any manner dispose of the whole or any part of the property so acquired.

To apply for, purchase, lease, or otherwise acquire, register, hold, own, use, sell, assign, grant licenses concerning or otherwise acquire, deal in and dispose of, inventions, patent rights, letters patent, secret processes, formulae, trade marks and trade names, useful or thought to be useful in connection with any of the articles which may lawfully be manufactured, purchased or dealt in by this corporation.

To receive, own and operate under licenses covering the rights secured by letters patent, secret processes, formulae and trade marks; to grant sub-licenses concerning the same and to pay and receive royalties and other emoluments therefor.

To do any and all other acts and things necessary, proper or incident to and relating to or convenient in connection with the carrying on of its business as

aforesaid, or for the attainment of any one or more of the purposes herein enumerated.

Nothing herein contained, however, shall be construed to authorize this corporation to discount bills, notes or other evidences of indebtedness, or to buy or sell bills of exchange or to carry on a banking business, either within or without the State of New York, or to do any act or thing forbidden by law to a corporation organized under the Business Corporations Law of the State of New York.

FORM NO. 26.

*Chemicals, Dyes, Oils, Paints.*

To manufacture, produce, purchase or otherwise acquire, own, deal in, sell, pledge or otherwise dispose of, chemicals of every description and combinations and manufactures thereof, dyes and dye-stuffs, acids, alkalis and salts, paints, oils, varnishes, colors and pigments, drugs and pharmaceutical preparations and all articles or materials necessary or useful in connection therewith; and, in general, goods, wares and merchandise of every description.

FORM NO. 27.

*Combustibles.*

To manufacture, produce, purchase or otherwise acquire, hold, own, deal in, sell, pledge or otherwise dispose of fireworks and firecrackers of every description, chemicals and any combustions thereof, and all goods, articles or materials used in the manufacture thereof, candies, gums, toys, novelties and goods, wares, merchandise and property of every kind and description.

FORM NO. 28.

*Jewelry.*

To manufacture, produce, purchase or otherwise acquire; to hold, own, market or otherwise deal in; to sell, pledge or otherwise dispose of, jewelry, gold and silverware, clocks and watches (both movements and cases), opera glasses, canes, umbrellas, novelties of all kinds, and goods, wares and merchandise of every class and description.

FORM NO. 29.

*Leather and Lumber.*

(a) To manufacture, produce and otherwise prepare, and to buy and otherwise acquire, sell, store, transport, distribute, dispose of and deal in and with (1) leather, lumber, belting, and any and all other merchandise and commodities of whatsoever nature and character, and (2) any and all materials, machinery, appliances, products and supplies proper or adapted to be used in or in connection with or incidental to the manufacture, production or preparation of any of the articles, merchandise and commodities aforesaid, and, also (3) any and all commodities and things which result from or are by-products of the manufacture, production or preparation of leather, lumber, belting or other merchandise or article, or in manufacture, production or preparation of which

any of the said articles may be a factor or an ingredient or of which the same may be a component part;

(b) To engage in any other manufacturing, warehousing, trading or selling business of any kind or character whatsoever;

(c) To acquire, dispose of, lease and utilize, in the manner and to the extent permitted by law, lands, timber, bark, tanneries, mills, warehouses, plants, and other buildings and structures, machinery, supplies, and any and all articles and property, including good-will, which the corporation may deem to be necessary or convenient to the attainment or furtherance of any of its objects.

#### FORM NO. 30.

##### *Motors, Engines, Boilers.*

To purchase, manufacture, produce, hire or otherwise acquire, hold, own, use, sell, pledge, rent, license the use of or otherwise deal in and dispose of motors, engines, boilers and other instruments for generation, production and utilization of power, articles intended to promote the efficiency of such instruments, automobiles and vessels self-propellant in air and water, and parts thereof and appliances and supplies therefor, and in general, machinery, tools, apparatus, metals, woods and articles composed in whole or in part of metal or wood, and goods, wares and merchandise of every kind and description; to conduct such business either for its own account or as agent, factor, broker, middleman, commission man or representative of others.

#### FORM NO. 31.

##### *Motors, Airships, Automobiles.*

To manufacture, purchase, import or otherwise acquire, sell, rent, repair, take upon storage, exchange, export and otherwise deal in and dispose of any or all of the following: Motors, engines, or other machinery or contrivances for the generation of steam, electricity, gasoline or other forms of power now known or which may be hereafter discovered; automobiles, cars, trucks, carriages, wagons, boats, airplanes and airships, and vehicles of every kind and description for the transportation of passengers or goods; machinery, machine supplies and engineering appliances, hardware, tools, parts, batteries, self-starters, magnetos, igniters, tires, rims, wagon and carriage bodies and all other accessories, apparatus and appliances; and fuel, oils and other materials useful in connection with the ownership, use or enjoyment of any of the above.

#### FORM NO. 32.

##### *Moving Pictures.*

To purchase, hire, lease, manufacture, produce or otherwise acquire, hold, own, use, import, export, exhibit, sell, exchange, pledge, rent, license the use of and otherwise deal in and dispose of moving picture and other films, photographic negatives, positives and prints, pictures by whatever process produced, and chemicals, materials, appliances, apparatus, cameras, stereoscopes, projecting machines, lenses, and any and every other article useful, or believed to be useful

in the production, exhibition, use or disposition of films, pictures, whether moving or otherwise, photographs and kindred articles;

To apply for, register, take by assignment or otherwise acquire, receive, hold and operate under licenses to use, and grant licenses and sub-licenses concerning, pay and receive royalties and emoluments for the use of, sell, assign, lease or otherwise dispose of, applications for patents, patent rights, letters patent, trade marks, trade names, processes and formulæ, secret or otherwise, including improvements on any of the same, useful or thought to be useful in the manufacture or use of any kind and all of the articles to be acquired, manufactured, dealt in, utilized or disposed of by this corporation.

To purchase, lease or otherwise acquire, erect, construct, improve, hold, own, occupy, use, manage, rent, sell, mortgage or otherwise dispose of lands, studios, plants, mills, factories, stores, warehouses, machine shops, motion picture and other theatres, dwellings and other real property, structures and buildings wheresoever situate.

#### FORM NO. 33.

##### *Real Estate.*

To take, buy, purchase, exchange, hire, lease or otherwise acquire, real estate and property, either improved or unimproved, and any interest or right therein, and to own, hold, control, maintain, manage and develop the same in any State of the United States.

To purchase, exchange, hire or otherwise acquire such personal property, chattels, rights, easements, permits, privileges and franchises as may lawfully be purchased, exchanged, hired or acquired under the Business Corporations Law of the State of New York.

To erect, construct, maintain, improve, re-build, enlarge, alter, manage and control, directly or through ownership of stock in any corporation, any and all kinds of buildings, houses, hotels, breweries, stores, offices, warehouses, mills, shops, factories, machinery and plants, and any and all other structures and erections which may at any time be necessary, useful or advantageous in the judgment of the Board of Directors for the purposes of the corporation and which can lawfully be done under the Business Corporations Law.

To sell, manage, improve, develop, assign, transfer, convey, lease, sub-lease, pledge or otherwise alienate or dispose of, and to mortgage or otherwise encumber the lands, buildings, real property, chattels real, and other property of the company, real and personal, and wheresoever situate, and any and all legal and equitable rights therein.

To transact the business of buying and selling, dealing in, leasing, renting and managing real estate and any interests therein for its own account, as agent or broker, or upon commission.

To purchase, sell and manufacture, and deal in building materials and goods, wares and merchandise, and to carry on any other lawful trade or business incident to or proper or useful in connection with the purchase, sale, ownership, construction, maintenance and management of real property.

To borrow money, with or without pledge of or mortgage upon all or any of its property, real or personal, as security, and to loan and advance money upon mortgages on personal and real property, or on either of them.

To buy, sell and deal in, with or without guaranty of payment thereof, bonds and mortgages and other like securities and other kinds of properties, whether

real or personal, not prohibited or specially excepted by any law, and to do and prosecute any acts and things incident to or proper in connection with the carrying on of the business of this company.

To purchase, acquire, hold, sell, assign and transfer, mortgage, pledge and otherwise dispose of the shares of the capital stock, bonds, debentures or other evidences of indebtedness of any corporation, domestic or foreign, and, while the holder thereof, to exercise all the rights and privileges of ownership, including the right to vote thereon, and to issue in exchange therefor its own stock, bonds and other obligations.

To purchase or otherwise acquire, undertake, carry on, improve or develop all or any of the business, good will, rights, assets or liabilities of any person, firm, association or corporation carrying on any kind of business the same as or of a similar nature to that which this corporation is authorized to carry on pursuant to the provisions of this certificate.

To do all such acts and things as are incident or conducive to the premises. And this corporation shall have the power to conduct its business in all its branches in the State of New York and any other State or States of the United States, and ultimately to hold, purchase, mortgage, lease, convey, manage and control real and personal property therein as above provided, and generally to do all acts and things, and to exercise all the powers now or hereafter authorized by law necessary to carry on the business of the said corporation, or to promote any of the objects for which the company is formed.

The foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the general powers of the company and the enjoyment thereof as conferred by the laws of the State of New York upon corporations organized under the provisions of the Business Corporations Law.

#### FORM NO. 34.

##### *Shades, Shade-Rollers, Shade-Cloth.*

To carry on the trade or business of manufacturing, producing, adapting, importing, exporting, buying, selling or otherwise dealing in, whether as principal or agent, shade-rollers, rollers, shade-cloth, cloth, paper-boxes, boxes, paper, matches, bark, lumber, timber, wood-pulp, wooden-work, metal, metal-work, stamped-steel, steel, tin, copper, tools, hardware, hardware-supplies, machinery, and any and all fibres, ingredients, articles, products, compounds and materials that now or hereafter may be used in or in connection with such trade or business.

#### FORM NO. 35.

##### *Ships.*

To construct, build, purchase or otherwise acquire, equip, hold, own, sell, mortgage, pledge and otherwise deal in and dispose of ships, vessels, boats and water craft of every kind and description, together with engines, boilers, motors, tools, machinery and all materials, articles, apparatus, gear and appliances entering into or suitable or convenient for or in connection with the construction or equipment thereof.

To erect, construct, purchase, lease or otherwise acquire, improve, hold, own, occupy, use, operate, manage, rent, sell, mortgage or otherwise dispose of lands, yards, plants, wharves, docks, drydocks, marine railways, piers, mills, factories, machine shops, stores, warehouses, dwellings and other real property, structures and buildings wheresoever situate.

## FORM NO. 39.

*Amended Certificate of Incorporation to Correct Informality, Inclusion of Unauthorized Matter, or Defective Proof or Acknowledgment.*

We, the undersigned, being the corporators (or, directors) of ....., a domestic corporation the original (or, amended, or supplemental) certificate of incorporation of which was filed in the office of the Secretary of State and of the Clerk of the County of ....., on the ..... day of ....., and ..... day of ....., respectively, do hereby make and file this amended certificate of incorporation to correct an informality in (or, to strike out matter not authorized by law to be stated therein and contained in; or, to correct the defective proof or acknowledgment of) said original (or, amended; or, supplemental) certificate of incorporation.

The said informality is that.....

[or, The said matter not authorized by law to be stated is .....].

[or, The said defective proof or acknowledgment is .....].

We do make, sign, acknowledge and file this amended certificate in duplicate to correct said informality [or, to strike out said matter not authorized by law; or, to correct said defective proof or acknowledgment], as follows:

[Insert correct formal requirement or add correct proof or acknowledgment.]

Witness our signatures and acknowledgments this ..... day of ....., 191...

[Add individual acknowledgments.]

## FORM NO. 40.

*Petition or Affidavit for Obtaining Amendment by Supreme Court of Certificate of Incorporation to Set Forth True Corporate Object.*

SUPREME COURT, ..... COUNTY.

In the Matter of the ..... Amendment  
of the Certificate of Incorporation of  
....., a corporation, to have  
it truly set forth the true object and  
purpose of said Corporation.

The petition of ....., a corporation, respectfully shows:

[Or, State of ..... county of ....., ss. ...., being duly sworn, deposes and says:]

That petitioner is a corporation incorporated under the laws of the State of New York; and that its certificate of incorporation was duly filed in the office of the Secretary of State and the Clerk of the county of ....., both of the State of New York, on the ..... day of ....., and the ..... day of ....., 191..., respectively.

That said certificate expressed the object and purpose of petitioner as follows:  
[Quote object clause of certificate of incorporation].

That the true object and purpose of petitioner is as follows:

[Quote object clause as desired in certificate of incorporation].

Wherefore petitioner prays this Court, upon notice to the Attorney-General and to such other persons as this Court may direct, and upon such terms and conditions as this Court may impose, to amend petitioner's said certificate of incorporation without prejudice to any action or proceeding pending or to any rights accrued previously to such amendment, so as to have said certificate, when so amended, truly set forth petitioner's said true object and purpose; and that this Court order that on filing by petitioner and record by the said Secretary of State and County Clerk of an amended certificate identical with said original certificate save for said change in the expression of petitioner's object and purpose, said original certificate be deemed amended accordingly; and that this Court give petitioner such other and further relief as may be just.

(Corporate Seal).

By .....

President.

(Add corporate verification.)

#### FORM NO. 41.

*Notice of Motion to Supreme Court for Amendment of Certificate of Incorporation to Have It Truly Set Forth Corporate Purpose.*

*Caption and Title as in Form No. 40.*

Take notice that upon the annexed petition of ....., verified herein the ..... day of ....., 191., the undersigned will make a motion at a Special Term of the Supreme Court, ..... county, to be held at ....., on the ..... day of ....., 191., at .... o'clock in the .....noon, or as soon thereafter as counsel can be heard, for an order amending the original certificate of incorporation of said ....., filed as stated in said petition, so as truly to set forth said corporation's object and purpose as set forth in said petition; and for the other relief prayed in said petition.

Dated the ..... day of  
....., 191...

Yours, etc.,

.....  
Petitioner's Attorney,

Office and P. O. Address,

To .....

*The Attorney-General of the State of New York.*

#### FORM NO. 42.

*Order Amending Certificate of Incorporation to State Corporation's True Object.*

[Title as in Form No. 40]

[Court Order Caption]

Upon reading and filing the petition of ....., herein, verified the ..... day of ....., 191., from which it appears to the satisfaction of the Court that due proof has been made that the certificate of incorporation

of said corporation fails to express its true object and purpose and due cause has been shown for amending said certificate to set forth said corporation's true object and purpose; and upon reading and filing the notice of motion, herein, dated the ..... day of ....., 191., and the affidavit of ....., herein, verified the ..... day of ....., 191., from which it appears to the satisfaction of the Court that due and timely service of said petition and notice of motion upon the Attorney-General has been made; and the Court not having directed notice to any other person, now, after hearing ....., Esq., of counsel for petitioner, in support of said motion, and the Hon. The Attorney-General of the State of New York, by ....., in opposition thereto, it is, On Motion of counsel for the petitioner,

Ordered, that said motion be and the same hereby is in all respects granted; and, further,

Ordered, that the certificate of incorporation of ....., be and it is hereby amended but without prejudice to any action or proceeding pending or to any rights accrued previously to such amendment; so as to set forth its true object and purpose as follows:

[*Take in new object clause*]; and, further,

Ordered, that on filing by petitioner and record by the Secretary of State of an amended certificate as herein directed petitioner's original certificate of incorporation be deemed amended accordingly.

#### FORM NO. 43.

*Certificate of Incorporation Amended by Supreme Court to Set Forth True Corporate Object.*

(This will be the same as Form No. 22, except for the object or purpose clause.)

#### FORM NO. 44.

*Minutes of Directors Authorizing Alteration of Certificate of Incorporation to Include Powers Enjoyed by Like Corporations.*

[NOTE.—The Minutes are those of a Special Meeting of Directors; and a majority of the directors must vote for the alteration].

#### FORM NO. 45.

*Notice of Meeting of Stockholders to Authorize Alteration of Certificate of Incorporation to Include Powers Enjoyed by Like Corporations.*

*To the stockholders of .....*

Take notice that a special meeting of the stockholders of ..... is hereby called to be held on the ..... day of ....., 191., at .. o'clock in the ..... noon, at ....., for the purpose of voting upon a proposition to alter said corporation's certificate of incorporation so as to include therein certain purposes, powers or provisions which now apply to corporations

engaged in a business of the same general character or which might be included in the certificate of incorporation of a corporation organized under any general law of New York State for a business of the same general character, viz.:

[Here state the alteration proposed.]

.....

Secretary.

.....

President or Vice-President.

[NOTE.—The meeting must be called in the manner provided in the by-laws. The notice must be published once a week for at least two successive weeks in a newspaper in the county where the corporation's principal business office is located. A copy of the notice must be duly mailed each stockholder at his last known post office address at least two weeks before the meeting or be personally served on him at least five days before the meeting.]

#### FORM NO. 46.

*Minutes of Stockholders Authorizing Alteration of Certificate of Incorporation to Include Powers Enjoyed by Like Corporations.*

[NOTE.—The minutes are those of a special meeting of stockholders, and stockholders representing at least three-fifths of the capital stock must vote for the alteration.]

#### FORM NO. 47.

*Verification by Director of Proceedings of Stockholders' Meeting to Alter Certificate of Incorporation to Include Powers Enjoyed by Like Corporations.*

State of New York, }  
County of ....., } ss.:

....., being duly sworn, says: I am a director of .....  
I was present at a meeting of stockholders of said corporation of which the foregoing are the minutes. Said minutes are a true copy of the proceedings of such meeting.

.....

Sworn to before me this .....

day of ....., 191..

#### FORM NO. 48.

*Amended Certificate of Incorporation to Alter Original to Include Powers Enjoyed by Like Corporations.*

We, the President and Secretary of ....., do hereby execute and file this Amended Certificate of Incorporation, pursuant to the eighteenth section of the Stock Corporation Law, to alter said corporation's certificate of incorporation as follows: [State the alteration proposed.]

We hereby state that said alteration has been duly authorized by a vote of a majority of the directors and also by vote of stockholders of said corporation representing at least three-fifths of the capital stock of said corporation at a meeting of said stockholders called for the purpose in the manner provided in the sixty-third section of the Stock Corporation Law, and that a copy of the proceedings of such meeting, verified by the affidavit of one of the directors present thereat, is filed herewith.

Witness our hands and seals and the corporate seal of said corporation to duplicate copies hereof, this ..... day of ....., 191...

.....  
President.

(Corporate Seal)

.....  
Secretary.

[Add individual acknowledgments.]

#### FORM NO. 49.

*By-Laws.*

By-Laws of ....., Inc.

#### ARTICLE I. CAPITAL STOCK

§ 1. *Stock Certificates.* Stock in the Company shall be evidenced by certificates therefor, issued to owners of stock which has been fully paid for and signed by the ..... (*state officer of the company*) and by ..... (*state other officer of the company*) with the corporate seal impressed thereon.

§ 2. *Stock Transfers.* Stock in the Company shall not be transferred on its books from the name of the owner of record thereof save by the holder thereof or by his attorney thereunto duly authorized by written, duly executed and witnessed power of attorney. Before making such transfer the proper officer of the Company shall require to be delivered to and left with him the certificates representing the stock to be transferred, duly endorsed for transfer; and also the power of attorney, if any, of the attorney endorsing the same. For ..... days prior to the annual meeting of the corporation the books of the Company shall be closed for transfer of its stock.

§ 3. *Stock Subscriptions.* The directors may call for payment of subscriptions to the capital stock in such amounts and at such times as they deem fit.

§ 4. *Loss of Certificate.* Any person claiming a certificate of stock to be lost or destroyed, shall make an affidavit or affirmation of that fact and advertise

the same in such manner as the Board may require, and shall give the company a bond of indemnity in form and with one or more sureties satisfactory to the Board, in at least double the par value of such certificate, whereupon the President and Secretary or Treasurer may issue a new certificate of the same tenor with the one alleged to have been lost or destroyed; but always subject to the approval of the board.

#### ARTICLE II. MEETINGS OF STOCKHOLDERS.

§ 1. *Quorum at Meetings.* The presence at any stockholders' meeting of holders of a majority of the company's outstanding capital stock, or their proxies, constitute a quorum.

§ 2. *Annual Meetings.* The ..... day of ..... in every year, or, if it be a Sunday or holiday, the next succeeding business day, shall be the day, and ..... o'clock in the .....noon shall be the hour for the annual stockholders' meeting, which shall be held at .....; and notice thereof shall be given as follows: [*State how.*]

§ 3. *Special Meetings.* Special stockholders' meetings shall be held ..... [*state when and at whose call*] upon the following notice: [*State notice desired.*]

§ 4. *Proxies.* Stockholders may vote at all meetings, either in person or by proxy in writing. All proxies shall be filed with the Secretary of the meeting before being voted upon.

§ 5. *The election of directors* shall be held at the annual meeting of the stockholders, and shall, after the first election, be conducted by two Inspectors of Election, appointed by the President for that purpose, and sworn as prescribed by law. The election shall be by ballot and each stockholder of record shall be entitled to cast one vote for each share of stock held by him.

§ 6. *The order of business* at the annual meetings and, as far as possible, at all other meetings shall be:

- a. Calling of the roll;
- b. Proof of due notice of meeting;
- c. Reading and disposal of unapproved minutes;
- d. Election of directors;
- e. Reports of officers and committees;
- f. Unfinished business;
- g. New business.

#### ARTICLE III. DIRECTORS.

§ 1. The board shall consist of ..... (*e. g.*, five) directors unless and until said number shall be increased in manner prescribed by law. They shall be elected by the stockholders for the term of one year, and shall serve until the

election and acceptance of their duly qualified successors. A director may resign at any time and his office shall be vacant on the delivery of his written resignation to the Secretary. Any vacancies may be filled for the unexpired terms by a vote of the board. If a majority of the board shall not agree upon an election or in case the entire board of directors shall die or resign, a special meeting of the stockholders to elect a director or directors for the unexpired term shall be called. Directors, as such, shall not receive any stated salary for their services, but by resolution of the board a fixed sum and expenses of attendance, if any, may be allowed for attendance at any regular or special meeting of the board; provided that nothing herein contained shall be considered to preclude any director from serving the company in any other capacity and receiving any compensation therefor.

§ 2. *Regular meetings of the Board of Directors* shall be held at the principal office of the company in ..... on the ..... (e. g., fourth) ..... (e. g., Monday) of each month, at ..... o'clock in the ..... noon, if not a legal holiday; if a legal holiday, then the day following.

§ 3. *Special meetings of the Board of Directors*, to be held in the principal office in ....., may be called at any time by the President or by any (or any stated number of the members) member of the board, or such meetings may be held at any time and place within or without the state of New York without notice by unanimous written consent of all the members, or if all the members be present at such meeting.

§ 4. *Notices of special meetings of the board* shall be given to each director three days before such meeting, either personally, in writing or by wire. No notice of regular meetings shall be required.

§ 5. *Powers of the board*. Without prejudice to the general powers conferred upon the board of directors by the charter and by these by-laws, it is hereby expressly declared that the board shall have the following powers, that is to say:

(a) From time to time to make and change rules and regulations not inconsistent with these by-laws, for the management of the company's business and affairs.

(b) To purchase and otherwise acquire for the company any property, rights or privileges which the company is authorized to acquire at such price or consideration, and upon such terms and conditions as they may see fit.

(c) At their discretion to pay for any property or rights acquired by the company, either wholly or partly in money, stocks, bonds or other securities of the corporation.

(d) To create, make or issue mortgages, bonds, deeds of trust, trust agreements and negotiable and transferable instruments or securities secured by mortgage or otherwise, and to do every act and thing necessary to effectuate the same.

(e) To appoint, and at their discretion, to remove or suspend such subordinate officers, agents or servants permanently or temporarily as they

think fit, and to determine their duties and fix and from time to time change their salaries or emoluments, and to require security in such instances and in such amounts as they think fit.

(f) To confer by resolution upon any appointed officer of the company the power to choose, remove and suspend such subordinate officers, agents or servants.

(g) To appoint any person or corporation to accept and hold in trust for the company any property belonging to the company or in which it is interested, or for any other purpose, and to execute and do all such deeds and things as may be requisite in relation to any such trusts.

(h) To determine from time to time who shall be authorized on the company's behalf to sign endorsements, cheques, releases, contracts, receipts and similar documents.

(i) To delegate any of the powers of the board in the course of the current business of the company to any officer or agent, and to appoint any persons to be the agents of the company with such powers and upon such terms as they think fit.

§ 6. *Quorum.* At all meetings of the board the presence of ..... [state number] directors shall constitute a quorum.

§ 7. *The order of business* at any regular or special meeting of the board of directors shall be:

- a. Reading and disposal of unapproved minutes;
- b. Reports of officers and committees;
- c. Unfinished business;
- d. New business.

#### ARTICLES IV. OFFICERS.

§ 1. *Election of Officers of the Company.* The officers of the company shall be elected by the board of directors at their first meeting after the election of the directors in each year. If any office becomes vacant during the term, the board of directors shall fill the same for the unexpired term.

§ 2. *The officers of the company shall be* a President, a Vice-President, a Secretary and a Treasurer, who shall be elected to serve until their respective successors be elected by the board, and if no successors shall be sooner elected, for one year, and shall hold office until their successors are elected and qualify. The offices of (e. g.) President and Treasurer may be united in one person. The officers shall [need not] be directors.

§ 3. *The President shall preside* at all meetings, shall have general supervision of the affairs of the company, shall sign or countersign all certificates, contracts and other instruments of the company as authorized by the board of directors, shall make monthly reports to the directors and annual reports to the stockholders, and perform all such other duties as are incident to his office or are properly required of him by the board of directors. He shall be *ex-officio* a member of all committees. In the absence or disability of the President, the Vice-President shall exercise all his functions.

§ 4. *The Treasurer shall have the custody* of all moneys and securities of the company and shall keep full and accurate accounts of receipts and disbursements in books belonging to the company, and shall balance the same each month. He shall disburse the funds of the company as may be ordered by the board, taking proper vouchers for such disbursements, and shall render to the

president and directors at the regular meetings of the board, whenever they may require, an account of his transactions as treasurer and of the financial condition of the company. He shall render a report to the stockholders at each annual meeting. He shall sign or countersign such instruments as require his signature. He shall, when required, give to the company a bond for the faithful performance of his duty in such sum and with such sureties as may be required by the board of directors. All drafts, notes, acceptances and other obligations of the company for the payment of money must be signed by the treasurer.

§ 5. *The Secretary* shall issue notices for all meetings; and shall attend the same and act as clerk thereof. He shall have charge of the seal and the corporate books; shall sign, with the president, such instruments as require his signature; and shall make such reports and perform such other duties as are incident to his office or are properly required of him by the board of directors.

§ 6. *A General Manager* may at any time be appointed by the board of directors who shall perform such duties as shall be delegated to him by the board.

§ 7. *An Assistant Treasurer and Assistant Secretary* may at any time be appointed and, at pleasure, removed by the board of directors, and may or may not be the same person, and shall perform respectively such duties as may from time to time be delegated to each of them by the board.

§ 8. *Resignations.* Any officer may resign his office at any time by notice in writing to that effect delivered to the secretary or to the president. Such resignation shall take effect from the time of its receipt unless some other time be fixed in said resignation, and acceptance of the resignation shall not be required to make it effective.

#### ARTICLE V. FISCAL YEAR, DIVIDENDS AND FINANCE.

§ 1. The fiscal year shall begin on the first day of ..... and end on the last day of ..... in each year.

§ 2. Dividends shall be declared only from the surplus profits at such times as the board of directors shall direct, and no dividend shall be declared that will impair the capital of the company.

§ 3. Moneys of the company shall be deposited in the name of the company in such banks or trust companies as the board of directors shall designate and shall be drawn out only by cheques signed by such officer or officers or other person as the board shall by resolution from time to time direct.

#### ARTICLE VI. SEAL.

§ 1. The corporate seal of the company shall be circular and shall have inscribed thereon the name of the company and the year of its incorporation; and such seal as is impressed on the margin hereof is hereby adopted as the corporate seal of the company.

#### ARTICLE VII. AMENDMENTS.

§ 1. These by-laws may be amended, repealed or altered in whole or in part by a majority vote of the entire outstanding stock of the company at any regular meeting of the stockholders or at any special meeting where such amendment has been proposed in the call and notice of such meeting.

## FORM NO. 50.

*Minutes and Waiver of Notice of Meeting of Incorporators.*

The first meeting of the incorporators of ....., Inc., was held at ....., on the ..... day of ....., 191., at ..... o'clock in the .....noon. All the incorporators were present in person, viz., ....., and .....

On motion Mr. .... was chosen chairman and Mr. .... secretary of the meeting.

The following original waiver of notice and consent to the holding of this meeting, signed by all the incorporators, was presented by the secretary and ordered recorded at this point in the minutes:

We, ....., the incorporators and subscribers to the capital stock of ....., Inc., waive notice of the time and place of the first meeting of its incorporators and subscribers, and appoint the ..... day of ....., 191., at ..... o'clock in the .....noon to be the time, and ....., to be the place of such meeting.

Dated .....

.....  
 .....  
 .....

The secretary presented a certified copy of the certificate of incorporation and stated that one of two, duplicate, duly executed and acknowledged originals thereof, [with sufficient cancelled revenue stamps affixed] had been duly filed and recorded in the office of the Secretary of State of New York, at Albany, N. Y., on the ..... day of ....., 191., and the other of such duplicate originals had been filed and recorded in the office of the Clerk of the County of ....., on the ..... day of ....., 191.; and that the organization tax had been duly paid to the Treasurer of the State of New York, and all filing and recording fees had been paid. It was thereupon

*Ordered*, that the certified copy of the company's certificate of incorporation be filed in its archives and that a copy be entered at length in the first pages of its minute book.

There were then submitted to the meeting by the chairman and read, discussed and approved, article by article and section by section, proposed by-laws, after which, on motion, duly seconded, the following resolution was adopted without dissent:

*Resolved*, that the by-laws just laid before this meeting, be and are adopted as a whole as and for the by-laws of ....., Inc., and that they be entered at length immediately following the certificate of incorporation in the corporate book of minutes.

There being no further business, the meeting then adjourned.

.....

Secretary of the Meeting.

## FORM NO. 51.

*Minutes of First Meeting of Directors.*

The first meeting of the Board of Directors of ..... Inc., was held at ....., on the ..... day of ....., 191..., immediately upon the adjournment of the meeting of the incorporators.

Present: ....., and ....., the full board. On motion Mr. .... was chosen temporary chairman and Mr. .... secretary *pro tem*.

It was moved that the Board proceed to the election of a president, a vice-president, a treasurer and a secretary. The motion, being seconded and put to vote, was unanimously adopted. The Board then proceeded to an election. The ballots having been collected and counted, it was found that the following officers were unanimously elected:

President, .....  
 Vice-President, .....  
 Secretary, .....  
 Treasurer, .....

The President thereupon took the chair. The Secretary then presented a seal prepared in accordance with the provisions of the by-laws and the same was, on motion, unanimously adopted as the corporate seal of this corporation, and the Secretary was directed to affix an impression thereof in the minute book opposite Article ..... of the By-laws, containing provision therefor.

The Secretary then presented a proposed form of stock certificate. Such form having been read and approved it was, on motion duly seconded, unanimously

*Resolved*, that the form of certificate this day presented to the meeting be adopted as the form of stock certificate of the company, and that the Secretary be and he hereby is authorized and instructed to procure a book of stock certificates in such form, duly printed and bound, and a stock transfer book and ledger

The following resolution was then moved, seconded and unanimously adopted:

*Resolved*, that this Board do hereby call for payment by the subscribers to the capital stock of their subscriptions to the same at the rate of \$..... per share.

Mr. .... reported that he had assigned his subscription to ..... shares of the company's stock to Mr. ....

A brief recess having been taken, the Treasurer reported that the subscribers to ..... shares of the capital stock, and their respective assigns, had paid their subscriptions in full at the rate of \$ ..... per share.

On motion duly made and seconded the President and Secretary were authorized and instructed to issue full paid certificates for the shares thus paid for to the persons entitled thereto.

Counsel for the company was then instructed to prepare and file the statutory certificate of payment of one-half of the authorized capital stock.

On motion duly made and seconded the principal office of the company was, until further action of the Board, established at .....

The following resolution was offered:

*Resolved*, That until further action of the Board moneys of this corporation be deposited to its credit with the ..... Bank, at .....; and that cheques thereupon be valid only when signed in the name of this corporation by two of the following named officers, viz.: [*e. g.*: *President, Vice-President and Treasurer*].

The above resolution being duly seconded and put to vote was unanimously adopted.

The Secretary was, by resolution, duly adopted, instructed to procure, fill out and keep in the archives of the company, in addition to a book of stock certificates, a book of account, transfer ledger or register in form prescribed by the Comptroller of the State of New York for the record of every transfer of stock, as prescribed by Section 276 of the Tax Law; and to file with such Comptroller the certificate of the place for sale, transfer or delivery of its stock as required by Section 275-a of the Tax Law.

There being no further business, the meeting then adjourned.

.....  
Secretary.

FORM NO. 52.

*Certificate of Secretary of Corporation of Adoption of Directors' Resolution and of Transcript from By-laws Re Bank Account.*

*"Resolved*: That until further action of the Board, the funds of this corporation be deposited to the credit of the corporation with the ..... Bank, subject to cheque signed in the name of this corporation by the Treasurer or Assistant Treasurer, when countersigned by the President or the Secretary.

*Resolved*: That until further action of the Board, Mr. .... be appointed Assistant Treasurer with authority to perform all of the duties of the office of Treasurer during the absence or inability to serve of that officer."

(Here comes original signature.)	(Here comes original signature.)
.....	.....
President.	Treasurer.
(Here comes original signature.)	(Here comes original signature.)
.....	.....
Secretary.	Assistant Treasurer.

I, ....., Secretary of ....., Inc., do certify that Resolutions of which the above are copies, were duly adopted at a regularly called meeting of the Board of Directors of said corporation, held on the ..... day of ....., 191..; that ..... is Treasurer, and ....., Assistant Treasurer, and that ..... is President and ..... is Secretary of said corporation, and that the signatures above set forth, of the officers authorized to sign and countersign checks, are the genuine signatures of such officers.

I do further certify that the following is a true copy of Article ..., Section ..., of the By-laws of said Corporation:

[Here insert provisions of By-laws having to do with Corporate Funds.]  
Given under the seal of said corporation, this ..... day of ....., 191...

(Corporate Seal.) .....  
Secretary.

FORM NO. 53.

Stock Subscription Agreement.

WHEREAS, ..... represents that he has been offered an agency to sell, in ....., from and after the ..... day of ....., 191., the following goods, wares and merchandise, viz.: ..... and proposes to organize under the Business Corporations Law of the State of New York, a corporation under the name of ....., Inc., with authorized capital to consist of ..... Shares of seven per cent (7%) cumulative preferred stock, par value One Hundred Dollars (\$100) each, and ..... Shares of common stock having no par value, and no dividends are to be payable upon any common stock until all said preferred stock has been redeemed in full;

NOW, THEREFORE, the subscribers hereto, in consideration of their mutual subscriptions, do hereby, and each for himself does, subscribe to the number of shares of preferred stock in said ....., Inc., when organized, set opposite their respective signatures hereunder, and each subscriber agrees to pay, at the rate of One Hundred Dollars (\$100) per share, the total amount set opposite his said signature, in manner following:

..... per cent (50%) of each subscription on the ..... day of ....., 191.; the balance on the ..... day of ....., 191...

This agreement may be executed in several counterparts, each of which, so executed, shall be deemed to be an original, and such counterparts shall, together constitute but one and the same instrument.

Name.	Address.	No. Shares	No. Shares
		Prefd. Stock	Common Stock
		Subscribed.	Subscribed.
			Amount.
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

## FORM NO. 54.

*Certificate of Payment of One-Half of Capital Stock.*

WHEREAS, ....., Inc., less than one year from the execution hereof, was incorporated as provided in section two of the Business Corporations Law, and one-half of its capital stock has been paid in within thirty days of the execution hereof,

Now, therefore, we, a majority of the directors of said corporation, do sign and acknowledge, and we, the president (or vice-president) and secretary (or treasurer) of said corporation, do verify; and do file in the offices where the certificate of incorporation of said corporation were filed, this certificate; that the capital stock of said corporation is ..... shares, having no par or nominal value [or is ..... shares of the par value of ..... dollars each] and that one-half of said capital stock has been paid in [state how, whether in cash, property or both].

[Add acknowledgments for directors and verifications for officers.]

## FORM NO. 55.

*Certificate of Common Stock Without Par Value.*

Incorporated under the

The .....

Laws of New York.

Corporation.

Ctf. No.: .....

No. of Shares: .....

Preferred Stock ..... Shares Par Value \$..... Each.

Common Stock ..... Shares Without Par Value.

This is to certify that ..... is the owner of ..... full paid and non-assessable shares without nominal or par value of the common stock of ....., Inc., transferable only on the books of the corporation by the holder hereof in person or by duly authorized attorney upon surrender of this certificate properly endorsed.

The common stock is subject in all respects to the prior rights of holders of preferred stock as provided in the Certificate of Incorporation.

Witness the seal of the corporation and the signatures of its duly authorized officers, affixed this ..... day of ....., 191...

.....  
President.

.....  
Secretary.

## FORM NO. 56.

*Certificate of Preferred Stock With Par Value.*

Incorporated under the  
Laws of New York.

The .....  
Corporation.

Ctf. No.: .....

No. of Shares: .....

Preferred Stock ..... Shares Par Value \$ ..... Each.

Common Stock ..... Shares Without Par Value.

This is to certify that ..... is the owner of ..... full paid and non-assessable shares of the par value of \$ ..... each of the preferred stock of ....., Inc., transferable only on the books of the corporation by the holder hereof in person or by duly authorized attorney upon surrender of this certificate properly endorsed.

Holders of the preferred stock are entitled [*here state preferences, e. g.*—to receive cumulative dividends at the rate of seven per centum per annum, and all earnings applicable to dividends shall be applied to payment thereof and to the accumulation of a fund sufficient to retire all outstanding preferred stock, before any dividends shall be paid on the common stock. The preferred stock may be retired at any time at ..... Dollars per share and accumulated dividends, in manner provided in the Certificate of Incorporation and the By-laws. The preferred stock shall, in the event of dissolution of the corporation, be paid in full, with accumulated dividends, before any payment of assets shall be made to the holders of common stock].

Witness the seal of the corporation and the signatures of its duly authorized officers, affixed this ..... day of ....., 191...

.....  
President.

.....  
Secretary.

## FORM NO. 56-A.

*Temporary Receipt for Stock Certificate.*

Received of .....  
.....  
Certificate No. ....  
in the name of .....  
for ..... shares of capital stock of undersigned corporation, for which new certificate is issuable on or after ....., 191..., pursuant to letter dated ....., 191..., to stockholders of undersigned corporation and agreement marked "Exhibit A" annexed thereto.

..... Company.

By .....

Treasurer.

Dated ....., 191...

## FORM NO 57.

*Petition to Court for New to Replace Lost or Destroyed Stock Certificate.*

SUPREME COURT,

COUNTY.

In the Matter of the Application of ....., a stockholder in ....., Inc., for an order requiring said corporation to issue a new certificate of stock.	} Petition.
---	-------------

The petition of ..... respectfully alleges:

I. That petitioner is the owner of ..... shares of stock in  
....., Inc., a domestic corporation, represented  
by certificate number ....., dated ....., 19.., in petitioner's  
name, for said number of shares of said corporation's stock, issued to petitioner  
[or however the fact may be].

II. That said certificate was lost [or destroyed] under the circumstances here-  
inafter particularly stated, viz.: .....

III. That petitioner has duly demanded of said corporation that it issue to  
petitioner a new certificate in place of said certificate number .....  
[e. g., upon petitioner giving said corporation a bond, etc., etc.]; and that said  
corporation has refused said request.

IV. That petitioner resides at ....., and that the  
principal business office of said corporation is located at .....

Wherefore, petitioner prays an order requiring said corporation to show  
cause why it should not be required to issue a new certificate in place of the  
one lost or destroyed.

.....  
[Verification by petitioner.]

## FORM NO. 58.

*Order to Show Cause Why New Stock Certificate Should Not Issue.*

(Title as in Form No. 57.)

(Caption of Court Order at Special Term.)

Upon presentation, reading and filing the petition herein of .....,  
verified the ..... day of ....., 191.., from which it appears to  
the court's satisfaction that ....., Inc., a domestic  
corporation, should show cause why a new certificate of its stock should not be  
issued to said petitioner in lieu of one lost or destroyed;

Let said ....., Inc., show cause before this court  
at a Special Term, Part .... thereof, to be held at the County Court House  
(in ..... Borough, New York City) on the ..... day of .....,  
191.., at ..... o'clock in the ..... noon, or as soon thereafter as counsel  
can be heard, why an order should not be made requiring said .....,  
Inc., to issue a new certificate to said ....., in place of  
one lost or destroyed; and, further,

Let a copy of said petition and of this order be served on the president or treasurer of said ....., Inc., personally, at least ten days before the time herein set for showing cause.

Dated ....., 191...

Enter.

.....

J. S. C.

#### FORM NO. 59.

*Order for Issue of New Certificate of Stock in Place of One Lost or Destroyed.*

*(Title as in Form No. 57.)*

*(Caption of Court Order.)*

Upon the petition of ....., verified the ..... day of ....., 191..., and heretofore filed herein; and upon the order to show cause dated the ..... day of ....., 191..., heretofore filed herein; and upon reading and filing the affidavit of ....., sworn to herein the ..... day of ....., 191..., by which it has been proven to the satisfaction of the court that due and timely service has been made of a copy of said petition and order upon ....., president [*or*, treasurer] of ....., Inc.; and the court having in a summary manner inquired into the truth of the facts stated in said petition, and heard the proofs and allegations of the parties in regard thereto, and being satisfied that the petitioner is the lawful owner of ..... shares of stock in said corporation, described in said petition and represented by certificate dated the ..... day of ....., 191..., and numbered ....., and that said certificate has been lost [*or* destroyed] and cannot after due diligence be found, and that no sufficient cause has been shown why a new certificate in place thereof should not be issued, now, after hearing ....., Esq., of counsel for petitioner in support of said order, and ....., Esq., of counsel for said corporation, in opposition, it is, on motion of ....., Esq., attorney for petitioner,

Ordered, that said corporation be and it hereby is required, on or before the ..... day of ....., 191..., to issue and deliver to petitioner a new certificate for ..... shares of its stock, upon petitioner depositing ..... [*state certain security, (or, filing a bond in ..... state form and penalty of bond)*], which said security [*or*, bond] appears to the court sufficient to indemnify any person other than petitioner who shall hereafter be found to be the lawful owner of said lost [*or*, destroyed] certificate.

[*An order may also be made for publication, either before or after this order, of such notice of the transaction as the court deems proper.*]

#### FORM NO. 60.

*Bond of Indemnity on Issue of New Stock Certificate for One Lost, etc.*

KNOW ALL MEN BY THESE PRESENTS, That we, ..... of ....., as principal, and ....., as surety, are held and firmly bound unto ....., Inc., in the penal sum of ....., lawful money of the United States, for the payment of which, well and truly to be made, the said principal and surety bind themselves, their heirs, executors, and administrators, jointly and severally, firmly by these presents.

SEALED with our seals and dated this ..... day of ....., 1917.

WHEREAS, On the ..... day of November, 191., the above named obligee issued to the said principal, a temporary certificate, representing ..... shares of capital stock of the said ....., Inc., being certificate No. ...., and

WHEREAS, The said certificate above described has been inadvertently mislaid or destroyed, and the said obligee will issue a permanent certificate for ..... shares of capital stock of the said ....., Inc., upon being properly indemnified by so doing.

Now, THEREFORE, the condition of this obligation is such that if the above bounden ....., shall well and truly indemnify and save harmless the above obligee from all loss, cost, damage or expense, by reason of executing a permanent certificate of stock as above described, then this obligation to be null and void, otherwise to remain in full force and effect.

..... (L. S.)

..... (L. S.)

[Add acknowledgments.]

#### FORM NO. 61.

##### *Assignment of Stock and Power of Attorney to Transfer on Books.*

For value received, I. (we) hereby sell, assign, and transfer unto ..... the shares of the capital stock represented by the within certificate [or, of the ..... corporation], and do hereby irrevocably constitute and appoint ..... attorney to transfer the said stock on the books of the within-named [or, the said] company, with full power of substitution in the premises.

Dated, .....

.....

In presence of

.....

#### FORM NO. 62.

##### *Proxy*

KNOW ALL MEN BY THESE PRESENTS, That I, the undersigned, do hereby constitute and appoint ....., ..... and ....., or any one or more of them, the action of the majority of them to be in any event controlling, for me and in my name, place and stead, to vote as my proxies or proxy at the annual meeting of the stockholders of the ....., Inc., to be held on ....., the ..... day of ....., 191., at ....., or at any adjournment thereof, for the election of directors to be chosen at said meeting, and on any resolution or proposition that may be submitted to a vote of the stockholders thereat, according to the number of votes that I should be entitled to cast if then personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said proxies or proxy, or substitutes or substitute may do in my place, name and stead, as fully as I could do if personally present.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this .....  
day of ....., 191...

..... (L. S.)

Witness:

.....

#### FORM NO. 63.

##### *Voting Trust Agreement.*

Agreement made this ..... day of ....., 191..., by and between each of such of the stockholders of ....., Inc., a domestic corporation, as may sign this agreement, hereafter called the stockholders, and ....., hereinafter called the voting trustee, and every other stockholder signing this agreement, Witnesseth, that in consideration of one dollar by each party hereto to every other party hereto paid, and of the premises, and of other good and valuable consideration, it is mutually agreed:

(1) That each stockholder signing this agreement transfers his stock in said corporation to the voting trustee for the purpose of vesting in the latter the right to vote thereon for a time not exceeding the ..... day of ....., 191.. [not more than five years] upon the following stated terms and conditions, pursuant to which said voting trustee shall act:

(a)

(b) ....., etc., [stating terms and conditions].

(2) That each stockholder of said corporation upon his or her request therefor, may transfer his or her stock in said corporation to said voting trustee and participate in the terms, conditions and privileges hereof by signing a like agreement in writing as these presents in duplicate.

(3) That the certificates of stock of said corporation so transferred shall be surrendered and cancelled and certificates therefor issued to such transferee in which it shall appear that they are issued pursuant to this agreement; and in the entry of such transferee as owners of such stock in the proper books of said corporation that fact shall also be noted and thereupon said transferee may vote upon the stock so transferred during the time herein specified.

(4) That a duplicate of this agreement and of every agreement like it executed by any of the stockholders of said corporation shall be filed in the office of said corporation where its principal business is transacted and be open to the inspection of any stockholder daily during business hours.

Witness our hands and seals to duplicate copies hereof this ..... day of ....., 191...

..... (L. S.)

..... (L. S.)

[Individual acknowledgments may be added.]

#### FORM NO. 64.

##### *Minutes of Stockholders' Annual Meeting.*

The annual meeting of the stockholders of ....., Inc., was held at ....., the principal office of the corporation, at .... o'clock in the .....noon of the ..... day of ....., 191...

The President in the Chair. The Secretary presented notice of the meeting, proof by affidavit verified the ..... day of ....., 191..., of ....., of publi-

cation of said notice in ....., at least once a week for two successive weeks immediately preceding the meeting, and proof by affidavit verified the ..... day of ....., 191.., of ....., of mailing of a copy of said notice to each stockholder as required by the by-laws. On motion duly seconded and unanimously carried, said notice and affidavits were ordered filed in the company's archives.

The Secretary reported that of the total outstanding shares of stock of the company, numbering ....., the following were present:

In person, ..... By proxy, .....; and that he had examined all said proxies and that they were on file and correct.

The minutes of the last annual meeting of the stockholders were read, and, on motion duly seconded and unanimously carried, approved.

The President presented his annual report as follows:

[Take in].

On motion, duly seconded and unanimously carried, said report was approved.

The Treasurer presented his annual report as follows:

[Take in].

On motion, duly seconded and unanimously carried, said report was approved.

The election of directors by ballot for the ensuing year was then held. Messrs. .... and ....., as inspectors of election, having duly qualified by taking the statutory oath of office, and counted the votes cast, reported as follows:

That the total votes cast numbered ....., distributed thus:

Mr. ....	..... votes.
Mr. ....	..... votes.
Mr. ....	..... votes.

The President declared Messrs. .... and ..... duly elected directors for the coming year.

[Then add any further minutes concerning other action taken by stockholders].

There being no further business to come before the meeting it was adjourned.  
.....  
Secretary.

FORM NO. 65.

\*  
*Minutes of Stockholders' Special Meeting.*

A special meeting of the stockholders of ....., Inc., was held at ....., at .. o'clock in the .....noon of the ..... day of ....., 191.., pursuant to the following call and waiver:

We, the undersigned, being the holders of all the stock outstanding of ....., Inc., do hereby waive any notice required by law, by-laws or otherwise of a special meeting of stockholders of said corporation, and do appoint ..... as the place, and .. o'clock in the .....noon of the ..... day of ....., 191.., as the time, for holding said meeting, and do consent to the transaction thereat of any business which may come before the meeting.

.....  
.....  
.....

The President in the Chair and the Secretary recording. Present: Messrs.  
 ....., and ....., being all the stockholders.

[Insert minutes of action taken for which meeting was called.]

There being no further business to come before the meeting it was adjourned.

.....  
 Secretary.

#### FORM NO. 66.

*Certificate of Office and Incorporation on Registration of Corporation under  
 § 275-a, Tax Law.*

Name .....  
 Address .....

I, ..... (President or Secretary) of the  
 ..... (name of corporation)  
 do hereby certify that the said corporation keeps or maintains its office [for  
 the sale, transfer or delivery of its stock] at No. ....,  
 in the city of ....., New York.

Incorporated ....., Laws of the State of .....

..... (President or Secretary).

State of New York, }  
 County of ..... } ss.:

On this ..... day of ....., 191., before me the subscriber,  
 personally came ....., to me known, and who being by me duly  
 sworn, did depose and say that he is the (President or Secretary) of the corpo-  
 ration above named and that he executed the foregoing certificate on behalf of  
 said corporation pursuant to authority vested in him by a vote of the board of  
 directors of said corporation.

.....  
 Notary Public.

#### FORM NO. 67.

*Certificate of Increase or Decrease of Capital Stock on Unanimous Consent of  
 Stockholders.*

We, being all the stockholders of ....., Inc., a domestic cor-  
 poration, do hereby unanimously consent in writing to the increase [or reduc-  
 tion] of the capital stock of said corporation, and do personally or by our  
 duly authorized proxies, execute this certificate, for filing in the offices of the  
 Secretary of State and Clerk of the County in which said corporation's prin-  
 cipal business office is located, as follows:

*First*—The amount of capital of said corporation authorized prior to the  
 change therein hereby accomplished was .....

*Second*—The proportion of said authorized capital actually issued was  
 .....

*Third*—The amount of the increased [or reduced] capital stock is .....  
*Fourth*—[In case of the reduction of capital stock.] The whole amount of the ascertained debts and liabilities of the corporation is .....  
*Fifth*—[If the capital stock is reduced and it is so desired.] The amount of capital over and above the amount of the reduced capital shall be returned to the stockholders *pro rata* at such times and in such manner as the directors shall determine.

In witness whereof we have hereunto subscribed our names personally or by duly authorized proxies in duplicate, this ..... day of ....., 191...

<i>Names of Stockholders.</i>	<i>Names of Proxies.</i>
.....	.....
.....	.....
.....	.....

[Add individual acknowledgments.]

FORM NO. 68.

*Affidavit That Reduced Capital Exceeds Liabilities.*

State of New York, }  
County of ..... } ss.:

WHEREAS, ....., Inc., has reduced its capital stock from ..... to ....., and it is required that the certificate for consent to such reduction shall have indorsed thereon the approval of the Comptroller, now therefore, ..... and ....., each having been duly sworn, does say: Said ..... is (*Assistant*) Secretary and said ..... (*Assistant*) Treasurer of said corporation, which is a domestic corporation other than a railroad or moneyed corporation, and that its said reduced capital is sufficient for its proper purposes and is in excess of its ascertained debts and liabilities.

Sworn to before me this .....  
day of ....., 191...

.....  
(*Assistant*) Secretary.  
.....  
(*Assistant*) Treasurer.

FORM NO. 69.

*Notice to Stockholders of Meeting to Increase or Reduce Corporation's Capital Stock.*

*To the Stockholders of ....., Inc.:*

Notice is hereby given that a special meeting of the stockholders of ..... Inc., will be held at ....., at ..... o'clock in the .....noon of the ..... day of ....., 191., with the object

of authorizing, by a vote of the stockholders owning at least a majority of the stock of said corporation, an increase [or, reduction] of said corporation's capital stock from \$....., consisting of ..... shares of preferred stock of the par value of \$..... each, and ..... shares of common stock without nominal or par value, to \$....., consisting of ..... shares of preferred stock of the par value of \$..... each, and ..... shares of common stock without nominal or par value.

.....  
President,

.....  
Secretary.

## FORM NO. 70.

*Minutes of Stockholders' Meeting to Increase or Reduce Corporation's Capital Stock.*

A special meeting of the stockholders of ....., Inc., was held at ....., at ..... o'clock in the .....noon of the ..... day of ....., 191., pursuant to the following notice:

[Take in notice as in Form No. 69.]

The meeting organized by choosing the president of the corporation, a stockholder therein, chairman, and its secretary, also a stockholder, secretary of the meeting.

The secretary of the meeting presented the foregoing notice and the affidavits of ..... and ....., verified respectively the ..... and ..... days of ....., 191., and showing respectively the publication and mailing (or personal service) of said notice as required by statute and the by-laws. On motion, duly seconded and unanimously carried, said affidavits were ordered filed in the archives of the corporation.

The secretary of the meeting reported the total number of shares of the corporation's stock authorized as ....., of which ..... were outstanding, and ..... were present at this meeting in person, and ..... by proxy, and that the proxies of the latter were on file and correct.

[If capital stock is to be reduced:—The secretary of the meeting presented the report of the treasurer of the corporation that the whole amount of its ascertained debts and liabilities was \$..... On motion, duly seconded and unanimously carried, such report was ordered filed with the archives of the corporation.]

The following resolutions were then moved:

Resolved, that the capital stock of this corporation as authorized at ..... shares of preferred stock of the par value of \$..... each and ..... shares of common stock without nominal or par value, be and it hereby is increased [or reduced] to ..... shares of preferred stock of the par value of \$..... each and ..... shares of common stock without nominal or par value.

[If the capital stock is reduced: Further resolved, that the amount of the corporation's capital over and above the amount of its capital as reduced at this meeting be returned to the stockholders *pro rata* [or according as their preferences entitle them], at such times and in such manner as the Directors shall determine].

Further Resolved, that the chairman and secretary of this meeting and the proper officers of the corporation be and they hereby are directed and authorized to make, sign, certify, acknowledge and file a certificate of the increase [or reduction] of this corporation's capital stock as required by law and to do all things necessary to effectuate such increase [or reduction].

The foregoing resolutions were duly seconded and unanimously carried.

There being no further business to come before the meeting, it was adjourned.

.....  
Secretary of the Meeting.

#### FORM NO. 71.

##### *Certificate of Increase or Decrease of Capital Stock on Stockholders' Meeting.*

THIS CERTIFICATE of the proceedings at a meeting of the stockholders of ....., Inc., a domestic corporation, WITNESSETH:

*First*—That said meeting was held at ....., on the ..... day of ....., 191.., at ..... o'clock in the .....noon, specially called in the manner provided by law or the by-laws for the purpose of authorizing the increase [or reduction] of the capital stock of said corporation from ..... to .....

*Second*—Notice of the meeting, stating the time, place and object, and the amount of the increase [or reduction] proposed, signed by the president [or a vice-president] and the secretary, was published once a week for at least two successive weeks in a newspaper, viz., ....., in the county where said corporation's principal business office is located, and a copy of such notice was duly mailed to each stockholder [or member] at his last-known post-office address at least two weeks before the meeting [or was personally served on him at least five days before the meeting.]

*Third*—At the time and place specified in said notice, as aforesaid, the stockholders appeared in person or by proxy in numbers representing at least a majority of all the shares of stock, and organized by choosing the undersigned from their number as chairman and secretary, respectively.

*Fourth*—A sufficient number of votes of said stockholders, viz., the votes of stockholders owning at least a majority of the stock of said corporation, was given in favor of such increase [or reduction].

*Fifth*—The amount of capital of said corporation authorized prior to said meeting was .....; the proportion thereof actually issued was .....; and the amount of the increased [or reduced] capital stock is .....

*Sixth*—[In case of the reduction of capital stock only.] The whole amount of the ascertained debts and liabilities of the corporation is .....

*Seventh*—The proceedings of said meeting were entered upon the minutes of the corporation.

Witness our signatures, verifications and acknowledgments, as chairman and secretary, respectively, of said meeting, to this certificate of the proceedings,

showing a compliance with the provisions of chapter 61, Laws of 1909, and its amendments.

Dated . . . . .

.....  
Chairman.  
.....  
Secretary.

[Add verifications and acknowledgments.]

## FORM NO. 72.

*Notice to Stockholders of Meeting to Issue Preferred and Common Stock and Different Classes of Preferred Stock.*

To the stockholders of ....., Inc.:

Notice is hereby given that a meeting of the stockholders of ....., Inc., is hereby called to be held at ....., at ..... o'clock in the ..... noon of the ..... day of ....., 191., for the purpose of obtaining the consent of the holders of record of two-thirds of the capital stock of said corporation to the issue of preferred stock in the amount of ..... shares of the par value of \$...... a share [or of different classes of preferred stock as follows: .....; or as the case may be].

.....  
Secretary.

.....  
President.

## FORM NO. 73.

*Minutes of Meeting of Stockholders to Issue Preferred and Common Stock and Different Classes of Preferred Stock.*

A special meeting of the stockholders of ....., Inc., was held at ....., at ..... o'clock in the ..... noon of the ..... day of ....., 191., pursuant to the following notice:

[Take in notice as in Form No. 72.]

The president in the chair and the secretary recording.

The secretary presented the foregoing notice and the affidavit of ..... , verified the ..... day of ..... , 191.., showing ..... [*such notice as is required by statute and by-laws of the annual meeting of the corporation*]. On motion, duly seconded and unanimously carried, such affidavit was ordered filed in the archives of the corporation.

The secretary reported the total authorized capital stock as ..... divided as follows: .....; of which ..... was outstanding, divided as follows: .....; and of which ..... were present at this meeting in person and ..... by proxy, and that the proxies of the latter were correct and on file.

The following resolution was then moved:

WHEREAS, the present authorized capital stock of this corporation is ..... divided, as follows: .....; of which ..... is outstanding, divided as follows: .....; and it is the stockholders' desire to

..... (*e. g.*, issue preferred stock as follows: .....; issue different classes of preferred stock as follows: .....; *or as the case may be*).

Resolved, that the stockholders of this corporation in meeting duly assembled consent to ..... (*e. g.*, *as in parenthesis in preamble above*).

Further Resolved, that the president or a vice-president and the secretary or an assistant-secretary of the corporation be and they hereby are directed to sign, swear, file and record, as required by law, a certificate of the proceedings of this meeting.

Said resolutions were duly seconded and carried by the vote of ..... shares, being more than the holders of record of two-thirds of the corporation's capital stock.

There being no further business to come before the meeting, it was adjourned.

.....  
Secretary.

#### FORM NO. 74.

#### *Certificate of Proceedings of Stockholders' Meeting Consenting to Issue of Preferred and Common Stock and Different Classes of Preferred Stock.*

We, ....., president (or vice-president), and ....., secretary (or assistant secretary), of ....., Inc., a domestic corporation, do in duplicate sign, swear to, file and record this certificate of the proceedings of a stockholders' meeting of said corporation consenting to the issue ..... (*e. g.*, of preferred stock, *or as the case may be*), as follows:

Said meeting was held pursuant to the following notice:

[*Take in notice as in Form No. 72.*]

Due notice, as required for the annual meeting of the corporation, was given of said meeting.

The undersigned president and secretary respectively presided over and recorded the proceedings of said meeting.

The authorized capital stock of said corporation prior to said meeting was ..... divided as follows: .....; of which ..... was outstanding, divided as follows: .....; of which ..... were present at said meeting in person and ..... by proxy; and the proxies of the latter were correct and on file.

The following resolutions were carried by vote of ..... of said corporation's capital stock, being more than two-thirds of the holders of record of said capital stock:—

[*Take in resolutions from Form No. 73.*]

That the authorized capital stock of said corporation, pursuant to the consent of stockholders given at said meeting, is as follows:

[*State as the case may be.*]

Witness our hands this ..... day of ....., 191..

.....  
(Vice) President,

.....  
Secretary.

[*Add jurats of president and secretary.*]

## FORM NO. 75.

*Request of Holders of Preferred Stock for Exchange Thereof for Common Stock.*

We, the undersigned, holding separately the number of shares of stock in ..... Inc., set opposite our signatures hereto, and in the aggregate all [or however the case may be] of the preferred stock in said corporation, do hereby in writing request said corporation to exchange our said holdings of preferred stock for common stock and to issue certificates of common stock therefor as ..... [e. g. agreed in the certificate of organization of said corporation; or, in the issue of said preferred stock; or, share for share].

Name.	No. of shares.
.....	.....
.....	.....
.....	.....
.....	.....

## FORM NO. 76.

*Minutes of Directors' Meeting to Exchange Preferred for Common Stock.*

A special meeting of the board of directors of ..... Inc., was held at ..... at .. o'clock in the .....noon of the ..... day of ..... 191., pursuant to the following call and waiver:

We do hereby waive all notice required by statute, by-laws or otherwise of a special meeting of the board of directors of ..... Inc., and do appoint ..... as the place and .. o'clock in the .....noon of the ..... day of ..... 191., as the time, for holding said meeting, and do consent to the transaction thereat of any business which may properly come before the meeting, and particularly of the business of exchanging preferred stock of said corporation for common stock thereof.

Dated, .....

.....  
 .....  
 .....

The President in the Chair, and the Secretary recording. Present: Messrs. ...., ....., and ....., the full board.

The Secretary presented the original of the following copy of request:

[Take in Form No. 75.]

*Resolved*, That pursuant to the written request now submitted to this board of holders of ..... shares of preferred stock of this corporation, said corporation, two-thirds at least of its directors voting "aye", hereby exchanges its preferred stock held by said stockholders for its common stock, share for share [or as the case may be]; and

*Further Resolved*, That the proper officers of this corporation be and they hereby are authorized and directed to issue certificates for its common stock as hereby resolved.

The foregoing resolution was duly seconded and carried by the vote of two-thirds of the directors.

There being no further business to come before the meeting, it was adjourned.

.....  
 Secretary.

## FORM NO. 77.

*Consent of Stockholders to Change in Classification of Capital Stock.*

We, the undersigned, being stockholders of ..... Inc., a stock corporation organized and existing under the laws of the State of New York, do hereby consent that the authorized increased capital stock of the company, amounting to one hundred twenty thousand dollars (\$120,000), be classified into common and preferred stock, so that twenty thousand dollars (\$20,000) thereof, consisting of two hundred (200) shares of the par value of one hundred dollars (\$100) each, shall be common stock, and so that one hundred thousand dollars (\$100,000) thereof, consisting of one thousand (1,000) shares of the par value of one hundred dollars (\$100) each, shall be preferred stock. Said preferred stock to be entitled to preference and priority over the common stock and subject to restriction as follows:

The preferred stock of said company shall be entitled to a dividend of not exceeding six per cent. (6%) in any one year, which dividend shall be cumulative and payable out of the net earnings before any dividend is paid upon the common stock. And upon dissolution, after all the debts of the corporation shall have been paid, the assets, property and effects shall first be applied to the payment of the said preferred stock at par, with any unpaid accumulations thereon, and before any payment is made to the holders of the common; and the balance to the payment of said common stock. The common stock shall be entitled to all net earnings and profits in excess of the cumulative dividends of six per cent. (6%) per annum payable on the preferred stock. And the holders of preferred stock shall have the same rights and privileges to vote as the holders of the common stock.

*In Witness Whereof*, we have signed this instrument in duplicate this ..... day of ....., 191..

[Add individual acknowledgments.]

State of ..... }  
County of ..... } ss.:

....., being duly sworn, deposes and says that he is the secretary and treasurer of ..... Inc., the corporation mentioned in the foregoing instrument; that he is the custodian of the stock book containing the names of the stockholders of said corporation; that ..... and ....., the persons who have signed the foregoing instrument, are all the stockholders of said corporation, and that they are the holders of record of the entire capital stock of said corporation issued and outstanding.

Sworn to before me, this ..... }  
day of ....., 191.. }

FORM NO. 78.

*Notice of Meeting of Stockholders to Change Number of Shares Without Changing Capital Stock.*

[Adapt from Form No. 69. See St. Corp. L. § 65.]

## FORM NO. 79.

*Minutes of Stockholders' Meeting to Change Number of Shares Without Changing Capital Stock.*

[Adapt from Form No. 70. See Stock Corp. L. § 65.]

## FORM NO. 80.

*Certificate of Change of Number of Shares Without Changing Capital Stock.*

[Adapt from Form No. 71. See Stock Corp. L. § 65.]

## FORM NO. 81.

*Certificate of Reorganization to Permit Issuance of Shares Without Nominal or Par Value.*

Certificate of reorganization of ....., Inc., pursuant to section twenty-four of the Stock Corporation Law.

We, the undersigned, being every stockholder of record of ....., Inc., do hereby ourselves or by our duly authorized proxies, [or, being the president (or a vice-president) and the secretary (or treasurer) of ....., Inc.] sign and acknowledge this certificate of reorganization of said corporation pursuant to section twenty-four of the Stock Corporation Law, as follows:

1. The name under which said corporation was originally organized was .....; and said name not been changed [or if it has been changed, state facts]; and the present corporate title is .....

2. The law under which said corporation was organized is Laws of ....., chapter ....., article .....

3. The date on which and the public office or offices in which said corporation's certificate of incorporation was filed, are as follows:

Date.	Office of Secretary of State.	Office of Clerk of County of
.....	.....	.....

4. The amount of capital stock authorized by the certificate of incorporation of said corporation is ....., and said amount has not been changed [or, and said amount was changed by certificate or consent authorizing said change filed the ..... day of ....., 191.., and the amount to which said capital stock was increased (or, reduced) by said certificate or consent was .....].

5. The amount of each payment of taxes for the privilege of organizing or of increasing the capital stock of said corporation is as follows: .....

6. The number of shares into which the capital stock of said corporation has been divided [and, if classified, and the number and par value of the shares included in each class together with the preferences or distinctive features of the shares of each class] are as follows: .....

7. The number and shares of each class issued and outstanding are as follows: .....

8. The number of shares that may henceforth be issued by the corporation are as follows: .....

9. [If any of such shares be preferred stock: The preferences of said shares of preferred stock are as follows: .....; and, if such preferred stock have a preference as to principal the certificate must state the amount of such preferred stock having such preference, the particular character of such preferences and the amount of each share thereof, which must be five dollars or some multiple of five dollars, but not more than one hundred dollars.]

10. The amount of capital with which the corporation will carry on business is .....

11. The terms upon which the new shares of the reorganized corporation are to be issued in place of the outstanding shares of stock are as follows: .....

[12. The consideration for which the reorganized corporation may issue and sell its authorized shares is as follows: .....; or. The board of directors of the reorganized corporation is hereby authorized to issue and sell the corporation's authorized shares from time to time for such consideration as shall be the fair market value of said shares.]

Name of stockholder.	Name of proxy, if any.	No. of shares.
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

[Add acknowledgment for each stockholder] [or, witness our hands as president (or vice-president) and secretary (or treasurer) of said corporation, this ..... day of ....., 191..].

.....  
 (Vice) President,  
 .....  
 Secretary  
 or  
 Treasurer.

#### FORM NO. 82.

#### *Affidavit of Custodian of Stock Book Annexed to Stockholders' Certificate of Reorganization to Permit Shares Without Par Value.*

State of New York, }  
 County of ..... } ss.:

....., being duly sworn, says: I am ..... [e. g., secretary] of ....., Inc., and custodian of its stock book. The persons who have executed the foregoing certificate of reorganization of said corporation to permit issuance of shares without nominal or par value in person or by proxy constitute the holders of record of all of the shares of stock of said corporation, irrespective of class, issued and outstanding.

Sworn to before me this .....  
 day of ....., 191..

## FORM NO. 83.

*Affidavit of Corporate Officers Annexed to Certificate of Reorganization to Permit Issuance of Shares Without Par Value When Capital of Reorganized Corporation to be Less Than the Par Value of the Previously Issued Stock.*

State of New York, }  
County of ..... } ss.:

..... and ....., being duly and severally sworn, each for himself says: ..... that he, the said ....., is the president, and he, the said ....., is the secretary of ....., Inc.; and that the whole amount of the ascertained debts and liabilities of said corporation is \$.....

.....  
.....

Sworn to before me this .....  
day of ....., 191..

## FORM NO. 84.

*Affidavit by Corporate Officers Annexed to Their Certificate to Permit Issuance of Stock Without Par Value.*

State of New York, }  
County of .... } ss.:

..... and ....., being duly and severally sworn, each for himself says: That he, the said ..... is president and he, the said ....., is secretary of ....., Inc.; that they have been authorized and directed to execute and file the foregoing certificate of reorganization to permit issuance of shares without nominal or par value by the votes, cast in person or by proxy, of the holders of record of two-thirds or more of each class of the outstanding shares of stock, irrespective of any provision of the certificate of incorporation purporting to deny voting powers to the holders of any class of stock, at a meeting called and held upon written notice mailed to each stockholder at least two weeks before the date set for the meeting and published once a week for at least two successive weeks in a newspaper published and circulating in the county wherein the principal office of the corporation is located, and that such notice did expressly state the purpose of the meeting to be that of reorganizing the corporation pursuant to section twenty-four of the Stock Corporation Law, so as to permit the issuance of shares without par value, and did state the terms upon which the outstanding shares of stock were to be exchanged for the new shares. [If the amount of capital of the reorganized corporation is to be less than the par value of the previously outstanding stock, add: That the whole amount of the ascertained debts and liabilities of the corporation is .....].

.....

Sworn to before me this .....  
day of ....., 191..

## FORM NO. 85.

*Notice of Stockholders' Meeting to Reorganize Corporation to Permit Issuance of Shares Without Par Value.*

Notice is hereby given that a meeting of the stockholders of ....., Inc., will be held at ....., at ..... o'clock in the .....noon of the ..... day of ....., 191.., for the purpose of voting upon a proposition to reorganize said corporation pursuant to section 24 of the Stock Corporation Law, so as to permit the issuance of shares without par value upon the following terms upon which the outstanding shares of stock are to be exchanged for the new shares, viz.: ..... (state terms).\*

.....  
*President,*  
 .....  
*Secretary.*

## FORM NO. 86.

*Minutes of Stockholders' Meeting to Reorganize Corporation to Permit Issuance of Shares Without Par Value.*

A meeting of the stockholders of ....., Inc., was held at ....., at ..... o'clock in the .....noon of the .... day of ....., 191.., pursuant to the following notice:

[Take in Form No. 85.]

The President in the chair; the Secretary recording.

The Secretary presented the affidavits of ..... and ..... verified respectively the ..... and ..... days of ....., 191.., showing respectively that the foregoing notice had been mailed to each stockholder at least two weeks before the date set for the meeting and that said notice had been published once a week for at least two successive weeks in a newspaper published and circulating in the county wherein the principal office of the corporation is located. The Secretary further reported the total authorized capital stock of the corporation to be ....., irrespective of any provision of the certificate of incorporation purporting to deny voting powers to the holders of any class of stock; the issued and outstanding stock to be .....; the stock present at this meeting in person to be ..... and by proxy .....; and that the proxies of the stock present by proxy were correct and on file. On motion duly seconded and unanimously carried, said affidavits were ordered on file.

The following preamble and resolutions were thereupon moved:

WHEREAS, this corporation is a stock corporation, other than a moneyed corporation and other than a corporation under the jurisdiction of any public service commission, organized under the Stock Corporation Law, and desires to reorganize so as to permit the issuance of shares without par value,

*Resolved*, that this corporation reorganize so that it, its officers, directors and stockholders, shall acquire and enjoy all the rights, privileges, powers and exemptions, and be subject to all the liabilities and obligations imposed by

sections nineteen to twenty-three, inclusive, of the Stock Corporation Law; and further

*Resolved*, that the President (or Vice-president) and Secretary (or Treasurer) of this corporation be and they hereby are authorized and directed to execute and file the certificate of such reorganization required by law in form as follows:

[Take in from Form No. 22.]

Said motion was duly seconded and carried by vote by ballot of the holders of record of ..... shares of stock of said corporation, being more than two-thirds of each class of the outstanding shares of stock, irrespective of any provision of the certificate of incorporation purporting to deny voting powers to the holders of any class of stock.

There being no further business to come before the meeting, it was adjourned.

.....,  
Secretary.

#### FORM NO. 87.

##### *Certificate of Payment of Half of Capital Stock.*

WHEREAS, ....., Inc., less than one year from the execution hereof, was incorporated as provided in section two of the Business Corporations Law, and one-half of its capital stock has been paid in within thirty days of the execution hereof,

Now, therefore, we, a majority of the directors of said corporation, do sign and acknowledge, and we, the president (or vice-president) and secretary (or treasurer) of said corporation, do verify; and do file in the offices where the certificate of incorporation of said corporation were filed, this certificate that the capital stock of said corporation is ..... shares, having no par or nominal value [or is ..... shares of the par value of ..... dollars each]; and that one-half of said capital stock has been paid in [state how, whether in cash, property, or both].

[Add acknowledgments for directors and verifications for officers].

#### FORM NO. 88.

##### *Affidavit of Truth of Statements in Certificate of Payment of Half of Capital Stock.*

State of New York, }  
County of ....., } ss.:

..... and ....., being severally duly sworn, each for himself deposes and says: That he, the said ....., is the (Vice) President of ....., Inc., and that he, the said ....., is the Secretary thereof; and that the statements contained in the Certificate of Payment of Half the Capital Stock of said corporation, executed and acknowledged by ....., ..... and ....., on the ..... day of ....., 191..., are true.

Sworn to before me this ..... day of ....., 191....

.....  
.....

FORM NO. 89.

*Notice of Annual Meeting of Stockholders for Election of Directors, etc.*

Notice is hereby given that the annual meeting of the stockholders of ..... Inc., will be held at ..... at ..... o'clock in the .....noon of the ..... day of ....., 191.., to elect directors and to transact other business properly coming before such meeting.

.....  
President.

.....  
Secretary.

FORM NO. 90.

*Notice of Meeting to Elect Directors on Failure to Elect on Day Designated in By-Laws or Law.*

Notice is hereby given that a meeting of the members of ..... Inc., is called to be held at ..... at ..... o'clock in the .....noon of the ..... day of ....., 191.., for the purpose of electing directors by reason of the fact that the election thereof has not been held on the day designated in the by-laws or by law.

.....  
Directors.

FORM NO. 91.

*Noice of Meeting to Elect Directors on Failure of Directors to Call Meeting to So Elect After Failure to Elect on Day Designated by By-Laws or Law or Failure to So Elect at Such Meeting Called by Directors.*

Notice is hereby given that a meeting of the members of ..... Inc., is hereby called for ..... o'clock in the .....noon of the ..... day of ....., 191.., to be held at ..... for the purpose of electing directors of said corporation, by reason of the failure to hold such election on the day designated in the by-laws or by law and the subsequent failure of the directors to call a meeting of the members of said corporation for such election within one month thereafter [or, the failure to elect directors of said corporation at a meeting of the members of said corporation called by the directors thereof on failure to hold such election on the day designated in the by-laws or by law].

.....  
Member of ....., Inc.

FORM No. 92.

*Oath of Inspectors of Directors' Election.*

STATE OF NEW YORK, }  
County of ....., } ss..

..... and ..... being duly and severally sworn each for himself says: I will faithfully execute the duties of inspector

of election at the meeting of ....., Inc., to be held at .....,  
at ..... o'clock in the .....noon of the ..... day of ....., 191...,  
with strict impartiality and according to the best of my ability.

Sworn to before me this ..... day of ....., 191...

.....  
.....

FORM NO. 93.

*Report of Inspectors of Election.*

STATE OF NEW YORK, }  
County of ....., } ss.:

We, ..... and ....., the undersigned,  
Inspectors of Election of Directors of ....., Inc., at a  
meeting of the stockholders, held at its office, .....  
between the hours of 10 A. M. and 11 A. M., do hereby certify and report that  
we attended at the time and place so appointed for such election, and before  
entering upon the performance of our duties, we, each of us, took and subscribed  
the oath herein before set forth, that we would execute and discharge our duties  
at the election then to be held, with strict impartiality and according to the  
best of our ability. Thereupon we opened the polls at ..... That  
..... votes were cast upon shares of the capital stock of said company  
in person or by proxy and no more; that of said votes the following named  
persons received the number of votes set opposite their names, respectively,  
to wit:

.....	.....
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

We thereupon declared the following named persons, to wit:

.....	.....
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

Directors of this Company until the next Annual Meeting and until their suc-  
cessors are elected.

.....  
.....

Inspectors of Election.

Dated ....., 191...

## FORM NO. 94.

*Notice of Application for Court Inquiry Into Election of Directors.*

SUPREME COURT, ..... COUNTY.

In the Matter of the Application of .....  
 ....., a Stockholder of .....  
 Inc., Into the Election of Its Directors held  
 the ..... day of ....., 191...

TAKE NOTICE that upon the annexed affidavits of ..... and  
 ....., verified respectively the ..... and ..... day of  
 ....., 191..., the undersigned will apply to the Supreme Court,  
 ..... County, at Special Term, Part ..... thereof, at ..... o'clock  
 in the ..... noon of the ..... day of ....., 191..., or as soon  
 thereafter as counsel can be heard, for a summary hearing and inquiry into the  
 matters or causes of complaint and particularly the election of .....  
 (e g., the directors of ....., Inc., held on the ..... day of  
 ....., 191...), and for the establishment of said election (or, for an  
 order directing a new election), and for such order and such relief as right and  
 justice may require.

## FORM NO. 95.

*Affidavits on Application for Court Inquiry Into Election of Directors.*

(Title as in Form No. 94.)

[The affidavits on a court inquiry into a corporate election must depend upon  
 the facts of each particular case.]

## FORM NO. 96.

*Order on Court Inquiry Into Election of Directors.*

(Title as in Form No. 94.)

(Court Order Caption.)

On reading and filing the notice dated the ..... day of ....., 191...,  
 of application by ....., for a hearing and inquiry into and the  
 establishment of the election of directors of ....., Inc.,  
 held on the ..... day of ....., 191..., [or as the case may be] and  
 on reading and filing the affidavit of ....., verified herein  
 the ..... day of ....., 191..., from which it appears to my satisfaction  
 that said notice was duly served upon ..... and  
 ....., being the adverse party and those to be affected  
 thereby; and on reading and filing the affidavits of ..... and  
 ..... verified herein respectively by ..... and  
 ..... the ..... and ..... days of ....., 191...,  
 they being the persons aggrieved by or complaining of said election; and after  
 hearing in a summary way the proofs and the allegations of the parties and  
 inquiring into the matters or causes of complaint; and after hearing .....  
 ....., Esq., of counsel for the persons aggrieved in support

of their application, and ....., Esq., of counsel for the parties adverse to said application and for those to be affected thereby, now on motion of ....., Esq., attorney for said persons aggrieved, it is

Ordered, that new election of directors of ....., Inc., be held in lieu of the election thereof held, etc. [*or as they may be*].

Enter .....  
J. S. C.

FORM NO. 97.

*Unanimous Stockholders' Consent to Increase or Decrease of Number of Directors.*

We, the undersigned, being the holders of all the stock issued and outstanding of ....., Inc., a domestic stock corporation, do hereby consent to an increase [*or, decrease*] of the number of directors of said corporation from the number of ..... to the number of .....

Witness the signature of ourselves or our duly authorized proxies, this ..... day of ....., 191...

<i>Signature or Names of Stockholders.</i>	<i>Signature of Proxies.</i>	<i>No. of Shares.</i>
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

FORM No. 97-A.

*Affidavit of Custodian of Stock Book Annexed to Stockholders' Consent for Increase or Decrease in Directors.*

State of New York, }  
County of ....., } ss.:

....., being duly sworn, says: I am custodian of the stock book of ....., Inc., a domestic stock corporation. The persons who have signed the annexed foregoing consent to increase [*or reduction*] of the number of directors of said corporation, in person or by proxy, are the holders of record of the entire capital stock of said corporation issued and outstanding. The proxies of such as voted by proxy are hereto annexed.

Sworn to before me this ..... day of ....., 191...  
.....

FORM NO. 98.

*Minutes of Meeting of Stockholders to Increase or Reduce Number of Directors.*

A meeting of the stockholders of ....., Inc., a stock corporation, was held at ....., at ..... o'clock in the .....noon of the ..... day of ....., 191...

The President in the chair, and the Secretary recording.

The Secretary presented the affidavit of ....., verified the ..... day of ....., 191..., proving service at least two weeks before this meeting of a notice in writing on each stockholder of record personally or by mail, which notice was directed to each stockholder at his last known post-office address; and stated that said proof of service of such notice was filed in the office of the corporation at (or before) the time of this meeting.

The Secretary stated that the capital stock of the company was ..... shares, all outstanding and that the holders of more than a majority of its stock were present in person or by proxy, and that the proxies of the latter were regular and on file.

On motion made and duly seconded and carried by vote and determination of stockholders owning a majority of the stock of the corporation, it was

*Resolved*, That the number of directors be increased [or reduced, but not below the minimum number prescribed by law] from ..... to .....; and further

*Resolved*, That the proceedings of this meeting be entered in the minutes of the corporation and a transcript thereof verified by the president and secretary of the meeting be filed in the offices where the original certificate of incorporation were filed.

There being no further business to come before the meeting, it was adjourned.

.....  
Secretary of the Meeting.

#### FORM NO. 99

#### *Notice of Special Meeting of Stockholders to Increase or Reduce Number of Directors.*

A special meeting of the stockholders of ....., Inc., will be held at No. .... Street, Borough of ....., City of New York, N. Y., on Friday, the ..... day of ....., 191..., at ..... o'clock .. M., for the purpose of determining whether the number of its directors shall be increased from seven to nine; and of transacting such other business as may be brought before the meeting. A list of stockholders entitled to vote at said meeting will be taken as of the close of business on Thursday ....., 191....

If you do not expect to be present at the meeting, kindly sign the enclosed proxy, in the presence of a witness who should also sign, and return said proxy in the enclosed stamped addressed envelope.

Dated New York, ....., 191....

.....  
Secretary.

## FORMS NO. 100.

*Proof of Service of Notice of Meeting of Stockholders to Increase or Reduce Directors.*

State of New York,        }  
County of .....,        } ss.:

....., being duly sworn, says: At all times herein mentioned I was ..... (over 18) years old. On the ..... day of ....., 191.., I served a notice in writing, of which a true copy is hereto annexed, upon every stockholders of record of ....., Inc., by depositing in a United States mail-box at the New York post office, New York City, a copy of said notice enclosed in a sealed post-paid envelope addressed to each stockholder of record at his last known post-office address.

Sworn to before me this ..... day  
of ....., 191...

## FORM NO. 101.

*Certificate or Verification of Stockholders' Minutes to Increase or Reduce Number of Directors.*

The following transcript of the proceedings of a meeting of the stockholders of ....., Inc., to determine on the increase [or reduction] of said corporation's directors, is hereby verified by the president and secretary of said meeting for filing in the offices where the original certificates of incorporation of said corporation were filed:

[Take in Form No. 98.]

Witness our verifications, this ..... day of ....., 191..

.....  
President of Meeting.

.....  
Secretary of Meeting.

[Add Verifications.]

## FORM NO. 102.

*Petition to Supreme Court for Change of Corporate Name.*

STATE OF NEW YORK, COUNTY OF .....

In the Matter of the Petition of ..... , Inc., a domestic corporation to assume an other name.	} Petition.
---	-------------

*To the Supreme Court of the State of New York:*

The petition of ....., Inc., respectfully shows:

*First:* That it is a domestic stock corporation incorporated under a general law, viz.: [or, a special law, viz.: .....].*Second:* That its principal business office is situated at ....., in the Judicial District wherein this petition is made.*Third:* That it is not an insurance or railroad corporation or a corporation having banking powers or the power to make loans or deposits or to make insurances.*Fourth:* That its present name is ..... and it desires to assume another corporate name, viz.: .....*Fifth:* That annexed hereto is a certificate of the Secretary of State that the name which it proposes to assume is not the name of any other domestic corporation or a name which he deems so nearly resembling it as to be calculated to deceive.*Sixth:* That the grounds of this application are .....

Wherefore the petitioner applies for an order authorizing it to assume the name proposed on a day specified therein, not less than thirty days after the entry of the order.

(Corporate Seal)

Attest:

....., Inc.,  
by ..... President......,  
Secretary.

[Add verification as to a pleading in a court of record; and annex certificate of Secretary of State.]

## FORM NO. 103.

*Secretary of State's Certificate of Availability of New Name on Change of Corporate Name.*

State of New York, Office of the Secretary of State,	} ss.:
---	--------

This is to certify that I have examined the indices to the names of domestic corporations, the certificates of incorporation of which are filed or recorded in

this office, and find that the name ..... is not the name of any other domestic corporation, the certificate of incorporation of which is filed or recorded in this office, or a name so nearly resembling the name of any other such domestic corporation as to be calculated to deceive, except ..... which filed a certificate of incorporation ....., and ....., which filed a certificate of incorporation ....., .....

WITNESS my hand and the seal of office of the Secretary of State, at the city [SEAL] of Albany, this ..... day of ....., one thousand nine hundred and .....

.....  
Deputy Secretary of State.

#### FORM NO. 104.

##### *Notice of Presentation of Petition and Motion for Change of Corporatæ Name.*

Take notice that a petition by ....., Inc., for permission to assume another corporate name, viz.: ..... will be presented to the Supreme Court, at a Special Term (*Part* ..... thereof) to be held at ..... at .... o'clock in the .....noon of the ..... day of ....., 191.., or as soon thereafter as counsel can be heard; and a motion then made for permission to assume said new name.

.....

#### FORM NO. 105.

##### *Order Allowing Change of Corporate Name.*

(*Title as in Form No. 102.*)

(*Caption of Court Order.*)

On reading and filing the petition herein of ....., Inc., verified the ..... day of ....., 191.., and the certificate herein of the Secretary of State, dated the ..... day of ....., 191.., and the affidavit of ....., herein, verified the ..... day of ....., 191.., and the court being satisfied that said petition is true and that there is no reasonable objection to the change of name proposed and that said petition has been duly authorized and that notice of the presentation thereof as required by law has been made; and after hearing ....., Esq., of counsel for the petitioner in support of the application, and no one appearing in opposition thereto, it is, on motion of Messrs. ...., attorneys for the petitioner,

Ordered, That ....., Inc., be and it hereby is authorized to assume the name of ....., on the ..... day of ....., 191.., not less than thirty days after the entry of this order; and it is further

Ordered and directed, That this order be entered and the papers on which it was granted filed within ten days thereafter in the office of the clerk of the county in which petitioner's certificate of incorporation is filed, and that a certified copy hereof be filed within ten days after the entry thereof in the office of the Secretary of State; and it is further

Ordered and directed, That a copy hereof be published within ten days after its entry in ....., a newspaper in the county in which this order is directed to be entered, once in each week for four successive weeks.

Enter

.....,

J. S. C.

FORM NO. 106.

*Unanimous Consent of Stockholders to Change of Corporate Principal Office.*

We, being all the stockholders of ....., Inc., do hereby express in writing and duly acknowledge and file in the office of the Secretary of State, our unanimous consent to the change of said corporation's principal office and place of business, as follows:

*First.* Said corporation is a stock corporation existing under the laws of New York State, and is not a moneyed corporation.

*Second.* We consent to the change of its principal office and place of business from the city [town or county] named in its certificate of incorporation, viz. .... [or, to which it has been changed under the provisions of Stock Corporation Law, § 13], to the city [town or county] of ....., State of New York.

*Third.* Said corporation desires to actually transact and carry on its regular business from day to day in said ..... (*new place of business*).

Witness our hands as aforesaid, this ..... day of ....., 191..

.....  
.....  
.....

[*Add individual acknowledgments.*]

State of New York, }  
County of ..... } ss.:

....., being duly sworn, deposes and says that he is the Secretary of ....., Inc., the corporation mentioned in the foregoing instrument; that he is the custodian of the stock book containing the names of the stockholders in said corporation; that the persons who have attached their signatures to the foregoing instrument and acknowledged the execution thereof are all the stockholders of said corporation, and that they are the holders of the entire capital stock thereof issued and outstanding.

Sworn to before me this

day of ....., 191..

.....

## FORM NO. 107.

*Notice of Special Meeting of Stockholders to Change Corporation's Principal Office.*

[Adapt from Form 99.]

## FORM NO. 108.

*Minutes of Special Meeting of Stockholders to Change Corporation's Principal Office.*

[Adapt from Form No. 98.]

## FORM NO. 109.

*Certificate of Officers and Directors of Change of Corporation's Principal Office.*

The following certificate of a change of the principal office and place of business of ....., Inc., a domestic stock corporation, by authorization of its stockholders, *witnesseth*:

*First.* The signers hereof are the president, secretary, and a majority of the directors of said corporation, respectively.

*Second.* Said change was authorized by the stockholders of said corporation by unanimous consent expressed in writing (*or*, by a vote of the stockholders of said corporation; *or*, effected by the creation of a new county wholly within the limits and boundaries of an existing county).

*Third.* The name of said corporation is .....

*Fourth.* The city (*town*) and county where its principal office and place of business was originally located is .....; (and the city and county to which it was subsequently changed is .....).

*Fifth.* The city (*town*) and county to which it is desired to change its said principal office and place of business is .....

*Sixth.* It is the purpose of said corporation to actually transact and carry on its regular business from day to day at such last-named place.

*Seventh.* The names of the directors of said corporation and their respective places of residence are:

<i>Names.</i>	<i>Residences.</i>
.....	.....
.....	.....
.....	.....
.....	.....

Witness our signatures and verifications, this ..... day of ....., 191..

.....  
President.  
.....  
Secretary.  
.....  
.....  
.....  
Directors.

[Add verifications.]

FORM NO. 110.

Corporate Annual Report.

We, ..... the (vice-)president, and ....., the treasurer [or, secretary], of ....., Inc., a domestic [or foreign] stock corporation doing business within the State of New York [or, without the United States] do make the following annual report as of the first day of January, 19..:

*First.* The amount of said corporation's capital stock is ....., of which ..... is actually issued.

*Second.* The amount of said corporation's debts is \$..... [or, is not in excess of \$.....].

*Third.* The amount of said corporation's assets is \$..... [or, is at least equal to \$.....].

*Fourth.* The names and addresses of all the directors and officers of said corporation [and, in the case of a foreign corporation, the name of the person designated in the manner prescribed by the statutes of this State, as a person on whom process against said corporation may be served within the State of New York] are:

Names.	Character of Offices.	Addresses.
.....	.....	.....
.....	.....	.....
.....	.....	.....

Witness our hands and said corporation's seal this .... day of ....., 191..

(Corporate Seal)

(Vice-)President.

Attest:

.....  
Secretary [of Treasurer.]

.....  
Secretary.

## FORM NO. 111.

*Corporate Bond.*

[Forms of Corporate Bonds are found in the text of Form No. 112, immediately following, which is a corporate mortgage and trust indenture.]

## FORM NO. 112.

*Corporate Mortgage and Trust Indenture.*

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NOTE.—Neither the foregoing Table of Contents nor the Marginal Notes constitute any part of the Indenture or have a bearing on the meaning or construction of any of its provisions.

*Parties.*

AN INDENTURE, dated the ..... day of ....., A. D. One Thousand, Nine Hundred and ....., between ....., a corporation created and existing under the laws of the State of ..... (hereinafter termed the ..... Company), party of the first part, and ..... TRUST COMPANY ....., a corporation created and existing under the laws of the State of ..... (hereinafter termed the Trustee), party of the second part:

*Recitals.*

WHEREAS, the ..... Company, in the exercise of its corporate powers and for the purpose of furthering and accomplishing its corporate objects and purposes, has acquired, and is about and contemplates hereafter to acquire and to become interested in, certain properties, assets, bonds, debentures, and other obligations, and, also, shares of the respective capital stocks of other corporations hereinafter referred to; and desires to provide for the custody and preservation of the certificates representing and evidencing such shares of stock and of any bonds, debentures and other obligations that may become subject to the provisions hereof, now owned or which may hereafter be acquired by it; and

*Purposes of Indenture.*

WHEREAS, for the purpose of making payment, in part, for the properties, assets, bonds, debentures, obligations and shares of capital stock so acquired, or about or hereafter to be acquired, and of providing funds (a) to acquire outstanding obligations of corporations a majority in amount of whose then outstanding capital stock shall have been acquired or be controlled by the ..... Company; (b) to make loans and advances to enable said corporations, and to otherwise aid them, to discharge their outstanding indebtedness, in whatever form the same may be evidenced, and to construct, equip, enlarge, better, extend and add to their properties, and to otherwise promote their corporate purpose; (c) to make additions to and betterments, extensions and enlargements of the properties now owned or hereafter acquired by the ..... Company; (d) to otherwise further and accomplish its several and respective corporate powers and objects; and (e) for other lawful purposes, the ..... Company has resolved to make and to issue its bonds, of the several denominations hereinafter specified, payable on the ..... day of ....., or on a day or date subsequent thereto, in gold coin of the United States of America of or equal to the present standard of weight and fineness, and bearing interest at a rate not exceeding

five per cent. per annum, payable semi-annually, in like gold coin, on such days as may be specified and provided in the bonds to be issued hereunder from time to time; and

*Description of First Series of Bonds.*

WHEREAS, the first series of the bonds authorized hereby, aggregating the principal sum of ..... Dollars (\$.....), and as well any other bonds which the Board of Directors of the ..... Company may resolve and direct to be issued hereunder by such description and designation, shall be known as the ..... Company's First Lien Twenty-Year Five Per Cent. Gold Bonds, and each of said bonds shall be payable on the ..... day of ....., ....., and shall bear interest at the rate of five per cent. per annum until paid, payable in semi-annual instalments on the first days of ..... and ..... of each year; and

*Denominations of Bonds.*

WHEREAS, all the bonds authorized hereby shall be issued either as coupon bonds of the denomination of One Thousand Dollars (\$1,000) each, or as registered bonds without coupons of the denomination of One Hundred Dollars (\$100) or of One Thousand Dollars (\$1,000) or of Ten Thousand Dollars (\$10,000) each, or partly as such coupon bonds and partly as such registered bonds without coupons of any such denominations, as the Board of Directors of the ..... Company may from time to time fix and determine; and the several coupon bonds may be registered as to principal, and may also, to the extent hereinafter mentioned, be exchanged for registered bonds without coupons of the same series; and each bond is to bear a distinctive number or designation; and

WHEREAS, the said coupon bonds are to be numbered in consecutive order, and each of them is to be substantially of the following form, the number of the bond being inserted in the blank therefor, viz.:

UNITED STATES OF AMERICA.

STATE OF .....

..... COMPANY.

*Form of Coupon Bond.*

FIRST LIEN TWENTY-YEAR FIVE PER CENT. GOLD BOND.

\$1,000

\$1,000

No. ....

No. ....

..... Company, a corporation created under the laws of the State of ....., and hereinafter termed the ..... Company, for value received, hereby promises to pay, on the first day of ....., A. D., ....., at the office or agency of the ..... Company in the city of ....., to bearer, or, if registered, to the registered holder of this bond, One Thousand Dollars in gold coin of the United States of or equal to the present standard of weight and fineness, and to pay interest thereon from the date hereof at the rate of five per cent. per annum until paid, such interest to be payable at such office or agency in like gold coin, semi-annually, on the first days of ..... and ..... in each year, but only upon presentation and surrender of the respective coupons for such interest hereto attached, as they severally mature. All payments upon this bond, both of principal and interest, shall be made without deduction of any

tax or taxes which the ..... Company may lawfully be required to pay thereon or to retain therefrom, under any present or future law of the United States, or of any State, county or municipality therein.

This bond is one of a duly authorized issue of coupon bonds and registered bonds of the ..... Company, the aggregate amount whereof is limited to the principal sum of ..... Dollars, all of which bonds have been issued, or are to be issued, pursuant to and are to be secured ratably by, and are subject to, an indenture dated ....., duly executed by the ..... Company to the ..... Trust Company ....., as Trustee, to which indenture reference is hereby made with the same effect, in all respects, as if the provisions of said indenture were herein fully set forth. All rights of action and otherwise of the holder hereof under or by reason of this bond are agreed by said holder to be expressly subject to the provisions of said indenture.

No recourse shall be had for the payment of any part of the principal or interest of this bond against any incorporator, or any present or future stockholder, officer, or director of the ..... Company, either directly or through the ..... Company, by virtue of any statute, or by enforcement of any assessment, or otherwise; any and all liability of the said incorporators and of the present and any future stockholders, directors and officers of the ..... Company being, by the acceptance hereof and as a part of the consideration for the issue hereof, expressly released.

This bond shall pass by delivery unless registered in the owner's name on the books of the ..... Company at its office or agency in the city of New York, such registry being noted on the bond by the bond registrar of the ..... Company, after which no transfer shall be valid unless made on said books in the manner prescribed in said indenture and similarly noted on the bond; but the same may be discharged from registry by being transferred in like manner to bearer, after which transferability by delivery shall be restored; but again, from time to time, this bond may be registered or transferred to bearer as above. Such registration, however, shall not affect the transferability of the coupons for the interest hereon, by delivery merely, and payment to bearer thereof shall discharge the ..... Company in respect of the interest therein mentioned, whether or not the bond shall have been registered

This bond, with the coupons for all interest instalments which shall not have matured, may also, as provided in said indenture, be exchanged for a registered bond without coupons on payment of the charges provided in said indenture.

Neither this bond nor any coupon for interest thereon shall become or be valid or obligatory for any purpose until and unless the certificate indorsed hereon shall have been duly signed by the Trustee under said indenture.

IN WITNESS WHEREOF, said ..... Company has caused these presents to be signed by its President or one of its Vice-Presidents, and its corporate seal to be hereunto affixed and attested by its Secretary or one of its Assistant Secretaries, and coupons for such interest bearing the engraved fac-simile signature of its Treasurer to be attached hereto, this ..... day of ....., A. D. ....

..... COMPANY,

by.....

President.

Attest:

.....,

AND WHEREAS, at the time of the issue thereof, there are to be attached to each of said coupon bonds hereby secured coupons representing the instalments of interest which may, from time to time, become due thereon; and every such coupon is to be substantially of the following form, the number thereof, the date of payment, the number of the bond, and the engraved fac-simile signature of the Treasurer of the ..... Company being appropriately inserted, viz.:

*Form of Coupon.*

No. .... \$25.

Coupon for Twenty-Five Dollars gold coin of the United States of America, payable to bearer on ....., 19.. at the office or agency of ..... Company in the city of New York, without deduction for taxes, for six months' interest due on that day, on \$1,000 First Lien Twenty-Year Five Per Cent. Gold Bond of said company, No. ...., subject to the terms of said bond and of the indenture therein mentioned.

.....,  
Treasurer.

AND WHEREAS, each of the said registered bonds without coupons is to be substantially of the following form, the number, principal sum and date of the bond and the name of the payee thereof being appropriately inserted, viz.:

*Form of Registered Bond Without Coupons.*

UNITED STATES OF AMERICA.

STATE OF .....

..... COMPANY.

REGISTERED FIRST LIEN TWENTY-YEAR FIVE PER CENT. GOLD BOND.

No. .... No. ....

..... Company, a corporation created under the laws of the State of ....., and hereinafter termed the ..... Company, for value received, hereby promises to pay to ..... or registered assigns, on the first day of ....., A. D. ...., at the office or agency of the ..... Company in the city of New York, the sum of ..... Dollars in gold coin of the United States of or equal to the present standard of weight and fineness, and to pay interest thereon, from the first day of ....., or the first day of ....., next preceding the date hereof, at the rate of five per cent. per annum until paid, such interest to be payable to the registered holder hereof at such office or agency, in like gold coin, semi-annually, on the first days of ..... and ..... in each year. All payments upon this bond, both of principal and interest, shall be made without deduction of any tax or taxes which the ..... Company may lawfully be required to pay thereon or to retain therefrom under any present or future law of the United States, or of any State, county, or municipality therein.

This bond is one of a duly authorized issue of coupon bonds and registered bonds of the ..... Company, the aggregate amount whereof is limited to the principal sum of ..... Dollars, all of which bonds have been issued, or are to be issued, pursuant to, and are to be secured ratably by, and are subject to, an indenture dated ..... first, ....., duly executed by the ..... Company to the ..... Trust Company ....., as Trustee, to which indenture reference is hereby made with the same effect, in all respects,

as if the provisions of said indenture were herein fully set forth. All rights of action and otherwise of the holder hereof under or by reason of this bond are agreed by said holder to be expressly subject to the provisions of said indenture.

No recourse shall be had for the payment of any part of the principal or interest of this bond against any incorporator, or any present or future stockholder, officer or director of the ..... Company, either directly or through the ..... Company; by virtue of any statute or by enforcement of any assessment, or otherwise; any and all liability of the said incorporators, and of the present and any future stockholders, directors and officers of the ..... Company being, by the acceptance hereof and as a part of the consideration for the issue hereof, expressly released.

This bond is transferable, but only in the manner prescribed in said indenture, on the books of the ..... Company, at its office or agency in the city of New York, upon surrender and cancellation of this bond, and thereupon a new registered bond or new registered bonds without coupons or, at the election of the transferee,—provided, always, that the registered bond or bonds without coupons desired to be exchanged shall be for or aggregate the principal sum of One Thousand Dollars, or some multiple thereof,—a new coupon bond or new coupon bonds, in each case of the same series and for an equivalent principal sum, will be issued to the transferee in exchange therefor, on payment of the charges provided in said indenture. But no registered bond without coupons of or exceeding One Thousand Dollars shall be exchangeable for registered bonds without coupons of a less denomination than One Thousand Dollars each.

This bond shall not become or be valid or obligatory for any purpose until and unless the certificate indorsed hereon shall have been duly signed by the Trustee under said indenture.

IN WITNESS WHEREOF, said ..... Company has caused these presents to be signed by its President or one of its Vice-Presidents, and its corporate seal to be hereunto affixed and to be attested by its Secretary or one of its Assistant Secretaries, this ..... day of ....., 191..

..... COMPANY,

by .....,  
President.

Attest:

.....  
Secretary.

AND WHEREAS, on each of said coupon bonds and on each of said registered bonds without coupons there is to be indorsed a certificate of said Trustee, or its successor appointed hereunder, that such bond is one of the bonds issued under this indenture; which certificate shall be the only and conclusive evidence that such bond is entitled to the security and benefits of this indenture; and no such bond shall be secured by this indenture, or shall be valid or obligatory for any purpose, unless and until such certificate shall have been executed by said Trustee, or by its successor appointed hereunder; which said certificates shall be substantially of the following form, viz.:

*Form of Trustee's Certificate.*

THIS IS TO CERTIFY that this bond is one of series of bonds of ..... Company mentioned in the indenture within referred to.

..... COMPANY,

Trustee,

by .....

AND WHEREAS, each of the coupons for interest to be attached to said coupon bonds is to bear the fac-simile signature of the present Treasurer or of any future Treasurer of the ..... Company, and for that purpose the ..... Company may adopt and may use the engraved fac-simile signature of any person who shall have been such Treasurer, notwithstanding the fact that he may have ceased to be such Treasurer at the time the bonds to which such coupons belong shall actually be authenticated or be delivered; and

*Substitution and Refunding of Bonds.*

WHEREAS, all bonds of any subsequent series which may be issued under this indenture, or in substitution for or in lieu of or in succession to any of the bonds authorized hereby, shall bear such date or dates, shall be payable at such time or times, not earlier than ....., .., ....., and shall bear interest at such rate or rates, not exceeding five per cent. per annum, as the Board of Directors of the ..... Company may hereafter determine; and said bonds of any subsequent series, whether coupon bonds or registered bonds without coupons, and the coupons to be attached to the coupon bonds, shall all, as nearly as the said Board of Directors shall deem to be practicable, be substantially of the same tenor and purport as the aforesaid respective forms of said coupon bonds and coupons and registered bonds without coupons, except as to the dates, time or times of payment, the numbers thereof, and the rate or rates of interest therein specified; but in no event shall the aggregate amount of any and all bonds which may at any time be issued and outstanding under and in pursuance of this indenture, exceed the principal sum of ..... Dollars; and any and all bonds which may at any time be outstanding and which have been issued under and in pursuance of this indenture, are to be secured ratably thereby; and

*Provisions of Certificate of Incorporation.*

WHEREAS, it is provided in the certificate of incorporation of the ..... Company, "that, among its other powers, and without the assent or other action of the stockholders, the Board of Directors shall have power, by resolution of said board and for any lawful purpose, to authorize the execution of the bonds of the corporation not to exceed the principal sum of ..... Dollars (\$.....), par value, at any one time outstanding, which bonds shall be in such form and issued and delivered at such times and for such purposes and under such terms and conditions as said board may determine, and said Board of Directors shall also have power, by resolution of said board, to authorize the execution of an indenture, mortgaging and pledging all or any part of the property or assets of the corporation, then owned or which may thereafter be acquired by it, to secure the payment of said bonds and the interest thereon and the performance of the covenants in said indenture contained, which indenture shall be in such form and embody such provisions, covenants, agreements and conditions as said board may determine," and

*Resolution of Board of Directors.*

WHEREAS, at a meeting of the Board of Directors of the ..... Company, duly called and regularly held on the ..... day of ....., ....., a draft indenture of the form and effect of these presents was submitted and read, and thereupon said Board of Directors duly and unanimously did resolve that, in behalf of the ..... Company, this indenture be executed by the President or one of the Vice-Presidents of the ..... Company, and its corporate seal be affixed thereto and attested by its Secretary, and that this indenture be acknowledged and thereupon delivered to the ..... Trust Company, as Trustee; that the bonds of the ..... Company, substantially of the form and effect set forth in this indenture, be executed from time to time, in the name and in behalf of the ..... Company, by its President or one of its Vice-Presidents, and that the corporate seal of said ..... Company be thereto affixed and attested by the Secretary or one of the Assistant Secretaries of the ..... Company; and that, from time to time, bonds of said ..... Company be issued, authenticated and delivered in the manner and upon the terms and conditions and for the purposes set forth in this indenture,—

*Now, Therefore, this Indenture Witnesseth:*

That, in order to secure the payment of the principal and interest of all the ..... Company's bonds at any time issued and outstanding under this indenture, according to their tenor, purport and effect, and the performance and observance of each and every the covenants and agreements of the ..... Company herein contained, and to declare the terms and conditions upon which said bonds are issued, received and held, and for and in consideration of the premises and of the purchase and acceptance of such bonds by the holders thereof, and of the sum of One Hundred Dollars to it duly paid by the Trustee at or upon the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged;

*Granting Clause.*

..... Company, party of the first part hereto, has granted, sold, bargained, aliened, released, enfeoffed, conveyed, confirmed, pledged, assigned and transferred, and by these presents does grant, sell, bargain, alien, release, enfeoff, convey, confirm, pledge, assign and transfer, unto ..... Trust Company, as Trustee, party of the second part, and its several successors in the trust hereby created:

FIRST.—The following shares of capital stock, the certificates for which, duly indorsed for transfer in blank, have been delivered to the said Trustee, namely:

*Description Shares of Stock of The ..... Company.*

(.....) shares, of the aggregate par value, of \$..... of the preferred stock of The ..... Company, a corporation organized and existing under the laws of the State of ..... (hereinafter termed The ..... Company), out of the total outstanding preferred capital stock of said company consisting of ..... (.....) shares of the par value of One Hundred Dollars (\$100) each.

..... (.....) shares, of the aggregate par value of \$..... of the common stock of The ..... Company, a corporation organized and

existing under the laws of the State of . . . . ., out of the total outstanding common stock of said company consisting of . . . . . ( . . . . . ) shares of the par value of One Hundred Dollars (\$100) each.

The certificates aforesaid have been stamped, and the certificates for any and all additional or further shares of stock and any bonds, debentures, or other obligations, as and when the same shall, under provisions hereof, become subject to the lien and charge of this indenture, shall likewise be stamped, with substantially the following words (hereinafter sometimes termed the Indenture Stamp), to wit:

*Indenture Stamp.*

"This instrument is held under an Indenture made by the . . . . . Company to the . . . . . Trust Company, as Trustee, dated . . . . ., . . . . ., and is subject to be disposed of only as in said Indenture provided."

*Interest in Real and Fixed Property of The . . . . . Company.*

SECOND.—All the right, title and interest of the . . . . . Company in and to the real and other fixed property of every kind and nature of The . . . . . Company; and, if, as and when the legal title to the said property shall be acquired by the . . . . . Company, in whole or in part, the lien of this indenture shall attach to all the real and other fixed property so acquired.

*After-acquired Securities and Property.*

THIRD.—The . . . . . Company further covenants and agrees that, from time to time hereafter (a) any and all additional shares of the capital stock of The . . . . . Company which may, in any manner, be acquired by the . . . . . Company; and (b) if, as and when the . . . . . Company, or any one for it, shall out of the proceeds of or in any way representing any of the bonds issued and to be issued hereunder, or of or in any way representing the shares of stock or other securities, or any of them, hereby pledged or agreed to be, acquire any shares of stock of any corporation other than The . . . . . Company, or any bonds, debentures or other obligations of The . . . . . Company or of any other corporation, or any other securities, or any real or fixed property of any nature whatsoever, the shares of stock, bonds, debentures, obligations or other securities, or the real or fixed property, as the case may be, so acquired, shall, immediately upon the acquisition or receipt thereof, be and be deemed to be mortgaged or pledged, assigned and transferred to the Trustee hereunder; and all such stocks, bonds, debentures, evidences of indebtedness, obligations and other claims and securities, and the evidences thereof, shall be delivered (duly indorsed in blank wherever necessary) to the Trustee, and be thereupon stamped with the Indenture Stamp. And all such additional property shall be held and applied under and in accordance with this indenture as if owned by the . . . . . Company and by it hereby mortgaged or pledged and transferred at the delivery hereof.

All the property, real and personal, in any way mortgaged, pledged, assigned or transferred to the Trustee for the purposes of or subject to this indenture, or agreed or intended to be, is hereinafter sometimes termed "the property hereby mortgaged and pledged."

*Habendum.*

*To have and to hold all and singular*, the said premises, properties and shares of stock, and also any and all additional shares of stock and all bonds, debentures, evidences of indebtedness, obligations and other property, of any kind and of every nature, that, by virtue of any provision hereof, shall hereafter become subject to this indenture, to the Trustee, its successors and assigns, forever:

*Trusts Declared.*

*But in trust, nevertheless*, under and subject to the conditions and provisions hereinafter set forth, and for the equal and proportionate benefit and security of all present and future holders of the bonds and interest obligations issued and to be issued hereunder and secured by this indenture, and to secure the payment of such bonds and interest obligations, when payable in accordance with the provisions of such bonds and interest obligations, and the performance of, and compliance with, the covenants and agreements of the ..... Company in this indenture set forth, without preference, priority, or distinction, as to lien or otherwise, of any one bond over any other bond, by reason of priority in the issue, sale or negotiation thereof, or by reason of the purpose of its issue, or by reason of any other cause; and after payment of the principal and interest of such bonds and interest obligations, or after provision for the satisfaction thereof as hereinafter authorized, then upon the further trusts hereinafter set forth.

And it is hereby covenanted and agreed that all such bonds, with the coupons for interest on any coupon bonds, are to be issued, authenticated and delivered, and that all property, shares of stock, bonds and other securities subject or to become subject to the lien of this indenture, are to be held subject to the further covenants, conditions, uses and trusts hereinafter set forth; and the ..... Company covenants and agrees with the Trustee hereto and with the respective holders from time to time of said bonds and coupons or any part thereof, as follows, namely:

## ARTICLE ONE.

*Description of Bond Issue.**All Bonds Ratably Secured.*

SECTION 1. This indenture is to be a continuing lien to secure the full and final payment of the principal and interest of all bonds which may, from time to time, be created, issued and authenticated under the same, to an amount not exceeding, in the aggregate of the principal thereof at any one time outstanding and secured hereby, the sum of ..... Dollars; but upon the payment, purchase, or other acquisition and cancellation and deposit with the Trustee of any of the bonds issued or to be at any time hereafter issued under this indenture, an equal amount of bonds, face value, maturing at such time or times, not earlier than ....., .., ....., and bearing interest at such rate or rates, not exceeding five per cent. per annum, as the Board of Directors of the ..... Company, shall, from time to time, determine, may, except as otherwise hereinafter provided, be made and issued by the ..... Company and be authenticated and delivered hereunder as hereinafter provided, in lieu of and in substitution for or in succession to, the bonds so paid, purchased, or otherwise acquired and canceled and deposited. All bonds issued under and in pursuance

of this indenture and at any time outstanding, shall in all respects be equally and ratably secured thereby, without preference, priority or distinction on account of the actual time or times of the issue of the said bonds or the date or dates of the maturity thereof, or of any of them, so that all of such bonds at any time outstanding shall have the same right, lien and preference under and by virtue of this indenture, and shall all be equally secured thereby, with like effect as if they had all been made, executed and authenticated simultaneously on the date hereof, whether the same, or any of them, shall actually be sold or disposed of at such date, or whether they, or any of them, shall be sold or disposed of at some future date, or whether they, or any of them, shall have been authorized to be issued under the foregoing resolution of the Board of Directors of the ..... Company, or may be authorized to be issued by a resolution hereafter adopted by the said Board of Directors.

*Proceedings for Issue of Bonds:*

From time to time the bonds to be secured hereby shall be executed by the ..... Company and by it shall be delivered for authentication to the Trustee, and thereupon, as provided in this Article and not otherwise, the Trustee shall authenticate and deliver the same. At the option of the ..... Company, from time to time, any of such bonds may be executed, authenticated and delivered either as coupon bonds or as registered bonds without coupons, and such bonds may be of any of the denominations authorized by this indenture

*Authentication by Trustee.*

Before authenticating or delivering any coupon bonds hereby secured, the Trustee shall detach and shall cancel all coupons thereof then matured, and every registered bond without coupons shall be dated on the day of the actual authentication thereof. Only such of said bonds as shall bear thereon a certificate substantially in the form hereinbefore recited, duly executed by the Trustee, shall be secured by this indenture, or shall be entitled to any lien or benefit hereunder. No such bond, nor any coupon thereunto attached, shall be obligatory or valid for any purpose until and unless such certificate shall be duly indorsed on such bond. Every such certificate of the Trustee, upon any bond executed by the ..... Company, shall be conclusive and the only evidence that the bond so authenticated was duly issued and that the same is entitled to the benefit of any part of the security and trusts herein created.

*First Series; Disposition.*

SECTION 2. Of the said first series of First Lien Twenty-Year Five Per Cent. Gold Bonds authorized to be issued under and to be secured by this indenture, bonds for the aggregate principal sum of ..... Dollars (\$.....) par value, shall forthwith be executed by the ..... Company, and, as soon as may be after the execution of this indenture, shall be delivered to the Trustee for authentication, and, without any further action on the part of the ..... Company, shall by the said Trustee be authenticated and delivered to the ..... Trust Company of New York, as Depositary, or upon its written order; and said Depositary shall not by virtue hereof be accountable to the ..... Company, or to the Trustee, or to any other

person, for or in respect of the bonds so delivered, or the disposition or the use thereof, or of the proceeds of the same

*Purposes for Which Remaining Bonds May be Issued.*

SECTION 3. The remaining ..... Dollars, (\$.....), par value, of the said first series of \$....., par value, of bonds authorized under and secured by this indenture, and any or all of the remaining ..... Dollars (\$.....), par value, of the bonds authorized under and secured by this indenture, except only to the extent that any of said bonds may be applied and authenticated as in section 4 of this Article specified and provided, shall be authenticated and delivered solely as in this section provided.

All of said remaining bonds shall be subject to be and shall be authenticated and delivered by the Trustee to the ..... Company, or upon its order; and the same, or the proceeds thereof, may be used or applied by the ..... Company for or to any or all of the following purposes:

(1) To acquire and pay for any and all additional shares of the preferred stock of The ..... Company; and

(2) To acquire and pay for property purchased or caused to be purchased, or for any shares of stock, bonds, debentures or other obligations of any other corporation, which the ..... Company is or may be, by its certificate of incorporation or any amendment thereof or by law, authorized to acquire or to be interested in; and

(3) To make loans to The ..... Company, or any other corporation a majority in amount of whose then outstanding capital stock may be held or controlled by the ..... Company at the time; and

(4) To make payment for any enlargements, extensions or betterments of or additions to any of the properties of the ..... Company; and

(5) To otherwise promote and accomplish the several and respective corporate powers, purposes and objects set forth in the certificate of incorporation of the ..... Company or any amendment thereof.

From time to time, when authorized by a resolution of the Board of Directors or Executive Committee of the ..... Company, the said bonds shall, by the Trustee, be authenticated and delivered as follows, to wit:

*Authentication of Bonds for Securities or Property Purchased or for Loans to Other Corporations.*

(a) Whenever the Board of Directors or Executive Committee of the ..... Company shall pass a resolution finding and declaring (1) that the ..... Company has purchased or arranged to purchase or acquire any additional shares of the preferred stock of The ..... Company, or any or all of the property or assets of The ..... Company, or of any other person, firm or corporation, or any real estate or plants, or any shares of stock, bonds, or other obligations of any other corporation, or any other property whatsoever, provided always that the said property, assets, shares of stock, bonds, and other obligations are such as the ..... Company is or may be lawfully authorized to purchase, or acquire, or finding and declaring (2) that it has loaned the sum stated in said resolution to The ..... Company, or to any other

corporation a majority in amount of whose then outstanding capital stock may be held or controlled by the ..... Company at the time, and shall deliver to the Trustee a copy of such resolution, certified as such by the President or one of the Vice-Presidents and by the Secretary or one of the Assistant Secretaries of the ..... Company, accompanied by a certificate, signed by the President or one of the Vice-Presidents and by the Treasurer or one of the Assistant Treasurers of the ..... Company, stating the amount, in par value, of the said bonds agreed or necessary to be issued on account of such purchase or to provide the funds to enable the same to be made, or so loaned or agreed to be loaned, and, in each case, that the amount paid for or the value of the real estate, plants, shares, bonds or other property or securities so purchased or acquired, or arranged to be, was or is not less than the par value of the bonds so to be issued on account thereof, the Trustee shall authenticate an amount of the bonds which are then subject to the provisions of this section, not to exceed, in par value, the amount thereof stated in such copy of such resolution and in said certificate to have been agreed or to be necessary to be issued by the ..... Company, for said property, or for such shares of stock, bonds, or other obligations, or so loaned or agreed to be loaned, and shall deliver such an amount of the bonds, so authenticated, as may be directed in writing by the President or one of the Vice-Presidents and the Treasurer or one of the Assistant Treasurers of the ..... Company, upon there being (1) deposited with the Trustee an amount in cash equal to the par value of the bonds so authenticated and delivered; or (2) mortgaged or pledged to the Trustee hereunder, the property so acquired, or arranged to be acquired, in each case subject to all the terms and conditions of this indenture; or (3) delivered to the Trustee, certificates for the shares of stock, or the bonds, notes or other obligations of the other corporation or corporations thus purchased or acquired or given to evidence the loan thus made, and which may be mentioned in the copy of such resolution of said Board of Directors or Executive Committee, and in the certificate in this section last above referred to, properly indorsed or assigned for transfer in blank (if the same be not in terms payable to bearer). The Trustee shall pay and disburse any cash deposits so made with it upon the order of the President or one of the Vice-Presidents and of the Treasurer or one of the Assistant Treasurers of the ..... Company that the amount the said Trustee of a mortgage or pledge of the property, or of certificates for said shares of stock, or of the bonds, notes or other obligations mentioned in the copy of such resolution above referred to, properly assigned or indorsed in blank (if the same be not in terms payable to bearer), and also of a certificate signed by the President or one of the Vice-Presidents and by the Treasurer or one of the Assistant Treasurers of the ..... Company that the amount paid for or the value of such property, or shares of stock, bonds, notes or obligations so mortgaged or so pledged or delivered was or is not less than the sum in cash so directed to be paid and disbursed. And the Trustee shall thereupon stamp or cause to be stamped on each such stock certificate, bond, note, or other obligation, the aforesaid Indenture Stamp. All such property so mortgaged or pledged to the Trustee, and any and all such shares of stock, bonds, notes, or other obligations, so delivered to the Trustee, shall be held subject to and for the purposes of the mortgage, pledge, security, trusts and conditions in and by this indenture made, created and declared, with the same force and effect as if

the said property, shares of stock, bonds, notes, and other obligations had been and were specifically included and described in the granting and pledging clauses of this indenture. The Trustee may rely upon the certificate of the President or one of the Vice-Presidents and of the Treasurer or one of the Assistant Treasurers of the ..... Company, and the same shall be conclusive evidence in favor of the Trustee, as to the amount of hereby secured bonds agreed or necessary to be issued for or on account of the said property, or said shares of stock, bonds, or other obligations, and as to the amount loaned to any such other corporation, and as to any other matter in this section referred to, all as mentioned in said certificate delivered to the said Trustee, and in respect of the right and power of the ..... Company to acquire and hold the same, but may, in its discretion and at the expense of the ..... Company, require further proof as to such amount and as to such right and power, and shall be entitled to rely upon the report of any expert or counsel it may select in the premises. Said Trustee shall not, however, be under a duty to require such additional proof, or liable for not requiring the same.

*Authentication of Bonds for Construction, Enlargements, Betterments, etc.*

(b) Whenever the Board of Directors or Executive Committee of the ..... Company shall pass a resolution finding and declaring that, to its satisfaction and approval, the properties, plants, and appliances of the ..... Company, or of The ..... Company, or of any corporation a majority in amount of whose then outstanding capital stock shall be held or controlled by the ..... Company at the time, have been constructed, acquired, enlarged, extended, bettered, or added to, and also finding and declaring the amount in cash which has been expended, applied or loaned by the ..... Company for or on account of such construction, acquisition, enlargements, extensions, betterments, or additions, in addition to the proceeds of any other bonds theretofore issued for that purpose under this indenture, and if such enlargements, extensions, betterments, or additions shall, in the judgment of said Board of Directors or Executive Committee, consist of fixed property, then further finding and declaring that the same have been constructed, erected or made upon premises the title to which is then subject to this indenture, or if such new property, enlargements, extensions, betterments, or additions shall have been constructed, acquired, erected or made by The ..... Company, or any such other corporation, then so finding and declaring, and further finding and declaring that The ..... Company or such other corporation has executed bonds or other obligations for the amount loaned or agreed to be loaned for the purpose of constructing, acquiring, erecting, or making such new property, enlargements, extensions, betterments, or additions, and that the said bonds or other obligations have been delivered to the Trustee to further secure the bonds issued and to be issued hereunder, then, in any such case, upon delivery to it of a copy of such resolution, certified as such by the President or one of the Vice-Presidents and the Secretary or one of the Assistant Secretaries of the ..... Company, the Trustee shall authenticate and deliver to the ..... Company, or upon its order, an amount of the bonds then subject to the provisions of this section, not to exceed in par value, as the case may be, either the sum in cash which is so stated to have been expended, applied or loaned by the ..... Company in and about the making and acquisition

of the new property, enlargements, betterments or additions mentioned in said copy of said resolution, or the sum paid or disbursed for or on account of the bonds or other obligations of The ..... Company, or of such other corporation, so delivered to the Trustee; and the Trustee may thereupon place on the bonds or other obligations so received by it, the said Indenture Stamp. The said Trustee may rely upon the findings, declarations, statements and requests contained in such copy of such resolution, and shall be under no liability for so relying and acting on the faith thereof. The Trustee may, however, at the expense of the ..... Company, require further proof of such expenditure or cost, or of the amount thereof, and may cause the statements in said resolution contained to be verified in such manner as it may determine, and shall be entitled to rely upon the report of any expert or counsel it may select for the purpose of making such verification; but it shall not be bound to verify such statements, or liable for not doing so

*Provisions Concerning The ..... Company Debentures.*

SECTION 4. Not to exceed an aggregate of ..... Dollars (\$.....), par value, of the said remaining \$....., par value, of the bonds authorized under and secured by this indenture, may at the discretion of the Board of Directors or Executive Committee of the ..... Company, be issued, authenticated and delivered in exchange for or to provide funds necessary to pay, redeem, discharge or otherwise acquire any of the then outstanding Sinking Fund Gold Debentures of The ..... Company, dated May first, 1893.

For any and all of said debentures that shall be acquired by the ..... Company by purchase, exchange or otherwise, and deposited with the Trustee hereunder, together with all coupons not matured at the time of such deposit, the Trustee shall, upon request of the ..... Company, evidenced by a resolution of its Board of Directors or Executive Committee, authenticate, and deliver to the ..... Company, or upon its order, bonds secured hereby and mentioned in this section, at such rate as said Board of Directors may from time to time designate. Whenever any of the said debentures are acquired by the ..... Company, by purchase, exchange or otherwise, the same, shall be canceled and satisfied, unless the ..... Company, by resolution of its Board of Directors or Executive Committee, shall request that the said debentures shall be kept in full force and effect. The Trustee may rely upon the recitals, requests and statements contained in a copy of any such resolution, certified as hereinafter provided, and shall be fully protected in acting upon the faith thereof.

When all of the said debentures have been exchanged, purchased, redeemed, paid, or otherwise acquired by the ..... Company and deposited with the said Trustee, or shall be so declared and certified to be, in or by resolution of the Board of Directors or Executive Committee of the ..... Company, or whenever the Board of Directors or Executive Committee of the ..... Company shall pass a resolution declaring that it is not the purpose or intention of said ..... Company to use the amount of bonds subject to this section which is mentioned in said resolution, for or on account of the said debentures, then, and in any such event, such amount of the bonds secured by this indenture and which have by this section been authorized to be used or applied in respect

of such debentures and which shall then remain unissued, all as may be stated in such resolution, shall thereupon be, in all respects, a part of the issue of bonds secured hereby, which is mentioned in section 3 of this Article, and shall be held and subject to be authenticated, delivered and disposed of as is in said section provided.

*Trustee May Rely on Certificates, Etc., of Officers.*

SECTION 5. Except as and when in this indenture otherwise expressly provided, the Trustee shall be entitled to act and rely upon any copy of resolution, certificate, order, request, direction or other instrument, by any provision of this indenture required or provided to be delivered by the ..... Company to the Trustee, when the same is certified or executed by the President or one of the Vice-Presidents and by the Secretary or one of the Assistant Secretaries, or by the President or one of the Vice-Presidents and by the Treasurer or one of the Assistant Treasurers, of the ..... Company, and shall be fully protected in respect of any and all acts done or action taken or suffered by it, or on its behalf, in reliance thereon; and every such copy of resolution, certificate, order, request, direction or other instrument, thus certified or executed, shall be, at all times, and in all places, conclusively taken and held to be the act and deed of and binding upon the ..... Company.

*Conversion and Reconversion of Coupon Bonds and Registered Bonds Without Coupons.*

SECTION 6. Whenever any coupon bond or bonds, issued under this indenture, together with all unmatured coupons thereto belonging, shall be surrendered to the Trustee for exchange for a registered bond or for registered bonds without coupons, the ..... Company shall execute, and the Trustee shall authenticate, and, in exchange for such coupon bond or bonds, shall deliver, registered bonds or one registered bond without coupons, of the same series as the surrendered bond or bonds and for the like aggregate principal sum, but in no event of a less denomination than \$1,000. Every registered bond without coupons so delivered in exchange for a coupon bond or for coupon bonds, shall bear interest from the date for payment of the last matured coupon of the surrendered bond or bonds.

Whenever any registered bond without coupons shall be surrendered to the Trustee, duly indorsed or transferred, the ..... Company, upon request therefor, shall issue to the transferee, and the said Trustee shall authenticate and deliver, registered bonds or one registered bond without coupons, of the same series and for a like aggregate principal sum; provided, always, that no registered bond without coupons shall be issued under this section of a smaller denomination than \$1,000, except that a registered bond or bonds without coupons of the denomination of \$100 shall, upon request therefor, be issued in exchange for a bond or bonds of the same denomination.

Whenever any registered bond or bonds without coupons of the denomination of or aggregating \$1,000, or some multiple thereof, shall be surrendered to the Trustee, duly indorsed or transferred, for exchange for a coupon bond or for coupon bonds, the ..... Company shall issue, and the Trustee shall authenticate and deliver, in exchange therefor, coupon bonds or one coupon bond of the same series, and bearing interest at the same rate as the surrendered registered

bond or bonds without coupons, and for the like aggregate principal sum, which bond or bonds shall have attached thereto the coupons maturing on and after the date when the next semi-annual instalment of interest would have matured on such surrendered bond or bonds without coupons.

Whenever any of the registered bonds without coupons of the denomination of \$100, provided to be issued hereunder, to the number of ten or some multiple of ten, shall be surrendered to the Trustee, the ..... Company shall execute, and the Trustee shall authenticate, and, in exchange for said surrendered bonds, shall deliver coupon bond or bonds, or, at the election of the transferee, a registered bond or bonds without coupons, in either case, of the same series and of the denomination of \$1,000 each, at the rate of one of said \$1,000 bonds for each ten of said \$100 bonds.

In every case of such exchange or transfer, the Trustee forthwith shall cancel the surrendered bond or bonds and coupons, and shall, upon written request therefor, deliver the same to the ..... Company.

For any such exchange of bonds, and for any transfer of registered bonds without coupons, the ..... Company, at its option, may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge or other expense connected therewith, and also of a further sum not exceeding one dollar for each new bond issued upon such exchange or transfer.

*Surrender of Bonds and Issue of Other Bonds in Lieu Thereof.*

SECTION 7. In case the ..... Company shall at any time surrender or cause to be surrendered to the Trustee any of the bonds which shall have been authenticated and delivered hereunder, and, if a coupon bond or coupon bonds, then also the unmatured coupons for interest thereon which shall then remain uncanceled, accompanied by a copy of a resolution of the Board of Directors of the ..... Company, certified as such by the President or one of the Vice-Presidents and by the Secretary or one of the Assistant Secretaries of the ..... Company, requesting the Trustee to authenticate and deliver new bonds in exchange for the bonds so surrendered to the Trustee, the Trustee shall authenticate and deliver, in lieu of the bonds so surrendered, bonds of a new or other series for the aggregate principal sum thereof, which new bonds shall be payable at such time or times, not before ..... 1, ....., and shall bear interest at such rate or rates, not exceeding five per cent. per annum, and which new bonds and the coupons to be attached thereto, shall, so far as may be appropriate, be otherwise substantially in the form or forms herein-before set forth, all as the Board of Directors of the ..... Company shall determine and designate in such resolution; and a copy of any form of new bond so determined upon or designated which may differ from the forms herein-before set out, shall be delivered to the Trustee. All bonds and coupons so surrendered to the Trustee shall forthwith be canceled by the Trustee, and, upon written request therefor, delivered to the ..... Company.

*Bonds Bearing Lower Rate and With Different Maturity May Be Issued.*

SECTION 8. The ..... Company, instead of issuing the whole of the \$45,000,000 in bonds authorized hereby in the form of Twenty-Year Five Per Cent. Gold Bonds, may at any time issue another series or other series of

bonds secured hereby, payable at such time or times on or subsequent to .....  
...., ....., and bearing interest at such rate or rates not exceeding five  
per cent. per annum, as its Board of Directors may from time to time determine  
by resolution; and the Trustee shall authenticate such other bonds upon due  
authority therefor as herein prescribed; provided, always, that the aggregate  
principal sum of all bonds of all series hereby secured, shall never exceed the  
sum of \$45,000,000 at any one time outstanding.

*Mutilation and Destruction of Bonds.*

SECTION 9. In case any coupon bond issued hereunder, with the coupons thereto appertaining, or any registered bond without coupons, shall become mutilated or be destroyed, the ..... Company, in its discretion, may execute, and thereupon the Trustee shall authenticate and deliver, a new bond of like tenor and date (including coupons in case of a coupon bond), in exchange and substitution for and upon cancellation of the mutilated coupon bond and its coupons or the mutilated registered bond without coupons, or in lieu of and in substitution for the coupon bond and its coupons or the registered bond without coupons, so destroyed. In case of destruction, the applicant for a substituted bond shall furnish to the ..... Company and to the Trustee evidence of the destruction of such bond or coupons so destroyed; which evidence shall be satisfactory to the ..... Company and the Trustee; and said applicant shall also furnish indemnity satisfactory to both of them. The Trustee shall not be liable for any act done by it, in good faith, under this section.

*Temporary Bonds.*

SECTION 10. Until the bonds to be issued under and secured by this indenture can be engraved and prepared, the ..... Company may execute, and, upon its request, the Trustee shall authenticate and deliver, in lieu of such engraved bonds and subject to the same provisions, limitations and conditions, temporary printed or lithographed registered bonds without coupons, of any denomination, substantially of the purport of the bonds to be issued as hereinbefore provided. Upon surrender to the Trustee of such temporary bonds for exchange, the ..... Company shall issue, and, upon cancellation of such surrendered bonds, the Trustee shall authenticate and, in exchange therefor, deliver engraved coupon bonds or registered bonds without coupons, of the denominations hereinbefore provided, for the amount of the temporary bonds surrendered; and, until so exchanged, each of such temporary bonds shall be entitled to the same security and rights as an engraved bond issued hereunder.

*Benefits Thereof Limited to Parties.*

SECTION 11. Nothing in this Article expressed or mentioned, or in any other Article of this indenture, or in the bonds issued hereunder, or to be implied therefrom, is intended or shall be construed to give to any person or corporation other than the parties hereto, and the holders of bonds issued under and secured by this indenture, any legal or equitable right, remedy or claim under or in respect of this indenture, or any covenant, condition or provision therein contained; all its covenants, provisions and conditions being intended to be, and being, for the sole and exclusive benefit of the parties hereto, and of the holders of the bonds hereby secured

## ARTICLE TWO.

THE ..... COMPANY COVENANTS AS FOLLOWS:

*Will Pay Principal and Interest Without Deduction for Taxes.*

SECTION 1. Duly and punctually it will pay or cause to be paid to every holder of any bond issued hereunder and secured hereby, the principal thereof and the interest accruing thereon, at the dates and the place and in the manner mentioned in such bonds, or in the coupons thereto belonging, according to the true intent and meaning thereof, without deduction from either principal or interest for any tax or taxes imposed by the United States, or by any State, county, or municipality therein, which the ..... Company may be required to pay thereon, or to retain therefrom, under or by reason of any present or future laws.

*Will Keep Place for Payment of Principal and Interest and for Serving Notices.*

The interest on the coupon bonds shall be payable only upon presentation and surrender of the several coupons for such interest, as they respectively mature, and, when paid, such coupons shall forthwith be canceled. The interest on the registered bonds without coupons shall be payable only to the registered holders thereof, or upon their order duly authenticated.

At all times until the payment of the principal of the bonds secured by this indenture, the ..... Company will keep an office or agency in the city of New York where bonds and interest coupons may be presented for payment, and where notices or demands in respect of such bonds or interest coupons may be served, and, from time to time, the ..... Company will give notice to the Trustee of the place of such office or agency. In case the ..... Company shall fail to keep such office or agency or to give to the Trustee notice of the place thereof, such presentation and demand may be made and such notices may be served at the office of the Trustee in the city of New York.

*No Extension for Payment of Interest.*

The ..... Company agrees and covenants that it will not, directly or indirectly, extend or assent to the extension of the time for the payment of any of the interest upon any of said bonds; and that it will not, directly or indirectly, be a party to or approve any arrangement for any such extension, by a purchase or keeping alive of any of said interest or (in case of a bond with coupons) of the coupons therefor, or in any other manner. In case the time for payment of any such interest shall be so extended, otherwise than as provided in section 2 of Article 4 hereof, and whether or not such extension be by or with the consent of the ..... Company, such interest shall not be entitled, in case of default hereunder, to the benefit or security of this indenture, except subject to the prior payment in full of the principal of all bonds issued hereunder then outstanding and of all matured interest on such bonds the payment of which has not been so extended

*Registration of Bonds.*

SECTION 2. The ..... Company, at an office or agency in the city of New York, will keep a register or registers for the registration and transfer of

bonds issued hereunder, in and at which it will register, or cause to be registered, subject to such reasonable regulations as it may, from time to time, prescribe, all such bonds without coupons, and upon presentation thereof for such purpose, any such coupon bond; and such register or registers shall, at all reasonable times, be open to the inspection of the Trustee.

Every registered bond without coupons shall be dated on the day of the actual authentication thereof, and the Trustee is hereby authorized, upon authentication, to fill in such date.

#### *Transfer of Registered Bonds.*

Upon presentation to the bond registrar of the ..... Company, at the place where such register shall be kept, of any such registered coupon bond, accompanied by the delivery of a written instrument of transfer, in a form approved by the ..... Company, executed by the registered holder, such bond may be transferred upon the register by the registered holder in person or by attorney, and such transfer shall be noted by such bond registrar upon the bond. The registered holder of any such registered coupon bond shall also have the right to cause the same to be registered as payable to bearer, in which case transferability by delivery shall be restored, and thereafter the principal of such bond when due shall be payable to the person presenting the bond; but any such coupon bond registered as payable to bearer may be registered again in the name of the holder with the same effect as a first registration thereof. Successive registrations and transfers, as aforesaid, may be made from time to time as desired; and each registration of a coupon bond shall be noted by the bond registrar on the bond.

Registration of any coupon bond, however, shall not affect the transferability, by delivery merely, of any coupons thereto belonging, and payment to the bearer of any such coupon shall discharge the ..... Company in respect of the interest therein mentioned, whether or not the bond shall have been registered.

Any registered bond or bonds without coupons may be transferred upon such register at such office or agency by the registered holder in person or by attorney, upon (1) surrender of such bond to such bond registrar for cancellation; (2) delivery of a written instrument of transfer, in form approved by the ..... Company, duly executed by the registered holder of the bond; and (3) payment of any charges imposed under section 6 of Article One hereof. But no registered bond without coupons of the denomination of \$1,000 or \$10,000 shall be exchangeable for bonds of a less denomination than \$1,000 each, nor shall any coupon bond be issued under any provision of this indenture of a less denomination than \$1,000.

#### *Will Pay Taxes, Assessments; etc.*

SECTION 3. The ..... Company, from time to time, will pay and discharge all taxes, assessments, imposts and governmental charges lawfully imposed upon the shares of stock, bonds and other securities, and all other property, at any time subject to this indenture, or upon any part thereof, or upon the income or profits thereof, or upon the lien or interest of the Trustee in respect of any part of the property hereby mortgaged and pledged; provided, however, that the ..... Company shall have the right to contest by legal pro-

ceedings any such tax, assessment, impost or governmental charge, and, pending such contest, may delay or defer the payment thereof, unless thereby, in the opinion of the Trustee, any such shares of stock, bonds or other property shall be lost or forfeited or materially endangered.

*Covenants of Title and for Further Assurance.*

SECTION 4. The ..... Company is lawfully seized and possessed of the property hereby mortgaged and pledged and will warrant and defend the title thereto, to the Trustee, its successors and assigns, for the benefit of the holders for the time being of the bonds issued and to be issued hereunder, against the lawful claims and demands of all persons whomsoever.

The ..... Company, its successors and assigns, and each and every person having or holding any estate, right, title or interest in and to the property hereby mortgaged and pledged, from time to time, on written demand of the Trustee, or its successor or successors, will make, do, execute, acknowledge and deliver all such further acts, deeds, conveyances, and assurances in the law as may be reasonably advised, devised and required for effectuating the intention of these presents and for the better assuring or confirming unto the Trustee, and its successor or successors in the trust hereby created, upon the trusts and for the purposes herein expressed, all and singular the property hereby mortgaged and pledged, or intended or agreed so to be.

*To Pledge After-acquired Securities.*

SECTION 5. The ..... Company, from time to time, will pledge and assign or transfer and deliver to the Trustee, to be held subject to the trusts of this indenture as fully and completely as though expressly and specifically pledged, assigned and transferred thereunder at the time of the execution thereof:

(a) Any and all additional shares of the capital stock of The ..... Company which may be acquired by the ..... Company;

(b) Any and all bonds, debentures, and other obligations and securities which may hereafter be acquired by or accrue in favor of the ..... Company, and which, in whole or in part, shall have been purchased with, or otherwise result from, any of the bonds issued or to be issued hereunder, or the proceeds thereof; and

(c) Any and all shares of the capital stock of any other corporation, now or hereafter created, which may be acquired by the ..... Company and which shall have been paid for or acquired, in whole or in part, with or out of any of the bonds issued or to be issued hereunder, or the proceeds thereof, or with or out of any of the property, stocks, bonds, or other evidences of indebtedness or securities which are at the time subject to this indenture, or the proceeds thereof.

All such bonds, debentures, obligations and securities and the certificates for such shares shall be assigned, transferred and pledged hereunder, subject to the terms and conditions of the acquisition thereof by the ..... Company; and as and when the same shall be received by the ..... Company, it shall deliver them to the Trustee, duly indorsed for transfer in blank (if not already in bearer form), and the Trustee shall thereupon stamp or cause to be stamped thereon the Indenture Stamp hereinbefore set out

*To Mortgage After-acquired Property.*

SECTION 6. When and as, from time to time, the ..... Company shall acquire by purchase or otherwise, any real or other fixed property which may be paid for, in whole or in part, with or out of any of the bonds issued or to be issued hereunder, or the proceeds thereof, or with or out of any of the property, stocks, bonds or other evidences of indebtedness or securities which are at the time subject to this indenture, or the proceeds thereof, the ..... Company either (1) will convey or transfer the same, subject to the lien hereof, to some other corporation all the shares of whose capital stock, except so many of said shares as may be necessary to qualify persons to act as directors or officers of such corporation, shall then be held by the Trustee hereunder, or (2) will mortgage the same to the Trustee, or cause the same to be so mortgaged, as additional security for the bonds issued and to be issued hereunder. Every such conveyance or transfer or mortgage may be subject to any liens, rentals, or other charges affecting the property conveyed or transferred or mortgaged, at the time of the acquisition thereof by the ..... Company.

The Trustee may, at any time, accept any conveyance, assignment or transfer of any property, real or personal, which any person or corporation may make and deliver to said Trustee; and the property so conveyed, assigned or transferred, if and when the conveyance, assignment or transfer thereof shall be accepted by the Trustee, shall thereupon become a part of the property hereby mortgaged and pledged.

*Indebtedness and Dividends of Controlled Companies Regulated.*

SECTION 7. The ..... Company will not, so long as any of the bonds secured hereby are outstanding, cause, permit, or suffer the ..... Company, or any other corporation a majority in amount of whose then outstanding capital stock may hereafter be acquired by it, in whole or in part, with or out of any bonds issued hereunder, or the proceeds thereof, and the majority of whose directors may have been elected by or under the direction of the ..... Company (a) to become indebted, except in the ordinary course of business, or for the acquisition of additional property, shares of stock or other securities, or to the ..... Company as and to the extent authorized and contemplated by this indenture, or (b) to declare or pay a dividend upon any of the stock of such corporation, or to the holders thereof, or otherwise to distribute or pay any of its assets or funds to its stockholders, except only, in either case (1) out of the undivided and undistributed net profits of such corporation then on hand, and to the extent that the funds so divided or distributed and paid over, shall represent and consist of such net profits then on hand, or (2) as authorized or permitted by the terms and provisions of this indenture.

*Cash Items and Quick Assets Equal to Par of Outstanding Bonds to be Kept on Hand.*

SECTION 8. The ..... Company will at all times, so long as any of the bonds secured hereby are outstanding, keep on hand, or cause The ..... Company or other corporations a majority in amount of whose capital stock is at the time held or controlled by the ..... Company or The ..... Company, to keep on hand, (a) bills and accounts receivable and cash and cash

items, and (b) merchantable and movable assets consisting of and including merchandise, manufactured, produced or prepared, and in process of manufacture, production or preparation, raw material, including hides and bark, supplies and other articles generally constituting and known as "quick assets," to an amount so that the aggregate net value and amount, scheduled, verified, fixed or ascertained as hereinafter provided,

(1) of such items and assets of the ..... Company, and

(2) of a proportion of such items and assets of The ..... Company and of any corporation any of whose shares of stock may be held by The ..... Company, equal to the proportion which the number of shares of the capital stock of The ..... Company then held by the ..... Company and at the time pledged and deposited hereunder, shall bear to the total number of the then outstanding shares of the capital stock of The ..... Company, and

(3) of a proportion of such items and assets of any other corporation any of the shares of whose capital stock shall be at the time subject to this indenture, equal to the proportion which the number of such shares then subject hereto shall bear to the total number of the then outstanding shares of the capital stock of such corporation,

shall, on the thirty-first day of December of each year, be equal to at least the par value of the principal of the bonds authorized and secured hereby then outstanding. On or before the first day of April of each year, the ..... Company shall deliver to the Trustee a schedule, sworn to by its President or one of its Vice-Presidents and by its Treasurer or one of its Assistant Treasurers, showing, in general and summarized form, the nature, description, location and value of such items and "quick assets" on hand at the close of the last preceding calendar year by the said several corporations, and if such items and assets are not absolutely owned by the ..... Company, the value of its interest therein, computed as above provided. In case, in the opinion of the Trustee, any of such articles of merchandise mentioned in said schedule shall not at the time have or possess a market or reasonably known value, the Trustee may cause the value thereof to be verified or fixed by a competent appraiser or expert, to be selected by the Trustee; and the Trustee may, in its discretion, cause the books and records of any or all of said companies, so far as the ..... Company may have lawful power to grant or permit access to such books or records, to be examined in order to verify the correctness of any such schedule. The cost and expense of any such appraisal or examination shall be borne by the ..... Company. The Trustee shall be entitled to accept and rely on any schedule thus delivered to it, and upon the report of any appraiser or expert which it may select under the provisions hereof. The Trustee shall not be bound to cause such appraisal, verification or examination to be made, or liable for not doing so.

### ARTICLE THREE.

#### *Transfer of Pledged Stocks to Trustee.*

SECTION 1. From time to time, the Trustee may, but shall not be obliged to, cause to be transferred into the name of the Trustee, or its nominee, any or all shares of stock which shall have been assigned to or pledged with the Trustee hereunder; but in each case the corporation which issued such shares shall be

notified that such shares are held subject to this indenture; and the Trustee shall, in case any such shares are so transferred, indicate or cause such corporation to indicate upon the face of the certificate for such shares the fact that such shares are held subject to this indenture.

Any provision of this indenture to the contrary notwithstanding, the Trustee shall not be obliged, at any time, to accept a certificate for any shares of stock in any corporation, or to cause or permit a transfer thereof to be made to it, if, in the opinion of the Trustee, such acceptance will involve, or render it liable to be subjected to, the risk of any liability or expense.

*Trustee May Transfer Shares to Qualify Directors.*

The Trustee, at any time, may do whatever in its discretion and judgment may be necessary for the purpose of maintaining, preserving, renewing or extending the corporate existence of any company a majority in amount of whose shares shall then be held hereunder, and for such purpose, from time to time, the Trustee may sell, or assign, and transfer and deliver so many shares of the stock of the said several companies as may be necessary to qualify persons to act as directors of, or in any other official relation to, said companies, respectively. Whenever requested in writing by the President or one of the Vice-Presidents of the ..... Company, the Trustee shall assign and transfer to the persons designated by such officer of the ..... Company, a sufficient number of such shares held hereunder, to qualify such persons to act as directors of, or in any official relation to, the several companies, respectively, which issued such shares; provided, however, that no transfer shall be made which shall reduce the amount of stock in any company held hereunder, so as to render it less than a majority in amount of such stock; and in every such case the Trustee may make such arrangement as it shall deem necessary for the protection of the trust hereunder.

The Trustee may, but shall not be obliged to, cause to be transferred into the name of the Trustee, any or all registered bonds or other obligations which shall be received by it hereunder. The Trustee shall be authorized, but shall not be obliged, (1) to cause any or all coupon bonds or debentures received by it hereunder to be exchanged for registered bonds or debentures without coupons of any denomination, or (2) to cause any or all such coupon bonds or debentures to be registered in the name of the Trustee, as Trustee hereunder; and (3) to cause any such coupon bonds or debentures, or any stock certificates or other securities which may be received by it pursuant hereto, to be stamped with the said Indenture Stamp.

*Disposition of Dividends and Interest on Pledged Securities.*

SECTION 2. Unless there shall be some continuing default in respect of any of the matters mentioned in section 3 of Article Four of this indenture, the ..... Company, from time to time, shall be entitled to receive and to collect all dividends that may be declared on any shares of the capital stock of other corporations that shall at the time be subject to this indenture, and, as well, all sums that shall become due and payable for interest upon any bonds, debentures, or other obligations or claims that may at the time be held hereunder; and the Trustee, on request of the ..... Company, from time to time, shall

deliver to it suitable assignments and orders for the payment to its Treasurer, or other officer or agent designated by its President or one of its Vice-Presidents, of all dividends that, from time to time, may be declared or may become payable on such shares of capital stock of other corporations, and, upon like request, shall deliver to it, or such officer or agent, the coupons for interest on any such coupon bonds or debentures and suitable assignments and orders for the payment of the interest on any such registered bonds or debentures, and on any other bonds, debentures, or other obligations that shall be held hereunder, and the Trustee, from time to time, upon request of the ..... Company, shall pay over to its Treasurer, or other officer or agent designated by its President or one of its Vice-Presidents, any and all sums which shall be received or collected by the Trustee for interest upon any such bonds, debentures or other obligations, or for dividends upon any such shares of stock.

In case there shall be a continuing default in respect of any of the matters mentioned in section 3 of Article Four hereof, then, during the continuance of such default, in addition to the other remedies herein provided, the Trustee may revoke any such assignments or orders, and collect or receive all such dividends on such stock, and all such sums payable for interest upon any such bonds, debentures, or other obligations held hereunder; and all sums so collected or received, prior to any such sale hereunder as is mentioned in section 7 of Article Four hereof, shall be applicable to the payment of interest that shall become due on bonds hereby secured; but after any such default shall have been made good, or shall have been waived, the right of the ..... Company to receive and collect such dividends on such stocks and such interest on such bonds, debentures, or other obligations, and the duty of the Trustee to execute such assignments and standing orders, shall revive and continue as though such default had not taken place.

*Disposition of Payments of or on Account of Principal of Pledged Securities.*

In case there shall at any time or times be paid to the Trustee any sum on account or in payment of the principal of any bond, debenture or other obligation held hereunder or on account of the principal of any shares of stock or other securities subject to the lien hereof, the Trustee shall, on receiving the said amount, subject to, and except as otherwise provided in, section 5 of this Article, dispose of and disburse the same as follows: If the ..... Company, by a resolution of its Board of Directors or Executive Committee, shall request Article, dispose of and disburse the same as follows: If the ..... Company, by a resolution of its Board of Directors or Executive Committee, shall request that said amount, or the portion thereof stated in said resolution, shall be used and applied for and to any of the purposes specified in sub-paragraphs (a) and (b) of section 3 of Article One of this indenture, the Trustee shall disburse said amount, or said portion thereof, upon the order of the President or one of the Vice-Presidents and the Treasurer or one of the Assistant Treasurers of the ..... Company upon compliance with the conditions and provisions in said sub-paragraphs, or one of them, set forth and specified, in the same manner and to the same extent in all substantial respects as if said ..... Company were requesting the authentication of an equal amount, par value, of the bonds provided to be subject to said section 3. If the ..... Company shall fail to deliver a copy of such resolution, certified as such by the President

or one of the Vice-Presidents and by the Secretary or one of the Assistant Secretaries of the ..... Company, to the Trustee within sixty days after written notice from the Trustee to the ..... Company of the receipt of such sum or sums, or within such other period as may be allowed by the Trustee, the Trustee shall, without further action on the part of, or request from, the ..... Company, purchase so many of the bonds then outstanding hereunder as the amount so received will enable it to do at the lowest price practicable, either on the New York Stock Exchange or otherwise at private sale or by public advertisement, as the Trustee in its sole and absolute discretion may see fit; and its expenses in respect of any such purchases or advertising or publishing any notice in relation thereto shall be payable out of said fund. In case the Trustee shall not be able to expend the whole of said amount in the purchase of bonds at a less price than par and accrued interest and a premium of five per cent. (5%) on the principal thereof, the Trustee shall invest or dispose of such unexpended amount as may be directed by a resolution of the Board of Directors or Executive Committee of the ..... Company; provided, however, that such investment or other disposition be made in such manner that the same will, in the opinion of the Trustee, inure to and become a part of the security for the bonds issued or to be issued hereunder.

In case any such payment shall be made to the Trustee at a time when there is, to the knowledge of the Trustee, a continuing default in respect of any of the matters mentioned in section 3 of Article Four hereof, then, during the continuance of such default, the Trustee, instead of disposing of the same as above provided, may, if in its judgment it is advisable to do so, hold the said amount as part of the security for the bonds and coupons issued and to be issued hereunder; but after such default shall have been made good or shall have been waived, the said amount, or the unexpended portion thereof then in the hands of the Trustee, shall be subject to be disposed of, disbursed, applied or invested as above provided.

The Trustee shall not be liable for or because of any action taken or suffered on its part under or in pursuance to this section or by it believed to be authorized thereby, which is done, taken or suffered by it in good faith.

#### *Voting Power of Pledged Stocks; Proxies, etc.*

SECTION 3. Unless there shall be some continuing default in respect of any of the matters mentioned in section 3 of Article Four of this indenture, the ..... Company shall have the right, except only as hereinafter limited, to vote upon all shares of stock that shall have become subject to this indenture, with the same force and effect as though such shares were not subject to this indenture, including the right to vote any or all of said shares in favor of changing the name of any such corporation or of amending its certificate of incorporation or its by-laws; and the Trustee, on demand of the ..... Company, from time to time, shall execute and deliver to the ..... Company, or to such person or persons as shall be designated by resolution of its Board of Directors or Executive Committee, such proxies or powers of attorney, in general form, as may be necessary to enable the ..... Company, or the person or persons so designated, or its or their substitute or substitutes, to vote upon all shares of stock of other corporations that shall have been transferred to the Trustee hereunder, at all meetings, whether general or special, of the

shareholders of any such corporation, to the same extent and with the same effect as though such shares were absolutely owned by the ..... Company and were not subject to this indenture.

In case there shall be a continuing default in respect of any of the matters mentioned in section 3 of Article Four hereof, then during the continuance of such default, in addition to the other remedies hereinafter provided, the Trustee may revoke any such proxies or powers of attorney, and vote upon any such shares of the capital stock of other corporations; but after any such default shall have been made good, or shall have been waived, the right of the ..... Company to vote upon any such shares, and the obligation of the Trustee to execute such proxies and powers of attorney, shall revive, and shall continue as though no such default had taken place.

#### *Liens on Property of Controlled Companies Regulated.*

Nevertheless, such voting power shall not, in any case or at any time, be used or exercised for the purpose of authorizing the creation of any lien or charge upon the properties or franchises of any such corporation, except to secure the unpaid purchase-money of additional property acquired by such corporation or advances or loans made by the ..... Company to or for any of such corporation as and to the extent authorized by this indenture; and all such proxies shall by proper limitations provide against such use or exercise of such voting power.

Any provision to the contrary notwithstanding, the Trustee shall not be under a duty to vote, or to execute its proxy or power of attorney to vote, in accordance or compliance with any request of the ..... Company, in case there shall be at the time a continuing default in respect of any of the matters mentioned in section 3 of Article Four hereof.

#### *Consolidation or Dissolution of Controlled Companies.*

Whenever requested by resolution of the Board of Directors or Executive Committee of the ..... Company, the Trustee shall vote, or shall execute its proxy or power of attorney to vote upon, the shares of stock of other corporations held by the Trustee under this indenture, in favor of consolidating or merging such corporations, or any of them, with each other, or of dissolving, or of selling, transferring, or liquidating any or all the assets of any such corporation; provided, that upon such consolidation or merger, all of the stock of the consolidated company applicable to, and all other proceeds received in exchange for or on account of the shares of stock theretofore held hereunder, shall become subject hereto, and provided, further, that no such consolidation or merger shall take place unless the ..... Company shall own a majority in amount of the shares of stock of the corporation resulting from such consolidation or merger and that such majority of shares shall be made subject to this indenture; and provided, further, that every such dissolution, sale, transfer or liquidation, other than a sale or transfer made pursuant to Article 6 of this indenture, shall be subject to the provisions of section 5 of this Article in that behalf.

#### *Increase or Reduction of Capital Stock of Controlled Companies.*

Whenever requested by resolution of the Board of Directors or Executive Committee of the ..... Company, the Trustee shall vote, or shall execute its

proxy or power of attorney to vote upon, the shares of stock of other companies held under this indenture, in favor of the increase or reduction, from time to time, of the capital stock of any of such companies.

In case of an increase of the capital stock of any such company, the ..... Company covenants and agrees forthwith to assign, transfer and deliver to the Trustee, to be held upon the terms of this indenture, in the same manner and with the same effect as though assigned, transferred and delivered at the date of the execution hereof, certificates for the additional shares of the capital stock of such company, or such part thereof as shall be proportionate to the part of the entire capital stock of such company previously held hereunder.

In case of the decrease of the capital stock of any such company, the Trustee may surrender such part of the shares thereof held hereunder as shall be proportionate to the amount of such decrease.

*Sale or Lease of Property of Controlled Companies.*

Anything in this indenture to the contrary notwithstanding, any company any of whose shares of capital stock shall be held hereunder may sell or lease its property and franchises, or any part of its property and franchises, to any other company, whether or not the shares of such last-mentioned company be held hereunder, or may purchase or lease the property and franchises, or any part of the property and franchises, of any other company, whether or not the shares of such last-mentioned company be held hereunder, and, in either event, any company, any part of whose capital stock shall be held under this indenture, may execute any such conveyance or lease of or to such property and franchises, or any part thereof; and whenever requested by resolution of the Board of Directors or Executive Committee of the ..... Company, the Trustee, unless such conveyance or lease shall appear to the Trustee to be detrimental to the interests of the bondholders hereunder, shall vote, or execute its proxy or power of attorney to vote upon, the shares of stock held hereunder, in favor of the execution of any such conveyance or lease.

Anything in this indenture to the contrary notwithstanding, any company any of whose shares of capital stock are subject to this indenture, may be merged or consolidated with, or all or any part of its property may be sold or conveyed to, the ..... Company; but all real property, and all leaseholds or other qualified interests in real property, and all shares of stock, bonds, and other obligations, belonging to the company or companies so consolidated or merged with the ..... Company, or whose property as an entirety may be purchased by the ..... Company, shall become and be subject to the lien and operation of this indenture, with the same effect as though mortgaged, assigned and transferred to the Trustee at the time of the execution hereof, but subject to any prior lien upon any of the property of any such corporation which may be so consolidated or merged with the ..... Company or upon any property so purchased by the ..... Company; and the ..... Company, and any such consolidated company, shall execute all such further instruments of mortgage, pledge, assignment or transfer, as the Trustee may reasonably require for that purpose.

The Trustee shall not be liable for any action taken or suffered by it in good faith and believed by it to be authorized under the provisions of this section. It may rely upon the statements contained in a certificate signed by the Presi-

dent or one of the Vice-Presidents of the ..... Company in determining whether a proposed lease or conveyance of all or any part of the property or franchises of any company, any of whose shares of capital stock shall be held hereunder, will or will not be detrimental to the interests of the holders of bonds issued hereunder.

*Renewal, Extension, and Cancellation of Pledged Bonds, Etc.*

SECTION 4. At any time, if requested by resolution of the Board of Directors or Executive Committee of the ..... Company, the Trustee shall consent to the extension or renewal of any bonds, debentures, or other obligations which may, from time to time, be held hereunder, and to the extension or renewal of any mortgage or lien or agreement securing or concerning such bonds, debentures, or other obligations; provided, that the ..... Company shall not at the time be in default hereunder, and that the maker of such bonds, debentures, or other obligations shall not at the time be in default thereunder; and at any time, if the Trustee shall not deem it inadvisable, the Trustee shall so consent notwithstanding there be such a default.

Whenever all the bonds, debentures, or other obligations of any other corporation deposited with the Trustee hereunder, or entitled to be, shall be paid or satisfied, then, if thereunto requested by resolution adopted by the Board of Directors or Executive Committee of the ..... Company, the Trustee, at the expense of the ..... Company, shall cause to be canceled all such bonds, debentures, or other obligations held hereunder, and shall take such steps as may be necessary to procure the release or the satisfaction of any deed of trust or other instrument securing the same.

The Trustee may receive the opinion of any counsel as conclusive evidence of the existence of any facts authorizing any such extension or renewal of bonds, debentures, or other obligations, or any such cancellation of said bonds, debentures, or other obligations, and the release or satisfaction of such deed of trust or other instrument, in pursuance of the provisions of this section.

*Liquidation or Judicial Sale of Property of Controlled Companies.*

SECTION 5. In case (1) at any time The ..... Company or any other company a majority in amount of whose capital stock shall be held hereunder, shall be dissolved, or its property or assets, or any part thereof, shall be liquidated, sold or transferred; or in case (2) all or any of the property of any company any of the shares of the stock of which shall then be held hereunder, shall be sold upon the insolvency of such company, or under proceedings for the collection or enforcement of any notes or other obligations held hereunder, or otherwise at any judicial or other sale; or in case (3) any property covered by a mortgage or pledge securing any bonds or notes held hereunder, or subject to any charge or trust for the payment of any obligations held hereunder, shall be sold upon the foreclosure of such mortgage or by enforcement of such charge or trust, then, in any such event, the Trustee, at the request of the Board of Directors or Executive Committee of the ..... Company, evidenced by resolution of said board or of said committee, either shall purchase or cause to be purchased, or shall permit the ..... Company to purchase, such property, either in the name or in behalf of the ..... Company, or by purchasing

agents or trustees, and shall use, or permit the ..... Company or such purchasing agents or trustees to use, such shares of stock, bonds, debentures, or other obligations, and any interests therein, so far as may be, to make payment for such property. In case of any such purchase the Trustee shall take such steps as the Trustee may deem advisable, to cause such property to be vested either in the ..... Company, subject to the lien of this indenture, or in some other corporation, organized or to be organized, with power to acquire and to manage such property, or partly in the ..... Company and partly in such other corporation, as the Trustee may deem advisable, provided (1) that a mortgage or pledge securing a bond or bonds or a note or notes, equal to at least the amount of the securities subject hereto which are used to pay therefor, shall be made to the Trustee hereunder; or (2) that any bonds and other indebtedness and all the capital stock of such newly organized corporation (except the number of shares required to qualify directors), shall be assigned, transferred, and delivered to the Trustee; and the same shall thereupon be held subject to the lien of this indenture as if originally pledged hereunder.

*Trustee May Join Reorganization Plan or Take Other Steps to Protect Bondholders.*

SECTION 6. With the written consent of the ..... Company, evidenced by resolution of the Board of Directors or Executive Committee of the ..... Company, the Trustee, upon being furnished with the funds deemed by the Trustee necessary in the premises or upon being indemnified to its satisfaction, shall, at any time, take such steps as the Trustee, in its discretion, may deem advisable, to protect its interests and the interests of the bondholders hereunder, in respect of any bonds, debentures, or other obligations or shares of stock, which may be subject to the lien hereof; and, with such consent of the ..... Company, so evidenced, the Trustee, if the Trustee shall deem it advisable, may join in any plan of reorganization in respect of any such bonds, debentures, or other obligations, or shares of stock, and may accept the new securities issued in exchange therefor under the provisions of such plan.

In case there shall be at the time a continuing default in respect of any of the matters mentioned in section 3 of Article Four hereof, the Trustee shall, if the Trustee deem it advisable, take such steps or join in such plan, without the consent of the ..... Company.

*Advance of Funds to Protect Security Hereof.*

The ..... Company covenants that, on demand of the Trustee, it, the ..... Company, forthwith will pay, or will satisfactorily provide for, all expenditures incurred by the Trustee under any provision of this Article, including all sums required to obtain and perfect the ownership and title to any property which the Trustee shall cause or permit to be purchased pursuant to the provisions of this Article; and in case the ..... Company shall fail to do so, then, without impairment of or prejudice to any of its rights hereunder by reason of the default of the ..... Company, the Trustee, in its discretion, may advance all such expenses and other moneys required, or may procure such advances to be made by others; and for such advances made by the Trustee, or by others at its request, with interest thereon

at the rate of six per cent. per annum, or other agreed rate, the Trustee shall have a lien prior to these presents, upon all the property, shares of stock, bonds, debentures, notes, obligations, claims and indebtedness in respect of which such advances shall have been made, and the proceeds thereof, and upon any property acquired by means thereof.

*Disposition of Cash Proceeds of Judicial Sales Apportioned to Pledged Securities.*

In case the Trustee shall not cause or permit to be purchased the property sold at any such sale, or shall not join in a plan of reorganization, as aforesaid, in respect of such bonds, debentures, obligations, claims or shares of stock, then the Trustee shall receive any portion of the proceeds of the same accruing on and apportioned to the securities then held hereunder, and such proceeds so received, from time to time, shall be applied by the Trustee, as is provided in section 2 of this Article in respect of sums received by the Trustee for or on account of the principal of any bond, debenture, note or other obligation or claim held hereunder or of any shares of stock subject hereto.

ARTICLE FOUR.

*Lien of Detached Coupons Subordinated.*

SECTION 1. No coupon belonging to any bond hereby secured, which in any way at or after maturity shall have been transferred or pledged separate or apart from the bond to which it relates, shall, unless accompanied by such bond, be entitled, in case of a default hereunder, to any benefit of or from this indenture, except after the prior payment in full of the principal of the bonds issued hereunder, and of all coupons and interest obligations not so transferred or pledged.

*Principal of Bonds May Be Declared Due on Default.*

SECTION 2. In case default shall be made in the payment of any interest on any of the bonds hereby secured and outstanding, and such default shall have continued for the period of ninety days, then, and in every case of such continued default, upon the written request of the holders of twenty-five per cent. in amount of the bonds hereby secured and then outstanding, the Trustee, by notice in writing delivered to the then acting President of the ..... Company, or to any officer or representative of the ..... Company at its office in the city of New York or in Jersey City, or if it shall have no such office, or officer or representative thereat, then mailed to the ..... Company at ....., shall declare the principal of all bonds hereby secured and then outstanding to be due and payable immediately; and upon any such declaration the same shall become and be due and payable immediately, anything in this indenture, or in said bonds, to the contrary notwithstanding.

*Waiver of Default.*

This provision, however, is subject to the condition that if, at any time after the principal of said bonds shall have been so declared to be due and payable, all arrears of interest upon such bonds, with interest at the rate of five per cent, per annum on such overdue instalments of interest from their respective

due dates, together with all expenses and the reasonable charges of the Trustee, shall either be paid by the ..... Company, or be collected out of the property hereby mortgaged and pledged, before any sale of the said property hereby mortgaged and pledged shall have been made, then, and in every such case, the holders of twenty-five per cent. in amount of the bonds hereby secured and then outstanding, by written notice to the ..... Company and to the Trustee may waive such default and its consequences; but no such waiver shall extend to or affect any subsequent default or impair any right consequent thereupon.

*Power of Sale and Foreclosure Proceedings.*

SECTION 3. In case (1) default shall be made in the payment of any interest on any bond hereby secured, and if such default shall continue for the period of ninety days; or in case (2) default shall be made in the due and punctual payment of the principal of any bond hereby secured; or in case (3) default shall be made in the due observance or performance of any other covenant or condition herein required to be kept or performed by the ..... Company, and any such last-mentioned default shall continue for a period of ninety days after written notice thereof to the ..... Company from the Trustee or from the holders of twenty-five per cent. in amount of the bonds hereby secured and then outstanding, then, and in every such case, the Trustee, personally or by attorney, if the Trustee shall deem it advisable, (1) shall sell to the highest bidder, all and singular, the property, shares of capital stock, bonds, debentures, and other obligations and claims and the evidences thereof held under this indenture, and all right, title, interest, claim and demand therein, and the right of redemption thereof, in one lot and as an entirety, unless prior to the said sale the owners or holders of at least fifty per cent. in amount of the bonds then outstanding hereunder shall in writing request the Trustee to sell said property in separate lots; and in that event the same shall be sold in the separate lots designated in such request and in the order therein specified; which said sale or sales shall be made at public auction, at such place in the city of New York, in the State of New York, or at such other place or places, and at such time or times, and upon such terms as the Trustee may fix and briefly specify in the notice of sale to be given as herein provided, or as may be required by law; or (2) shall proceed to protect and enforce its rights and the rights of the bondholders under this indenture, by suit or suits in equity or at law, whether for specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for any foreclosure hereunder, or for the enforcement of any other appropriate legal or equitable remedy, as the Trustee, being advised by counsel learned in the law, shall deem most effectual to protect and enforce the rights aforesaid; or (3) shall, in its discretion, proceed both by sale and by such suit or suits.

In case the Trustee shall have proceeded to enforce any right under this indenture, by foreclosure or otherwise, and such proceedings shall have been discontinued or abandoned because of a waiver of the default, as hereinbefore provided, in respect or because of which such proceedings shall have been instituted, or for any other reason, or shall have been determined adversely to the Trustee, then, and in every such case, the ..... Company and the Trustee shall be restored to their respective former positions and rights hereunder in respect of the property hereby mortgaged and pledged or intended or agreed to

be, and all rights, remedies and powers of the Trustee shall continue as though no such proceeding had been taken.

*Notice of Sale by Trustee.*

SECTION 4. Notice of any such sale pursuant to any provision of this indenture shall state the time and place when and where same is to be made, and shall contain a brief, general description of the property to be sold, and shall be sufficiently given if published twice in each week for six successive weeks prior to such sale in a daily newspaper of general circulation published in the city of New York, unless another and different notice or another and different publication thereof shall be required by law, in which event the notice or publication, or both, thus required shall be given and made.

*Bondholders May Direct Trustee.*

Anything in this indenture contained to the contrary notwithstanding, the holders of a majority in amount of the bonds hereby secured and then outstanding, from time to time, shall have the right to direct and control the method and place of conducting any and all proceedings for any sale of the property hereby mortgaged or pledged, or for the foreclosure of this indenture, or for the appointment of a receiver, or for any other purpose hereunder

*Adjournments of Sale.*

The Trustee, from time to time, may adjourn any sale to be made under the provisions of this indenture, by announcement at the time and place appointed for such sale, or for such adjourned sale or sales; and, without further notice or publication, such sale may be made at the time and place to which the same shall be so adjourned.

*Consummation of Sale.*

Section 5. Upon the completion of any such sale or sales under this indenture, the Trustee shall make and deliver to the accepted purchaser or purchasers of the property so sold, a good and sufficient deed or deeds for the same, and shall assign, transfer and deliver to the accepted purchaser or purchasers thereof, the certificates for the shares of stock and the bonds and other like property so sold.

The Trustee and its successor or successors hereunder hereby are made and appointed the true and lawful attorney or attorneys irrevocable of the ..... Company and of its successors or assigns, in its or their name and stead, to make all necessary deeds and other instruments of transfer aforesaid, including therein any and all recitals and stipulations deemed by the Trustee, or such successor or successors, respectively, to be proper; and for that purpose the Trustee, or its successor or successors, may execute all necessary or convenient deeds or acts of assignment and transfer, the ..... Company for itself, its successors and assigns, hereby ratifying and confirming all that said attorney or attorneys shall lawfully do by virtue hereof.

Nevertheless, the ..... Company shall, if so requested by the Trustee, ratify and confirm such sale or sales by executing and delivering to the Trustee, or to such purchaser or purchasers, all proper deeds, conveyances, transfers and releases which may be designated in such request.

*Operation and Effect of Sale — Receipt of Trustee to Protect Purchaser.*

Every such sale made under or by virtue of this indenture, whether under the power of sale hereby granted and conferred, or under and by virtue of judicial proceedings, shall operate to divest all right, title, interest, claim and demand whatsoever, either at law or in equity, of the ..... Company, or any person claiming or to claim by, through or under it, of, in and to the property so sold, and shall be a perpetual bar, both in law and in equity, against the ..... Company, its successors and assigns, and against all persons claiming or to claim the property sold, or any part thereof, either through or under the ..... Company, its successors or assigns; and the receipt of the Trustee for the purchase money paid on such sale shall be a sufficient discharge to the purchaser without any liability upon the part of the purchaser to see to the application of the purchase money or to be bound to inquire as to the authorization, necessity, expediency or regularity of any such sale.

*Maturity of Principal as Result of Sale.*

SECTION 6. In case of such sale, whether under the power of sale hereby granted or pursuant to judicial proceedings, the principal sums of all the bonds hereby secured and then outstanding, if not previously due, shall become due and payable immediately, anything in said bonds or in this indenture contained to the contrary notwithstanding.

*Distribution of Proceeds of Sale.*

SECTION 7. The purchase money, proceeds and avails of any such sale, whether under the power of sale hereby granted or pursuant to judicial proceedings, together with any other sums which then may be held by the Trustee under any of the provisions of this indenture as part of the trust estate, or the proceeds thereof, shall be applied as follows:

*First.* To the payment of the costs and expenses of such sale, including a reasonable compensation to the Trustee, its agents, attorneys and counsel, and of all other expenses, liabilities and advancements made or incurred by the Trustee in the premises;

*Second.* To the payment of the whole amount then owing or unpaid upon the bonds hereby secured and then outstanding for principal and interest, with interest at the rate of five per cent. per annum on the overdue instalments of interest from their respective due dates; and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid, then to the payment of such principal and interest, without preference or priority of principal over interest, or of interest over principal, or of any instalment of interest over any other instalment of interest, ratably, to the aggregate of such principal and the accrued and unpaid interest, subject, however, to the provisions of section 1 of this Article; and

*Third.* The surplus, if any, shall be paid to the ..... Company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same.

*Bonds and Coupons May Be Used to Make Payment.*

SECTION 8. In case of any sale hereunder, whether under the power of sale hereby granted or pursuant to judicial proceedings, any purchaser, for the purpose of making settlement or payment for the property purchased, shall, sub-

ject to the provisions of section 1 of this Article, be entitled to use and apply any bonds and any matured and unpaid coupons hereby secured, by presenting such bonds and coupons, in order that there may be credited thereon the sum apportionable and applicable to the payment thereof out of the net proceeds of such sale to the owner of such bonds and coupons as his ratable share of such net proceeds, after making any deductions which made be made from the proceeds of such sale for costs, expenses, compensation and other charges; and thereupon such purchaser shall be credited on account of such purchase price payable by him, with the sum apportionable and applicable out of such net proceeds to the payment of or as a credit on the bonds and coupons so presented; and, at any such sale, any bondholder, or the Trustee, may bid for and may purchase such property, and may make payment therefor as aforesaid, and, upon compliance with the terms of sale, may hold, retain and possess and dispose of such property in his or its own absolute right, without further accountability.

*Trustee May Sue and Recover Judgment on Default.*

SECTION 9. The ..... Company covenants that in case (1) default shall be made in the payment of any interest on any bond hereby secured, and if such default shall have continued for a period of ninety days; or in case (2) default shall be made in the payment of the principal of any such bonds when the same shall become payable, whether by the maturity of said bonds, or by declaration as authorized by this indenture, or, by a sale, as provided in section 6 of this Article, then, upon demand of the Trustee, the ..... Company will pay to the Trustee for the benefit of the holders of the bonds and coupons hereby secured then outstanding, the whole amount due and payable on all such bonds and coupons then outstanding, for principal or interest, or both, as the case may be, with interest (so far as such interest shall not be represented by overdue coupons) at the rate of five per cent. per annum upon the overdue principal and instalments of interest from their respective due dates; and in case the ..... Company shall fail to pay the same forthwith upon such demand, the Trustee, in its own name and as trustee of an express trust, shall be entitled to sue for and to recover judgment for the whole amount so due and unpaid.

The Trustee shall be entitled to sue and recover judgment as aforesaid, either before or after or during the pendency of any proceedings for the enforcement of the lien of this indenture, upon the property hereby mortgaged and pledged, and the right of the Trustee to sue and to recover such judgment shall not be affected by any sale hereunder, or by the exercise of any other right, power or remedy for the enforcement of the provisions of this indenture, or for the foreclosure of the lien thereof; and, in case of a sale of the property hereby mortgaged and pledged, the Trustee, in its own name and as trustee of an express trust, shall be entitled to enforce payment of and to receive all amounts then remaining due and unpaid upon any and all of the bonds and coupons issued hereunder and then outstanding, for the benefit of the holders thereof, and shall be entitled to sue for and to recover judgment for any portion of the said debt remaining unpaid, with interest. No recovery of any such judgment by the Trustee, and no lien of any execution upon property subject to the lien of this indenture, or upon any other property, shall in any manner, or to any extent, affect the lien of the Trustee upon the property hereby mortgaged and pledged,

or any part thereof, or any rights, powers or remedies of the Trustee hereunder, or any rights, powers or remedies of the holders of the bonds hereby secured, but such liens, rights, powers and remedies shall continue unimpaired as before, and also as security for and for the enforcement of any and every such judgment as fully as for and for the enforcement of the payment of such bonds and the interest thereon.

Any moneys thus collected by the Trustee under this section, after paying the expenses incurred in the premises of the character described in the first subparagraph of section 7 of this Article, shall be applied by the Trustee receiving the same towards the payment of the amount then due and unpaid upon such bonds and coupons, in respect or for the benefit of which, such moneys shall have been collected, ratably, and without any preference or priority of any kind, except as provided in section 1 of this Article, according to the amounts due and payable upon such bonds and coupons, respectively, at the date fixed by such Trustee for the distribution of such moneys, upon presentation of the several bonds and coupons or of said several registered bonds without coupons, and stamping thereon such payment, if only partially paid, and upon surrender thereof, if fully paid.

*Waiver of Stay Laws, Redemption, etc.*

SECTION 10. The ..... Company will not at any time insist upon or plead, or in any manner whatever claim, or take the benefit or advantage of, any stay or extension law now or at any time hereafter in force, nor will it claim, take or insist upon any benefit or advantage from any law now or hereafter in force, providing for the valuation or appraisal of the property hereby mortgaged and pledged, or any part thereof, prior to any sale or sales thereof to be made pursuant to any provision herein contained, or to the decree, judgment or order of any court of competent jurisdiction; nor, after any such sale or sales, will it claim or exercise any right under any statute now or hereafter made or enacted by any State or otherwise, to redeem the property so sold, or any part thereof; and it hereby expressly waives all benefit and advantage of any such law or laws, and it covenants that it will not invoke or utilize any such law or laws in order to hinder, delay or impede the execution of any power herein granted and delegated to the Trustee, but that it will suffer and permit the execution of every such power as though no such law or laws had been made or enacted.

*Limitations on Right of Bondholders to Institute Suits.*

SECTION 11. No holder of any bond or coupon hereby secured shall have the right to institute any suit, action or proceeding, in equity or at law, for the foreclosure of this indenture or for the execution of any trust thereof, or for the appointment of a receiver, or for any other remedy hereunder, or by reason hereof, unless such holder previously shall have given to the Trustee written notice of such default and of the continuance thereof, as hereinbefore provided; nor unless, also, the holders of twenty-five per cent. in amount of the bonds hereby secured and then outstanding, after the right of action upon the default complained of shall have accrued to the Trustee, shall have made written request upon the Trustee and shall have afforded to it a reasonable opportunity either

to proceed to exercise the powers hereinbefore granted, or to institute such action, suit or proceeding in the name of the Trustee; nor unless, also, they shall have offered to the Trustee adequate security and indemnity against the costs, expenses and liabilities to be incurred therein or hereby; and such notification, request and offer of indemnity are hereby declared, in every such case, at the option of the Trustee, to be conditions precedent to the execution of the powers and trusts of this indenture, for the benefit of the bondholders, and to any action or cause of action for foreclosure or for the appointment of a receiver, or for any other remedy hereunder; it being understood, intended and hereby provided that no one or more holders of bonds or coupons secured hereby shall have the right in any manner whatever, by his or their action, to enforce, affect, disturb or prejudice the lien of this indenture, or to enforce any right under this indenture, except in the manner herein provided, and that all proceedings at law or in equity under this indenture shall be instituted, had and maintained only in the manner herein provided, and for the equal benefit of all holders of such outstanding bonds and coupons.

*Remedies Cumulative.*

SECTION 12. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the Trustee, or to the holders of bonds hereby secured, is intended to be exclusive of any other remedy or remedies; but each and every such remedy shall be cumulative, and shall be in addition to every other remedy given hereunder, or now or hereafter existing at law or in equity or by statute.

*No Waiver by Delay.*

SECTION 13. No delay or omission of the Trustee, or of any holders of bonds hereby secured, to exercise any right or power accruing upon any default continuing, as aforesaid, shall impair any such right or power, or shall be construed to be a waiver of any such default, or acquiescence therein; and every power and remedy given by this Article to the Trustee, or to the bondholders, may be exercised, from time to time, and as often as may be deemed expedient, by the Trustee invested therewith, or by the bondholders, respectively.

ARTICLE FIVE.

*Individual Liability Negatived and Released.*

No recourse under or upon any obligation, covenant, or agreement contained in this indenture, or in any bond or coupon hereby secured, or because of the creation of any indebtedness herein mentioned, shall be had against any incorporator, or against any present or future stockholder, officer or director, of the ..... Company, or of any successor corporation, either directly or through the ..... Company, by the enforcement of any assessment, or through a receiver, assignee or trustee in bankruptcy, or by any other legal or equitable proceeding, or by virtue of any statute, or otherwise; it being expressly agreed and understood that this indenture and the obligations hereby secured, are solely corporate obligations, and that no personal liability whatever shall attach to, or be incurred by, the incorporators, or to or by any present or future stockholder, officer or director of the ..... Company, or of any successor corpora-

tion, or any of them, because of the incurring of the indebtedness hereby authorized, or under or by reason of any of the obligations, covenants, or agreements contained in this indenture or in any of the bonds or coupons hereby secured, or to be implied therefrom; and that any and all personal liability of every name and nature, and any and all rights and claims against every such incorporator, and against every such present and future stockholder, officer or director, whether arising at common law or equity, or created or to be created by statute or constitution, are hereby expressly released and waived as a condition of, and as a part of the consideration for, the execution of this indenture and the issue of the bonds and interest obligations secured hereby.

## ARTICLE SIX.

### *Release Clauses.*

If at any time any property, or any shares of stock, bonds, debentures, obligations, or other securities subject to this indenture, other than shares of stock of The ..... Company, cannot, in the judgment of the Board of Directors or Executive Committee of the ..... Company, be advantageously used in the proper and judicious operation of the business of the ..... Company, or if the sale and disposition thereof has, in the opinion of such Board of Directors or Executive Committee, become necessary or expedient for any cause, the same, or any interest therein, may be sold or exchanged for other property, or for bonds, shares of stock or other securities; and, upon the request of the ..... Company, evidenced by a resolution of its Board of Directors or Executive Committee, the Trustee shall release the same from the lien and effect of this indenture, but subject to the following provisions and conditions:

(a) Before any such property, shares of stock, bonds or other securities, or any interest therein, shall be released, the same shall be appraised by an appraiser, or by more than one appraiser, who shall be selected by the Trustee;

(b) In case of any such sale of any such property, shares of stock, bonds, or other securities, or of any interest therein, the price or proceeds of such sale, not less than the value of such property, or of such interest, as appraised by such appraiser or appraisers, or a sum equivalent to such price or proceeds, shall be deposited with the Trustee, to be held for the further security of the bonds hereby secured until paid over or applied as hereinafter provided; and

(c) In case of an exchange, other property, shares of stock, bonds, or other securities, appraised by an appraiser or appraisers selected by the Trustee, to be of the value at least equal to the appraised value of the property given in exchange, shall be subjected to the lien and operation of this indenture.

The moneys received by the Trustee upon any such sale or exchange shall, upon the request of the ..... Company, evidenced by a resolution of its Board of Directors or Executive Committee, be applied, as follows:

(1) The Trustee shall pay over to the ..... Company, out of any such proceeds, sums equal to any expenditures that shall have been made by the ..... Company, after such sale, for the acquisition of additional property, or for the acquisition of additional bonds or other obligations, or shares of the capital stock of other corporations, upon such property being subjected to the lien and operation of this indenture or upon the assignment and delivery of

such bonds, other obligations, and certificates for such shares of stock to the Trustee; or

(2) At the option of the Board of Directors or Executive Committee of the ..... Company, the Trustee shall apply such proceeds, or any part thereof, to purchasing, in the manner and under the conditions provided in respect of payments of or on account of principal in section 2 of Article Three of this indenture, bonds hereby secured; and all bonds so purchased shall be canceled; and anything herein to the contrary notwithstanding, no bonds shall be authenticated or delivered in place of the bonds so purchased and canceled.

The Trustee may receive and shall be entitled to act and rely upon a certificate signed by the President or one of the Vice-Presidents and the Treasurer or one of the Assistant Treasurers of the ..... Company, as conclusive evidence of any fact mentioned in this Article.

#### ARTICLE SEVEN.

##### *Possession of Mortgaged Property Until Default.*

SECTION 1. Until some default shall have been made in the due and punctual payment of the interest or of the principal of the bonds hereby secured, or of some part of such interest or principal, or in the due and punctual performance and observance of some covenant or condition hereof obligatory upon the ..... Company, and until such default shall have been continued beyond the period of grace, if any, hereinbefore provided in respect thereof, the ..... Company, its successors and assigns, shall be suffered and permitted to retain actual possession of all the property that may be conveyed and mortgaged or assigned and pledged to the Trustee (but not of bonds, evidences of indebtedness, certificates of stock, cash and other property hereby provided to be delivered or paid to the Trustee), and to manage, operate and use the same and every part thereof, with the rights and franchises appertaining thereto, and to collect, receive, take, use and enjoy the earnings, income, rents, issues, and profits thereof, and to manufacture, transform and otherwise utilize and to sell and dispose of any of the products thereof.

##### *Satisfaction on Payment — Disposition of Pledged Securities on Satisfaction.*

SECTION 2. If and when the bonds hereby secured shall have become due and payable, the ..... Company shall well and truly pay, or cause to be paid, the whole amount of the principal moneys and interest due upon all the bonds hereby secured and then outstanding, or shall provide for such payment by depositing with the Trustee hereunder, for the payment of such bonds and the accrued interest thereon, the entire amount then due thereon for principal and interest, and also shall pay or cause to be paid, all other sums then accrued and to be paid to the Trustee hereunder by the ..... Company, and shall well and truly keep and perform all the things herein required to be kept and performed by it, according to the true intent and meaning of this indenture, then and in that case, all property, shares of stock, bonds, obligations and other rights and interests hereunder conveyed, assigned, mortgaged or pledged, or then subject hereto, shall revert to the ..... Company, its successors or assigns; and the estate, rights, title and interest of the Trustee, in respect thereof shall there-

upon cease, determine and become void; and the Trustee, in such case, on demand of the ..... Company, its successors or assigns, and at its or their cost and expense, shall execute proper instruments acknowledging satisfaction of this indenture; but the Trustee, in such case, shall continue to hold, as depositary for the ..... Company, its successors or assigns, the certificates for all shares of stock and all bonds, or other obligations and claims and the evidences thereof, which are then on deposit with it hereunder, until the Board of Directors of the ..... Company, its successors or assigns, by resolution, shall have authorized some disposition thereof; whereupon, the Trustee shall dispose of such shares of stock, bonds or other securities, as authorized by such resolution.

*Provisions in Case of Change of Name by the ..... Company.*

SECTION 3. In case the ..... Company shall at any time change its corporate name, it may nevertheless adopt and use the name of ..... Company in issuing and causing to be authenticated and delivered, bonds secured hereby, or, at the election of the ..... Company, by whatever corporate name it may be known at the time, any bonds thereafter issued hereunder may, if so specified and provided in a resolution of the Board of Directors of said Company, be issued in the name to which said corporate name shall have been thus changed, and shall be authenticated and delivered by the Trustee in that form; and any and all bonds issued hereunder after such change of corporate name, whether in the name of the ..... Company or in the name to which the name of said ..... Company has been changed, shall, in all respects, be entitled to each and every the benefits and security of this indenture and be subject to the terms and provisions thereof; and in case of such change of corporate name, any resolution, certificate, request, direction, order or other instrument or action herein provided or contemplated hereby to be passed executed, made or done by the ..... Company, or its Board of Directors or Executive Committee, or any of its officers or representatives thereunto authorized, may be passed, executed, made or done in the name to which that of the ..... Company shall have been so changed.

ARTICLE EIGHT.

*Authentication of Bondholders' Instruments.*

SECTION 1. Any request, direction or other instrument required by this indenture to be signed and executed by bondholders, may be in any number of concurrent writings of similar tenor, and may be signed or executed by such bondholders in person or by attorney appointed in writing. Proof of the execution of such request, direction or other instrument, or of the writing appointing any such agent, and of the ownership of coupon bonds transferable by delivery, if made in the following manner, shall be sufficient for any purpose of this indenture, and shall be conclusive in favor of the Trustee with regard to action by it taken, or suffered under such request, to wit:

(a) The fact and date of the execution by any person of any such writing may be proved by the certificate of any officer in any jurisdiction who, by the laws thereof, has power to take acknowledgments within said jurisdiction, that

the person signing such writing did acknowledge before him the execution thereof, or by an affidavit of a witness of such execution.

(b) The fact of the holding of coupon bonds hereunder by any bondholder, and the amount and numbers of any such bonds, and the date of his holding the same, may be proved by a certificate executed by any trust company, bank, bankers or other depository (wherever situated), if such certificate shall be deemed by the Trustee to be satisfactory, showing that at the date therein mentioned such person had on deposit with such trust company, bank, bankers or other depository the bonds described in such certificate. The ownership of registered coupon bonds or of registered bonds without coupons, shall be proved by the register of said bonds.

#### *Right to Act on Apparent Ownership of Bonds.*

SECTION 2. The ..... Company and the Trustee may deem and treat the bearer of any coupon bond hereby secured which shall not at the time be registered in the name of the owner thereof, as hereinbefore authorized, and the holder of any coupon for interest on any such bond, whether such bond shall be registered or not, as the absolute owner of such bond or coupon, as the case may be, for the purpose of receiving payment thereof, and for all other purposes, and neither the ..... Company nor the Trustee shall be affected by any notice to the contrary.

The ..... Company and the Trustee may deem and treat the person in whose name any registered bond without coupons, issued hereunder shall be registered upon the books of the ..... Company, as hereinbefore provided, as the absolute owner of such bond, for the purpose of receiving payment of, or on account of, the principal and interest of such bond, and for all other purposes, and may deem and treat the person in whose name any coupon bond shall be so registered as the absolute owner thereof for the purpose of receiving payment of, or on account of, the principal thereof, and for all other purposes, except to receive payment of interest represented by outstanding coupons; and all such payments so made to any such registered holder, or upon his order, shall be valid and effectual to satisfy and discharge the liability upon such bond to the extent of the sum or sums so paid.

#### ARTICLE NINE.

##### *Conditions of Accepting Trusts Thereof.*

The Trustee, for itself and its several successors, hereby accepts the trusts and assumes the duties herein created and imposed upon it, but only upon the following terms and conditions, to-wit:

(a) The Trustee shall be protected in acting upon any notice, request, consent, certificate, bond, promissory note, or other paper or document believed by it, or by the one acting thereon, to be genuine and to have been signed by the proper party or parties.

##### *Immunities and Compensation of Trustee.*

(b) The Trustee may select and employ in and about the execution of this trust, suitable agents and attorneys, whose reasonable compensation shall be paid to the Trustee by the ..... Company, or, in default of such payment,

shall be a charge upon the property hereby mortgaged and pledged, and the proceeds thereof, paramount to said bonds. The Trustee shall not be responsible for the recording or filing or for the re-recording or re-filing of any instrument transferring or mortgaging to it upon the trusts herein contained, any property or securities other than or in addition to those specified in the granting clauses hereof. The Trustee shall not be under any responsibility or duty with respect to the disposition of the proceeds of the bonds hereby secured. The Trustee shall not be liable for failure to insure or renew insurance or for responsibilities of insurers. The Trustee shall not be personally liable for any loss or damage, save for its own wilful default.

(c) The Trustee shall have a first lien upon the property hereby mortgaged and pledged for reasonable expenses, counsel fees and compensation incurred in and about the execution of the trusts hereby created and the exercise and performance of its powers and duties hereunder, and also to indemnify and hold it harmless against any liability, charge, cost or expense based upon or resulting from the fact that said Trustee shall have taken or had transferred into its name, the certificate for any shares of stock or the title to any property, bond, or other obligation subject to this indenture, or entitled to be, and against the cost and expense of defending against any alleged liability in the premises of any character whatsoever.

(d) The Trustee shall be under no obligation or duty to perform any act hereunder, or to institute or defend any suit in respect hereof, unless reasonably indemnified. It shall not be required to take notice or be deemed to have notice of any default hereunder and may conclusively assume that there has been no default hereunder or on the part of the maker of or under any bonds, debentures or other obligations at any time held by the Trustee or to which it may be entitled under the terms hereof, unless it shall have been specifically notified in writing of such default. Except as herein expressly otherwise provided, the Trustee shall not be bound to recognize any person as a bondholder unless and until his bonds are submitted to the Trustee for inspection, if required, and his title satisfactorily established, if disputed.

(e) The recitals of fact herein and in said bonds contained shall be taken as statements by the ..... Company, and shall not be construed as made by the Trustee. The Trustee makes no representation as to the value or title of the property transferred hereunder.

#### *Trustee May Resign.*

(f) The Trustee, or any successor or successors hereafter appointed, may resign and be discharged of the trusts hereby created, by written notice thereof to the ..... Company and by publication at least once in each week for two consecutive weeks in a daily newspaper published in the city of New York.

(g) The Trustee may consult with counsel, and shall be protected in any action taken or suffered by it in good faith and in accordance with the opinion of its counsel.

#### ARTICLE TEN.

##### *Removal of Trustee.*

The Trustee, or any Trustee or Trustees hereafter appointed, may be removed at any time by an instrument or concurrent instruments in writing, signed by the

holders of two-thirds in amount of the bonds hereby secured and then outstanding.

*Appointment of Successor-Trustee.*

In case at any time the Trustee, or any Trustee or Trustees hereafter appointed, shall resign, or shall be removed, or be dissolved, or otherwise shall become incapable of acting, a successor may be appointed by the holders of a majority in amount of the bonds hereby secured and then outstanding, by an instrument or concurrent instruments in writing signed by such bondholders or by their attorneys in fact duly authorized; provided, nevertheless, and it is hereby agreed and declared, that in case at any time there shall be a vacancy in the office of Trustee hereunder, the ..... Company, by instrument executed by order of its Board of Directors or Executive Committee, may appoint a Trustee to fill such vacancy until a new Trustee shall be appointed by the bondholders as herein authorized. The ..... Company shall publish notice of any such appointment by it made, once in each week for four consecutive weeks, in two daily newspapers of general circulation published in the city of New York; and any new Trustee appointed by the ..... Company shall, immediately and without further act, be superseded by a Trustee appointed by the bondholders in the manner above provided, provided that such appointment be made prior to the expiration of one year from the date of such publication of notice. Every such Trustee appointed by the bondholders, or by the ..... Company, shall always be a trust company in good standing in the city of New York, having a capital, surplus and undivided profits aggregating not less than ..... Dollars (\$.....), if there be such a trust company willing and able to accept the trust upon reasonable or customary terms.

*Proceedings in Case of Appointment of New Trustee.*

Any new Trustee appointed hereunder shall execute, acknowledge and deliver to the Trustee last in office, and to its or his co-trustee, if any, and also to the ..... Company, an instrument accepting such appointment hereunder; and thereupon such new Trustee, without any further act, deed or conveyance, shall become fully vested with all the estates, properties, rights, powers, trusts, duties and obligations of its predecessor in trust hereunder, with like effect as if originally named as Trustee herein; but the Trustee ceasing to act, shall nevertheless, on the written request of the ..... Company, or of the new Trustee, and at the cost and expense of the ..... Company, execute and deliver any and every instrument necessary or convenient to transfer to such new Trustee, upon the trusts herein expressed, all the estates, properties, rights, powers and trusts of the Trustee so ceasing to act, and shall duly assign, transfer and deliver all property and moneys held by such Trustee to the new Trustee. Should any deed, conveyance or instrument in writing from the ..... Company be required by the new Trustee for more fully and certainly vesting in and confirming to such new Trustee such estates, rights, powers and duties, any and all such deeds, conveyances and instruments in writing shall, on request, be executed, acknowledged and delivered by the ..... Company.

*Appointment of Co-Trustee or of Additional Trustee.*

If, at any time or times, in order to conform to any legal requirement, the ..... Company shall so request, the ..... Company and the Trustee shall unite in the execution, delivery and performance of any and all instruments and agreements necessary or proper to appoint another trust company, or one or more persons approved by the Trustee, either to act as Co-trustee or Co-trustees of all or any of the property subject to the lien hereof, jointly with the Trustee originally named herein, or its successor or successors, or to act as separate Trustee or Trustees of any such property.

Every successor Trustee and every additional Trustee hereunder, other than any trust company which may be appointed as successor to the ..... Trust Company, shall, to the extent permitted by law, be appointed subject to the following provisions and conditions, namely:

(1) The bonds secured hereby shall be certified and delivered, and all powers, duties, obligations and rights conferred upon the said Trustee in respect of the custody of all stocks, bonds, securities, and cash, shall be exercised, solely by said ..... Trust Company, or a trust company appointed and acting as its successor in the trust hereunder;

(2) No power shall be exercised hereunder by such successor or additional Trustee or Trustees, except jointly with the consent in writing of said ..... Trust Company, or any trust company which may have been appointed and be acting as its successor in the trust; and

(3) the ..... Company and the ..... Trust Company, or its successor in the trust, at any time, by an instrument in writing, executed by them jointly, may remove any such other Trustee or Trustees, and by an instrument in writing, executed by them jointly, may appoint a successor or successors to such other Trustee or Trustees, anything herein contained to the contrary notwithstanding.

Any notice, request or other writing by or on behalf of the bondholders delivered solely to the ..... Trust Company, or its successor in the trust, shall be deemed to have been delivered to all such Trustees as effectually as if delivered to each of them.

Every instrument appointing a successor or additional Trustee or Trustees shall refer to this indenture and the conditions in this Article expressed, and upon the acceptance in writing by such successor or additional Trustee or Trustees, he, they or it shall be vested with the estates and property specified in such instrument, either jointly with the ..... Trust Company, or its successor, or separately, as may be provided, subject to all the trusts, conditions, covenants and provisions of this indenture. Every such instrument shall be filed with the ..... Trust Company, or its successor in the trust.

Any additional Trustee or Trustees may, at any time, by an instrument in writing, constitute said ..... Trust Company, and its successor in the trust hereunder, his, their or its agents and attorney in fact, with full power and authority, to the extent which may be permitted by law, to do all acts and things and exercise all discretions authorized or permitted by him, them or it, for and in behalf and in the name of the Trustee or Trustees executing such instrument.

In case any additional Trustee or Trustees, or a successor to either of them, shall die, become incapable of acting, resign, or be removed, all the estates, properties, rights, powers, trusts, duties and obligations of the said Trustee, so far as permitted by law, shall vest in and be exercised by said ..... Trust Company, or its successor in the trust, without the appointment of a new Trustee as successor to such additional Trustee.

No successor to any additional Trustee shall be appointed unless such appointment shall be necessary for the full protection of the bondholders hereunder, nor unless the ..... Trust Company, or its successor, or the holders of a majority in amount of the bonds hereby secured, shall deem such appointment expedient for any cause.

*Trustee May Rely on Certificates of Mortgagor's Officers.*

Whenever the existence or non-existence of any fact or other matter shall be material, the Trustee shall, unless herein elsewhere provided to the contrary, be protected in acting or refraining from acting under any provision of this instrument, in relying upon a certificate as to the existence or non-existence of any such fact, or matter signed by the President or one of the Vice-Presidents and the Secretary or one of the Assistant Secretaries, or the Treasurer or one of the Assistant Treasurers of the ..... Company.

In case of the appointment of any new Trustee under the provisions of this article, a copy of the instrument making such appointment, duly authenticated by the President and Secretary of the ..... Company (they having inspected and compared said copy with the original) as a true copy, shall be filed with each of the corporations of whose capital stock shares shall then be subject to this indenture.

ARTICLE ELEVEN.

*Successors and Assigns Bond.*

SECTION 1. All the covenants, stipulations, promises, undertakings and agreements herein contained, by or on behalf of the ..... Company, shall bind its successors and assigns, whether so expressed or not. For every purpose of this indenture, including the execution, issue and use of any and all bonds hereby secured, the term "..... Company" includes and means, not only the party of the first part hereto, but also its successors and assigns.

*Definition of Terms.*

SECTION 2. The word "Trustee" means the Trustee for the time being, whether original or successor. The words "Trustee," "bond" and "bondholder" shall include the plural as well as the singular number, unless otherwise expressly indicated. The word "coupons" refers to the interest coupons attached to the bonds secured hereby. The word "person" used with reference to a bondholder, shall include associations or corporations owning any of said bonds.

*Signatures.*

IN WITNESS WHEREOF, the said ..... Company and the said ..... Trust Company of New York have each caused its corporate seal, duly attested by its Secretary, to be affixed to an original and duplicate hereof, and these presents to be subscribed by its President or one of its Vice-Presidents.

..... COMPANY,

(CORPORATE SEAL.)

By .....  
President.

Attest:

.....  
Secretary.

Signed, sealed and delivered by said }  
..... Company in the }  
presence of }

.....  
.....

..... TRUST COMPANY,

(CORPORATE SEAL)

By .....  
Vice-President.

Attest:

.....  
Secretary.

Signed, sealed and delivered by said }  
..... Trust Company }  
in the presence of }

.....  
.....

## FORM NO. 113.

*Minutes of Stockholders' Meeting, With Notice, Consenting to Mortgage.*

A special meeting of the stockholders of ....., Inc., was held at ....., at ..... o'clock in the ..... noon of the ..... day of ....., 191.., pursuant to the following notice, given as required for a notice of an annual meeting of said corporation:

Notice is hereby given that a special meeting of the stockholders of ....., Inc., will be held at ....., at ..... o'clock in the .....noon of the ..... day of ....., 191.., for the purpose of obtaining the consent of holders of not less than two-thirds of its capital stock to the mortgage of its property and franchises to secure payment of obligations or debts necessarily incurred or contracted in the transaction of its business.

.....  
Secretary.

.....  
President.

The President in the chair, the Secretary recording.

The Secretary presented the affidavit of ..... , verified the ..... day of ..... , 191.., showing proof of due notice of this meeting as required in the case of an annual meeting of the stockholders of this company, which was, on motion duly seconded and unanimously carried, ordered filed in the archives of the corporation.

The Secretary reported the total capital stock of the company as ..... , of which ..... were present in person and ..... by proxy, the proxies of the latter being correct and on file with him.

The President reported ..... [*state facts showing need of mortgage*].

On motion, duly seconded and unanimously carried, the following resolution was adopted by the vote of ..... shares, being more than two-thirds of the capital stock of the company:

Whereas, this company needs \$..... to cover its obligations and debts necessarily incurred or to be incurred in the transaction of its business or the exercise of its corporate rights, privileges or franchises, viz. .... . . . . . [*state particular need*].

Resolved, that the stockholders of this corporation in special meeting for the purpose duly assembled consent and they hereby do consent to a mortgage or mortgages of the property and franchises of the corporation to secure an amount of \$....., and payment of its obligations and debts up to that amount; and that the proper officers and directors of this company be and they hereby are authorized to do all things necessary to consummate said mortgage.

There being no further business to come before the meeting, it was adjourned.

.....,  
Secretary.

FORM NO. 114.

*Stockholders Consent to Mortgage.*

We, the undersigned, being holders of not less than two-thirds of the capital stock of ..... , Inc., a stock corporation, do hereby in writing consent to a mortgage of the property and franchises of said corporation, to secure the payment of its obligations and any debt contracted in borrowing money necessary for the transaction of its business or the exercise of its corporate rights, privileges or franchises or necessary for any other lawful purpose of its incorporation, in an amount of \$.....-

Names of Stockholders.	No. of Shares.
.....	.....
.....	.....

FORM NO. 115.

*Certificate of Consent or Resolution of Stockholders to Corporate Mortgage.*

We, ..... , the president [*or, a vice-president*] and ..... , the secretary [*or, an assistant-secretary*] of ..... , Inc., do hereby, under the seal of said corporation, subscribe, acknowledge, file and record this certificate as follows:

*First.*—At a special meeting of the stockholders of ..... , Inc., a stock corporation, held at ..... , at ..... o'clock in the ..... noon of the

day of ....., 191.., pursuant to notice of a meeting called for the purpose duly given as required for the annual meetings of said corporation, the holders of ....., being not less than two-thirds of the capital stock of said corporation, voted in favor of the following resolution [*or, signed the following consent*]:

[*Take in resolution from Form No. 113 or consent as in Form No. 114.*]

Witness our subscriptions and acknowledgments and said corporation's seal, this ..... day of ....., 191..

.....  
(Vice-) President.

(CORPORATE SEAL.)

Attest:

.....  
(Assistant) Secretary.

[*Add acknowledgments.*]

#### FORM NO. 116.

##### *Certificate of Corporate Merger with Resolution of Board of Directors.*

This certificate under the common seal of ....., Inc., is hereby filed by it in the office of the Secretary of State to merge ....., Inc., as follows:

*First.* ....., Inc., the corporation executing this certificate and hereinafter called the possessor corporation, is a domestic stock corporation (*or, is a foreign stock corporation authorized to do business in this state*); and lawfully owns all the stock of ....., Inc., another stock corporation organized for or engaged in business similar or incidental to that of the possessor corporation.

*Second.* At a special meeting of the board of directors of the possessor corporation duly held on the ..... day of ....., 191.., the following resolution was duly adopted:

*Whereas*, ....., Inc., is a domestic stock corporation [or, is a foreign stock corporation] authorized to do business in the State of New York] and lawfully owns all the stock of ....., Inc., another stock corporation organized for or engaged in business similar or incidental to that of this corporation,

*Resolved*, That this corporation merges said ....., Inc.

Witness the execution hereof by ....., Inc., under its common seal, attested by its secretary, this ..... day of ....., 191..

....., Inc.,

By .....,

President.

(Corporate Seal.)

Attest:

.....

Secretary.

[Add corporate acknowledgment.]

#### FORM NO. 117.

##### *Agreement of Consolidation.*

Agreement made this ..... day of ....., 191.., by and between ....., Inc., and ....., Inc., by a majority of said corporations' respective boards of directors and under said corporations' respective corporate seals.

*Whereas*, Both said corporations are organized under the laws of New York State for the purpose of carrying on business of the same or similar nature which a corporation organized under the Business Corporations Law of said State might carry on, and desire to consolidate into a single corporation,

*Now this agreement witnesseth*, That in consideration of the premises, it is *Mutually agreed*:

*First*. That said two corporations consolidate into a single corporation.

*Second*. That the terms and conditions of said consolidation are as follows:

*Third*. That the mode of carrying said consolidation into effect is as follows:

*Fourth*. That the name of the new corporation is .....

*Fifth.* That the number of directors who shall manage said new corporation's affairs shall be ..... (not less than three).

*Sixth.* That the names and post-office addresses of said directors for the first year are as follows:

<i>Names.</i>	<i>Post-office Addresses.</i>
.....	.....
.....	.....
.....	.....

*Seventh.* That the term of said corporation's existence shall be ..... years (not exceeding 50).

*Eighth.* That the name of the town (or towns) and county (or counties) in which said corporation's operations are to be carried on is .....

*Ninth.* That the name of the town (or city) and county in New York State in which said corporation's principal place of business is to be situated is .....

*Tenth.* That the amount of said corporation's capital stock is ..... (not larger than the fair aggregate value of the property, franchises and rights of both corporations), and the number of shares into which the same is to be divided is .....

*Eleventh.* That the manner of distributing such capital stock among the holders thereof is as follows:

*Twelfth.* [If either corporation was organized to carry on any part of its business in any place outside New York State]. That said ....., Inc., was organized to carry on its business in ..... to this extent: ..... [state].

[Add such other particulars as the directors deem necessary].

Witness the execution of this agreement of consolidation entered into by said corporations under their respective corporate seals and signed by a majority of their respective boards of directors.

(CORPORATE SEAL.)	by ....., Inc., ..... ..... ..... Directors.
(CORPORATE SEAL.)	by ....., Inc., ..... ..... ..... Directors.

#### ADDITIONAL FORM NO. 117-a.

##### *Agreement of Consolidation (of N. J. Corporations).*

*Agreement,* made and entered into this .... day of ....., ....., by and between ..... Company, a corporation of the State of New Jersey, and the Directors thereof, parties of the first part, and ..... Company, a corporation of the State of New Jersey, and the Directors thereof, parties of the second part:

WHEREAS, the principal and registered office of each of said corporations in the State of New Jersey is at ....., in the city of ....., county

of ....., and the ..... Company is the agent therein in charge thereof upon whom process against each of said corporations may be served within said State; and

WHEREAS, ..... Company was heretofore incorporated under the laws of the State of New Jersey, and whereas under the amended certificate of incorporation of the said Company, filed in the office of the Secretary of State of New Jersey on or about the .. day of ....., and under a certain certificate of increase of the capital stock of said corporation, filed in the said office on the .. day of ....., ....., said company has an authorized capital stock of \$..... divided into ..... shares of the par value of \$100 each, of which ..... shares are .... per cent. (..%) cumulative Preferred Stock and ..... shares are Common Stock; and there have been duly issued and are now outstanding certificates for ..... shares of said Preferred Stock and for ..... shares of said Common Stock; and

WHEREAS, the ..... Company was heretofore incorporated under the laws of the State of New Jersey, and whereas under the certificate of incorporation of the said Company, filed in the said office of said Secretary of State on ..... .., 191.., said Company has an authorized capital stock of \$....., divided into ..... shares of the par value of \$100 each, of which ..... shares are .. per cent. (..%) cumulative Preferred Stock and ..... shares are Common Stock, and there have been duly issued and are now outstanding certificates for ..... shares of said Preferred Stock, and for ..... shares of said Common Stock; and said ..... Company has also executed its certain Indenture dated ..... .., to the ..... Company of ....., as Trustee, providing for an authorized issue of its First Lien Twenty-Year Five Per Cent. Gold Bonds, the aggregate amount whereof is limited to \$..... par value, at any one time outstanding, of which bonds there have been issued and are now outstanding \$..... par value; and

WHEREAS, said ..... Company was organized pursuant to the provisions of an Agreement dated ....., between ....., constituting a Committee of certain stockholders of ..... Company (therein called the "Committee"), parties of the first part, James R. Plum and all other holders of the stock of said Company who should, by signature to said Agreement or by deposit of stock thereunder, become parties thereto (therein called the "Depositing Stockholders"), parties of the second part, and the ..... Company of ..... (therein called the "Depository"), party of the third part, and also pursuant to a Plan set forth in a Circular Letter mentioned in said Agreement and of even date therewith, copies of said Agreement and of said Circular Letter being hereto annexed and marked, respectively, Exhibits "A" and "B"; and

WHEREAS, pursuant to the Agreement and Plan aforesaid, said ..... Company thereafter issued its securities in payment for shares of the stock of ..... Company acquired by it thereunder and otherwise, and did acquire and now owns shares of stock of ..... Company as follows: \$....., par value, of shares of its Preferred Stock, and \$....., par value, of shares of its Common Stock, leaving outstanding shares of stock of said ..... Company not owned by the ..... Company, as follows: \$....., par value, of shares of Preferred Stock, and \$....., par value, of shares of Common Stock; and

WHEREAS, dividends at the rate of .. per cent. per annum have regularly

been paid upon the preferred stock of ..... Company in quarterly installments of ..... per cent. from a date prior to the 1st day of ....., 19.., such quarterly payments having been made on the 1st day of ....., 19.., the 1st day of ....., the 1st day of ....., the 1st day of ..... and the 1st day of ....., 19.., and the 1st day of ....., the 1st day of ....., the 1st day of ..... and the 1st day of ....., 19.., and the 1st day of ....., the 1st day of ....., the 1st day of ..... and the 1st day of ....., 19.., the last mentioned date being the date of the last such payment; and, whereas, dividends at the rate of .. per cent. per annum have been regularly paid in quarterly installments of ..... per cent. upon the preferred stock of the ..... Company, such quarterly payments having been made on the 1st day of ....., 19.., and the 1st day of ....., the 1st day of ....., the 1st day of ..... and the 1st day of ....., 19.., and the 1st day of ....., the 1st day of ....., the 1st day of ..... and the 1st day of ....., 19.., the last mentioned date being the date of the last such quarterly payment; and, whereas, no dividends have at any time been paid upon the common stock of either ..... Company or the ..... Company; and

WHEREAS, both the ..... Company and ..... Company are organized for the purpose of carrying on business of a similar nature; and

WHEREAS, the respective boards of directors of said corporations deem it advisable, to the end that greater efficiency and economy of management may be accomplished, and otherwise and generally to the advantage and welfare of said corporations and their several and respective stockholders, to merge and consolidate said corporations under and pursuant to the provisions of an Act of the Legislature of the State of New Jersey entitled "An Act Concerning Corporations (Revision of 1896)";

NOW, THEREFORE, In consideration of the premises and the mutual agreements, provisions, covenants and grants herein contained, IT IS HEREBY AGREED by and between the said parties hereto, and in accordance with said Act of the Legislature of the State of New Jersey, that said ..... Company shall be and the same hereby is, merged and consolidated into and with said ..... Company, and the ..... Company does hereby merge and consolidate into and with itself said ..... Company;

AND the parties hereto do, by these presents, agree to and prescribe the terms and conditions of said merger and consolidation, and the mode of carrying the same into effect, which terms and conditions and mode of carrying the same into effect the said parties hereto do mutually and severally agree and covenant to observe, keep and perform, that is to say:

ARTICLE I.—The name of the consolidated corporation is and shall be and remain ..... Company.

ARTICLE II.—The number, names and places of residence of the first directors of the said ..... Company, as consolidated, who shall hold their offices until their successors be chosen according to the by-laws of the said ..... Company, are as follows:

The number of the first board of directors is seventeen (17) and their names and places of residence are as follows:

NAMES OF DIRECTORS...	RESIDENCES.
.....	.....
.....	.....
.....	.....

The first officers of the Company are a President, four Vice-Presidents, a Secretary, a Treasurer, and two assistant Treasurers and their names and places of residence are as follows:

OFFICER.	NAMES.	RESIDENCE.
President,	.....,	.....
First Vice-President,	.....,	.....
Second Vice-President,	.....,	.....
Third Vice-President,	.....,	.....
Fourth Vice-President,	.....,	.....
Secretary,	.....,	.....
Treasurer,	.....,	.....
Assistant Treasurer,	.....,	.....
Assistant Treasurer,	.....,	.....

ARTICLE III.—The capital stock of the said ..... Company, as consolidated, shall be ..... Dollars, divided into ..... (.....) shares of the par value of \$100 each, of which ..... (.....) shares shall be ..... per cent. cumulative Preferred Stock and ..... (.....) shares shall be Common Stock.

The rights, terms and conditions of the shares of said preferred and common stock issued and to be issued shall be respectively the same as those of the shares of the preferred and common stock of the present ..... Company now outstanding as set forth in the certificate of incorporation of said ..... Company, a copy of which marked Exhibit "C," is hereto annexed and made a part hereof.

ARTICLE IV.—The manner of converting the capital stock of ..... Company into the capital stock of the ..... Company shall be as follows: Each and every of the outstanding shares of stock of ..... Company shall be forthwith exchangeable for and convertible into the securities of the ..... Company in the same proportion and manner as was accorded to the holders of the stock of ..... Company under the provisions of the Agreement dated ....., 191., and of the Plan set forth in the Circular Letter therein mentioned, copies of which Agreement and Circular Letter are hereto annexed, as aforesaid, marked Exhibits "A" and "B," respectively, namely:

Each holder of one share of the Preferred Stock of ..... Company, upon the surrender of the certificate thereof to the ..... Company, duly indorsed in blank for transfer, shall receive the following securities of the ..... Company:

- \$50.00 in par value of First Lien Twenty-Year Five Per Cent Gold Bonds, and
- \$50.00 in par value of Seven Per Cent. Cumulative Preferred Stock, in exchange for and in full of the principal of such share; and
- \$23.50 in par value of Common Stock, in exchange for and in full of the accrued and unpaid dividends on such stock.

Provided, however, and it is hereby agreed, that the holder of any share or shares of said Preferred Stock of ..... Company may, at his option, produce to the ..... Company the certificate for said share or shares with a proper memorandum thereon signed by such holder, showing his receipt, on account of

said share or shares, of \$50 in par value of said gold bonds of the ..... Company, and \$50 in said Preferred Stock of the ..... Company for each such share, and upon such production and the delivery to said ..... Company of a duplicate of such memorandum and receipt likewise signed by such holder and reciting that the same is given pursuant and subject to the provisions of this proviso, the said holder shall have the right, without surrender or endorsement for transfer of said certificate, to demand and receive the said \$50 in par value of said gold bonds and \$50 in said Preferred Stock of the ..... Company for each share, which shall be in exchange for and in full of the principal of each said share of Preferred Stock of ..... Company; but the owner of such share or shares shall retain and be deemed to retain, and the said certificate shall continue thereafter to represent and shall be deemed to represent, the said share or shares so far as concerns any lawful right, whether past, present or future, of the holder thereof to demand or receive from ..... Company or the ..... Company any money, value or thing by reason of dividends accrued and unpaid upon the said share, and so far as concerns any lawful right whether past, present or future, of said holder in or by reason of the surplus or surplus earnings of ..... Company accumulated at the said time when this Agreement shall so take effect, or at any time theretofore, or in or by reason of the money or property of which such surplus or earnings shall then consist, or shall at any time theretofore have consisted, or which such surplus or earnings shall then represent, or shall theretofore have represented; and thereafter the holder of such certificate shall, with respect to such accrued and unpaid dividends, surplus and surplus earnings, and the money or property of which such surplus or surplus earnings shall consist, or by which they shall be represented, be and be deemed to be the holder of such share and not to have waived any lawful right whether past, present or future, whether against ..... Company or the ..... Company or otherwise, with respect to such dividends, surplus earnings, money or property, but shall be and be deemed to be entitled with respect thereto to enforce and exercise such right without prejudice by reason of such receipt of securities of the ..... Company in satisfaction of the principal or par of said share or shares. No holder of a share or shares of the preferred stock of ..... Company on a certificate for which shall have been signed the memorandum in the foregoing proviso mentioned, and on which bonds and shares of preferred stock of the ..... Company shall have been delivered as therein mentioned, shall be entitled to receive the said \$23.50 per share in par value of Common Stock of the ..... Company (receivable as aforesaid upon surrender, duly endorsed in blank for transfer of a share of said Preferred Stock of ..... Company) or any part of said \$23.50 or to receive anything further by reason of said principal or par of such share or shares of ..... Company.

Each holder of one share of the Common Stock of ..... Company, upon the surrender thereof to the ..... Company, duly indorsed in blank for transfer, shall receive three-tenths of one share of the Common Stock of the ..... Company.

In making such exchanges as aforesaid, an adjustment shall be made of the dividends and interest upon the Preferred Stock of said corporations and upon the bonds of the ..... Company, to the end that the accrued and unpaid

interest and dividends upon the bonds and Preferred Stock of the ..... Company issued in exchange for the Preferred Stock of ..... Company, or a sum in cash paid in lieu thereof, shall equal an amount equal to six per cent. per annum on the par value of the shares of said Preferred Stock of ..... Company, computed from the immediately next preceding day on which a dividend of ..... on each of said shares shall have been paid by the said ..... Company.

In all cases where the proportion of securities to be received shall consist of or include fractions of bonds or of shares of stock of the ..... Company, scrip or certificates duly executed by the ..... Company shall be issued by that Company to the holders of stock in ..... Company exchanging the same in accordance herewith. Said scrip or certificates shall be in favor of the bearers thereof and the ..... Company shall in and by each such scrip or certificate certify, in substance, that it holds for the holder of such scrip or certificate the fractional amount of bond or share of stock, as the case may be, specified in such scrip or certificate, and that upon presentation at one time to the ..... Company of such scrip or certificate together representing one bond or one share of stock, or any whole number of bonds, or any whole number of shares of stock, the ..... Company will deliver to the person so presenting such scrip or certificates the bond or bonds or a paper and regular certificate for the share or shares of stock so represented as the case may be; and the ..... Company shall thereby further certify that whenever any interest, dividend or other sum of money shall be payable by the ..... Company upon any such bond or share of stock for a fractional interest in which any such scrip or certificate is outstanding, the ..... Company shall pay the proportionate part of the same to the holder of such scrip or certificates upon presentation thereof to the ..... Company with a receipt for such interest or dividend duly indorsed thereon; and the ..... Company shall for all such scrip or certificates at any time outstanding hold and keep the bond or bonds and the certificate or certificates for the share or shares of stock represented thereby.

Provided further, however, and it is hereby Agreed, that, for all the purposes of this agreement, and for all other purposes (1) the stock of ..... Company heretofore acquired by the ..... Company upon the terms and conditions set forth in the Plan and Agreement dated ....., 19.., herein before mentioned, or otherwise, shall be deemed to have been exchanged for and converted into the securities of the ..... Company in accordance herewith; and (2) that no present holder of bonds or shares of stock of the ..... Company shall receive any other or additional bond, share of stock or fraction thereof or other allotment by reason of this agreement.

ARTICLE V.—Except in so far as herein otherwise specifically set forth or as provided by statute, the corporate name, franchise, rights and organization of the said ..... Company shall remain intact, and said ..... Company shall possess the powers, privileges and rights granted by and shall be governed by and be subject to the Certificate of Incorporation of the ..... Company, a copy of which is hereunto annexed and made a part hereof as aforesaid, with the same force and effect as if the same were here again fully set forth at length.

The corporate name and organization of ..... Company, except in so far as the same are continued by statute or may be requisite for carrying out

the purposes of this agreement, shall cease upon the filing in the office of the Secretary of State of New Jersey, of this agreement when adopted by the stockholders as hereinafter provided.

ARTICLE VI.—Upon the consummation of the act of merger or consolidation hereby provided for, all and singular the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations, shall be vested in the consolidated corporation, the ..... Company; and all property, rights, privileges, powers and franchises, and all and every other interest, of the two companies parties hereto, shall be thereafter as effectually the property of the said consolidated corporation as they were of the several and respective corporations parties hereto, and the title to any real estate, whether by deed or otherwise vested in either of such corporations, shall not revert or be in any way impaired by reason of the said merger and consolidation; provided, that all rights of creditors and all liens upon the property of either of said corporations parties hereto shall be preserved unimpaired, and the respective corporations parties hereto shall be deemed to continue in existence in order to preserve the same; and all debts, liabilities and duties of either of said corporations parties hereto shall thenceforth attach to said consolidated corporation and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it. If at any time said consolidated company shall deem or be advised that any further assignments, assurances in the law or things are necessary or desirable to vest in the said consolidated company, the title to any property of the ..... Company or of ..... Company, the said ..... Company or the said ..... Company (as the case may be) and its proper officers and directors shall and will execute and do all such proper assignments, assurances in the law and things necessary or proper to vest title to such property in the said consolidated company and otherwise to carry out the purposes of this agreement.

It is expressly declared that said ..... Company, as consolidated, shall be, and said ..... Company hereby covenants that, as consolidated, it shall be, subject to the remedies and liabilities in such case prescribed in the said act entitled "An Act concerning Corporations (Revision of 1896)" and the said several supplements thereto and amendments thereof, including chapter 241 of the Laws of 1902.

ARTICLE VII.—The said ..... Company, as consolidated, shall pay all expenses of merger and consolidation, including proper legal expenses.

ARTICLE VIII.—The principal and registered office of said ..... Company in the State of New Jersey is at ....., in the city of ....., county of ....., and ..... Company is the agent therein in charge thereof upon whom process against the said Company in the State of New Jersey may be served.

ARTICLE IX.—This agreement shall be submitted to the stockholders of each of said corporations as provided by law, and shall take effect and be deemed and taken to be the agreement and act of merger and consolidation of the said corporations upon the adoption thereof by the votes of the holders of two-thirds of all the shares of the capital stock of each of the said corporations and upon the doing of such other acts and things as are required by said act concerning corporations.

IN WITNESS WHEREOF, the said parties to this agreement have, pursuant to a resolution passed by the respective Boards of Directors of each of said corporations, at meetings thereof, duly and regularly held, at which a quorum was present, caused the respective corporate seals of said corporations to be hereto affixed and these presents to be signed by their respective Presidents or Vice-Presidents and attested by their respective Secretaries or Assistant Secretaries, all thereunto duly authorized, the day and year first above mentioned.

..... Company,

by .....  
its President.

[CORPORATE SEAL.]

Attest:

.....  
Secretary.

..... Company,

by .....  
its President.

[CORPORATE SEAL.]

Attest:

.....  
Secretary.

Signed, sealed and delivered  
in the presence of

.....

FORM NO. 118.

*Minutes and Notice of Stockholders' Meeting to Approve Corporate Consolidation.*

A special meeting of the stockholders of ....., Inc., was held at ....., at ..... o'clock in the .....noon of the ..... day of ....., 191..., pursuant to the following notice:

Notice is hereby given of a special meeting of stockholders of ....., Inc., to be held at ....., at ..... o'clock in the .....noon of the ..... day of ....., 191..., to secure the approval, by vote of holders of at least two-thirds of the stock of said corporation, of an agreement for the consolidation of this corporation and ....., Inc., submitted by the boards of directors of said corporations to the stockholders of their respective corporations.

.....,  
President.

.....  
Secretary.

The President in the chair and the Secretary recording.

The Secretary presented the affidavit of ....., verified the ..... day of ....., 191..., showing deposit in the post office, postage pre-paid, addressed to each stockholder at his last known post-office address, of

a copy of said notice, at least two weeks before the date set in said notice for this meeting, and publication thereof for at least two successive weeks in one of the newspapers in each of the counties in New York State in which either of said corporations has its place of business. Such affidavit, on motion made, duly seconded and unanimously carried, was ordered filed with the archives of the company.

The Secretary stated that the capital stock of the company was .....

The said agreement of consolidation was presented to and discussed by the meeting, paragraph by paragraph. On motion made, duly seconded and carried by the vote by ballot of stockholders of the corporation owning ..... shares, being at least two-thirds of its stock, it was

*Resolved*, that the agreement of consolidation of this corporation and ....., Inc., into a new corporation named ....., dated the ..... day of ....., 191., and submitted at this meeting for the approval of the stockholders of this company, be and it hereby is in all respects ratified and approved; and further

*Resolved*, that duplicate verified copies of the proceedings of this meeting, made by the Secretary of the company, together with said agreement of consolidation, be filed in the offices of the Secretary of State and of the clerk of the County of ....., where the office of said new corporation is to be situated in New York State, and that thereupon this corporation be merged into said new corporation and be known by said new corporation's corporate name.

There being no further business to come before the meeting, it was adjourned.

.....  
Secretary.

STATE OF NEW YORK, }  
County of ....., } ss.: •

....., being duly sworn, says: I am the Secretary of ....., Inc., and acted as such at a special meeting of its stockholders held the ..... day of ....., 191., to vote upon its proposed consolidation with ....., Inc., into a new corporation named ....., Inc. The foregoing is a true copy of the proceedings of said meeting and of the whole thereof. Annexed hereto is an original copy of the agreement of consolidation in said proceedings referred to.

Sworn to before me this ..... day of ....., 191..

#### FORM NO. 119.

##### *Notice by Stockholder of Objection to Corporate Consolidation.*

To ....., Inc..

Take notice that the undersigned, a stockholder in ....., Inc., owning ..... shares of stock represented by certificate number ....., who did not vote in favor of an agreement for the consolidation of said corporation and ....., Inc., into a new corporation named ....., at a meeting of stockholders of ....., Inc., held the ..... day of ....., 191., do hereby object to such consolidation and demand payment for my stock.

## FORM NO. 120.

*Notice by Stockholder of Consolidated Corporation of Application to Court for Appointment of Appraisers to Value His Stock.*

SUPREME COURT, ..... COUNTY.

In the Matter of the Application of  
 .....  
 a Stockholder in the Consolidated Cor-  
 poration of ....., Inc.,  
 for the Appointment of Appraisers  
 to Value His Stock,

Take notice that the undersigned, a stockholder in ....., Inc., will apply on the annexed petition to the Supreme Court, ..... County, at a Special Term, Part ..... thereof, at ..... o'clock of the ..... noon of the ..... day of ....., 191., or as soon thereafter as counsel can be heard, for the appointment of three persons to appraise the value of his stock in said corporation which was not voted in favor of the proposition, submitted at a meeting of the stockholders of said corporation held the ..... day of ....., 191., to consolidate said corporation and ....., Inc., into a new corporation named .....

## FORM NO. 121.

*Petition by Stockholder Dissenting From Consolidation for Appointment of Appraisers to Value His Stock.*

(Title and caption as in Form No. 120.)

To the Supreme Court, ..... County:

The petition of ..... respectfully shows:

*First:* That petitioner owns ..... shares of the stock of ....., Inc.

*Second:* That on the ..... day of ....., 191., a meeting of the stockholders of said ....., Inc., was held to approve an agreement for its consolidation with ....., Inc., into a new corporation named ....., Inc.

*Third:* That petitioner did not vote in favor of said agreement.

*Fourth:* That at said meeting [or, within twenty days after said meeting, viz., on the ..... day of ....., 191..] petitioner objected to said consolidation and demanded payment for his stock in said ....., Inc.; and that said agreement of consolidation was approved; that no payment has been made petitioner for his said stock; and that a copy of petitioner's said objection and demand is hereto annexed and made part hereof.

*Fifth:* That said consolidation took effect on the ..... day of ....., 191., by ..... [state how became effective].

*Sixth:* That in the district in which this Court is being held, viz., the county of ....., said new corporation has its place of business.

Wherefore, petitioner prays for the appointment of three persons to appraise the value of his said stock in said ....., Inc., and for such other, further and different relief as may be just and proper.

.....,  
Petitioner.

[Add verification.]

FORM NO. 122.

*Order Appointing Appraisers to Value Stock of Stockholder Dissenting From Consolidation.*

(Title as in Form No. 120.)

(Caption of Court Order.)

On reading and filing the petition of ....., verified herein the .... day of ....., 191., and the notice of application dated herein the .... day of ....., 191., and the affidavit of ....., verified herein the .... day of ....., 191., from which it appears to the court's satisfaction that said petition and notice were duly served upon ....., the new corporation therein referred to, at least eight days before the time set in said notice of application to this Court, and after hearing ....., Esq., of counsel for said applicant, in support of the application, and no one appearing in opposition thereto; now, on motion of ....., Esq., attorney for said applicant,

Ordered, that Messrs. .... and ..... be and they hereby are designated and appointed as three appraisers to appraise the value of the stock of said applicant, being ..... shares, in ....., Inc., and further

Ordered, that said appraisers hold their first meeting at ..... o'clock in the ..... noon of the .... day of ....., 191., at .....; and further

Ordered, [such directions in regard to the appraisers' proceedings as are deemed proper]; and further

Ordered, [direct manner in which payment for the stock shall be made to the stockholder applying for the appraisal].

Enter:

.....,  
J. S. C.

FORM NO. 123.

*Oath of Appraisers of Stock of Stockholder Dissenting From Consolidation.*

STATE OF NEW YORK, }  
County of ..... } ss.:

We, ..... and ....., being the three persons appointed by order herein entered the .... day of ....., 191., to appraise the value of the stock of ..... in ....., Inc., do severally and duly swear honestly and faithfully to discharge our duties as such appraisers.

Sworn to before me this ..... day of ....., 191..

FORM NO. 124.

*Certificate by Appraisers of Value of Stock of Stockholder Dissenting From Consolidation.*

We, ....., and ....., the persons appointed by order entered herein the ..... day of ....., 191.., to appraise the value of the stock of ..... in ....., Inc., do hereby certify:

*First:* That we duly took our oath of office, hereto annexed, as prescribed by law.

*Second:* That we met at the time and place designated in said order and estimated the value of said stock at the time of the dissent of the holder thereof to the consolidation of said ....., Inc., and ....., Inc., into ....., Inc., as follows:

Witness our hands this ..... day of ....., 191..

.....  
.....  
.....

FORM NO. 125.

*Corporate Reorganization Agreement.*

AGREEMENT made this ..... day of ....., 191.., between .....

..... a Committee representing stockholders of ..... Company (and hereinafter called the *Committee*) parties of the first part; ....., and all other holders of stock of the said Company who shall by signature hereto or by deposit of stock hereunder, become parties hereto (hereinafter called *Depositing Stockholders*) parties of the second part; and the ..... (hereinafter called the *Depository*) party of the third part:

WHEREAS, The Committee has, upon the request of stockholders of the ..... Company, prepared a Plan designed to promote the interest of all the stockholders of the ..... Company, the same being a corporation of New Jersey and hereinafter called the ..... Company" and has addressed to the stockholders of that Company a circular letter bearing even date herewith, which sets forth the principal features of the Plan, of which circular letter a copy is hereto annexed entitled "Copy of the Circular Letter and Plan;" and

WHEREAS, The parties of the second part have approved of the Plan and agreed, and do agree, each with the other parties of the second part, as well as with the parties of the first and third parts, to promote the success thereof and of the new Company mentioned in the Plan,—

NOW, THEREFORE, in consideration of the premises, the parties hereto agree each with all of the others, as follows:

*I.—Deposit of Shares and Issue of Trust Company Certificates.*

This agreement shall be signed by the parties of the first and third parts and by ....., one of the parties of the second part and when so signed shall be deposited with the party of the third part at its office in the City of New York.

Every holder of shares, whether preferred or common, of the stock of the ..... Company may become a party hereto either by signing and sealing this instrument or by depositing the certificates of his stock with the Depositary in the manner and within the time herein prescribed, provided, however, that and such stockholder signing this agreement who shall not deposit his stock hereunder with the Depositary before the lapse of ten days after such signature by him, shall, at the option of the Committee and upon notice by the Committee to the Depositary, cease to be a party hereto. The deposit of any certificate of stock with the Depositary in such manner and within such time shall constitute the depositor a party to this agreement with the same effect as if he had subscribed this agreement and affixed his seal hereto. The depositor must in every case indorse in blank the certificate or certificates for his stock and deposit therewith, or thereafter on demand of the Committee, every transfer, assignment, power of attorney or proxy which the Committee shall deem necessary or proper.

The time for such deposits is hereby limited to the close of business hours of the Depositary on ....., the ..... day of ....., 191.., provided, however, that the Committee may by a notice of not less than five days published not less than twice in not less than two newspapers published at the City of New York, prescribe a limit of such time for deposit, earlier than said ..... day of ....., 191.., and provided, further, that the Stockholders' Committee may, from time to time, extend the time for such deposit to any date not later than the ..... day of ....., 191..

The Depositary shall, upon the receipt from any depositor of his certificate or certificates of stock, issue to him its certificate, substantially in the form following,—each certificate being either exclusively for preferred stock or exclusively for common stock, the certificates for preferred stock being printed in black ink and the certificates for common stock being printed in blue ink.

[Form of Trust Company Certificate.]

No.	PREFERRED
	SHARES      OR
	COMMON

CENTRAL TRUST COMPANY OF NEW YORK.

Preferred  
Certificate of Deposit for shares of the      or      Stock  
Common  
of

THE ..... COMPANY.

The undersigned Trust Company hereby certifies that ..... has deposited with this Company a certificate or certificates for ..... preferred shares of the      or      capital stock of the ..... Company under and in common

pursuance and acceptance of an agreement dated the ..... day of ....., 191.., made between this Company, certain holders of the stock of the said ..... Company and the Stockholders' Committee, consisting of ..... and others. Such depositor or any subsequent holder of this certificate is entitled, with respect to the said shares for which certificates have been so deposited, to the rights prescribed by the said agreement and is subject to all the provisions thereof.

This certificate is transferable, but only upon the registration books of this Company, by the holder or holders hereof in person or by attorney upon surrender of this certificate properly endorsed.

..... COMPANY OF NEW YORK,

By

.....  
Vice-President.

.....  
Secretary.

The said certificates shall be duly engraved in manner required for listing by the New York Stock Exchange and there shall be engraved upon the back of each such certificate a blank form of transfer substantially as follows:

[Form of Transfer.]

For value received the undersigned hereby assign to ..... preferred  
shares of the ..... shares of or  
common

stock of the ..... Company therein mentioned, and also so much of the within certificate and of the rights of the undersigned thereunder as relates to the said shares.

..... hereby appoint ..... attorney irrevocable for ..... to make such transfer upon the registration books of the ..... Company of New York.

PROVIDED, however, and it is hereby agreed that, during the delay incident to the engraving of such certificates, temporarily printed certificates shall in like form be issued by the Depositary; but for such printed certificates engraved certificates shall be substituted as soon as may be; and provided, further, that no such certificate shall be valid until the same shall have been registered upon the books of the ..... Company of New York, which is hereby appointed Registrar for that purpose, subject to the right of the Committee in case of its refusal or disability or otherwise, to substitute some other Trust Company in the City of New York for such registrar.

The Depositary shall from time to time make transfers as mentioned in such certificates and forms of transfer thereon indorsed, and upon each transfer issue duly registered a new certificate or certificates according to the transfer.

The transfer books of the Depositary for preferred stock shall be closed for the payment of dividends upon such preferred stock for such period or periods as shall, from time to time, be determined by the Depositary or the Committee. Notice of such closing shall be published twice a week for two weeks prior to such closing in the manner prescribed by Article VII hereof. During such period no transfer of such certificates representing preferred stock shall be made

upon the books of the Depositary; and the amount of any dividend received by the Depositary upon the shares of preferred stock represented by any such certificate, shall be payable to the holder of record of such certificate at the date of such closing, or if not then received, then immediately after such receipt thereof by the Depositary.

The Committee shall, as soon as it deems desirable, apply to the New York Stock Exchange for the listing of such certificates; and the Depositary shall give to such application such support as may be proper.

The Depositary shall, during the period or periods limited therefor as herein prescribed, received for deposit all certificates for such shares which shall be tendered to it hereunder and, for the same, issue such Trust Company certificate or certificates; but this requirement is subject to the said provision for closing the books for the transfer of certificates for preferred stock.

### *II.—The Plan.*

Section 1. The Depositing Stockholders hereby severally assent to and accept all the provisions of the said Plan and of this Agreement and all of the parties hereto agree, with all other parties hereto, to promote the success of the Plan.

Section 2. The New Company shall not distribute to its common stock dividends representing, directly or indirectly, the surplus or property of the ..... Company actually accumulated on ....., 191., or its proceeds, or any part thereof; nor shall the new company declare any dividends to such common stock from income, business or property of the ..... Company or proceeds thereof except such as shall represent profits earned by the ..... Company or such new Company from and after ....., 191.: Provided, however, that the prohibitions of this section shall be absolute for the period of three years from and after the acquisition by the new Company of two-thirds of the capital stock of the ..... Company, but that after the expiration of such three years, such prohibitions shall be subject to modification or repeal upon the consent of the holders 66⅔ per cent. in par value of the outstanding preferred stock of the new Company. The by-laws of the new Company shall include a by-law, containing the provision hereinbefore in this section contained, and further providing that such by-law shall not be repealed or amended within such three years or thereafter without the consent of 66⅔ per cent. in value of the outstanding stock of the new Company.

### *III.—The Depositary.*

The Depositary shall transfer into its own name upon the books of the ..... Company the shares of such preferred stock for which certificates are deposited thereunder. The Depositary shall, if and after any meeting of the stockholders of the ..... Company shall be called and upon the request of the record holder of any certificate of deposit, deliver to such record holder a proxy in his name in proper form to entitle him to vote at such meeting for the Depositary as the holder of the shares represented by such certificate of deposit; and the Depositary shall not vote as owner or holder of any of the said shares except through and by such proxies. If and when notice in advance shall be given by the ..... Company that its books are to be closed in contemplation either of the payment of a dividend upon shares of preferred stock or of a meeting of the stockholders, and the Depositary is in time advised of such notice, the Depositary shall close its registration books for the transfer

of such certificates, for the same time. The Depositary shall require the payment to it by the ..... Company of all dividends declared and payable upon such preferred shares for which the Depositary shall have issued its certificates; and, upon the receipt of such dividends, the Depositary shall forthwith mail to the registered holder of any and every such Trust Company Certificate at the address registered with the Depositary and without charge or deduction for expense or otherwise, a cheque representing the amount of the dividend or dividends received upon the shares of preferred stock for which such Trust Company Certificate shall have been issued.

The Depositary shall, upon the requirement of the Committee, have transferred into its name upon the books of the ..... Company any of the shares of such common stock so deposited with it; but in such case the Depositary shall, if and after any meeting of the stockholders of the ..... Company shall be called and upon the request of the record holder of any certificate of deposit, deliver to such record holder a proxy in his name in proper form to entitle him to vote at such meeting for the Depositary as the holder of the shares represented by such certificate; and the Depositary shall not vote as owner or holder of any of the said shares except through and by such proxies.

The Depositary shall have the right with the approval of the Committee to adjust any claim of or dispute with any Depositing Stockholder; and, if such adjustment shall so provide, to surrender to such Depositing Stockholder or to the holder of the Trust Company Certificate issued to him, a certificate or certificates for the shares represented by such Trust Company Certificate upon his surrender thereof to the Depositary.

The Depositary shall have no power to in any way encumber the shares of stock represented by the Trust Company certificates; nor shall it have any power to transfer the same except as herein specifically provided.

The Depositary shall not be deemed to assume any liability under or by reason of this agreement or any proceeding hereunder, except for the exercise of good faith. Every Depositing Stockholder and every holder of any such Trust Company Certificate shall be conclusively deemed to have assented to every act and deed of the Depositary to which the Committee shall have assented.

All charges and expenses of the Depositary under or by reason of this agreement or the matters herein provided for, have been arranged for by the Committee; and in no event is any charge to be made against any Depositing Stockholder or holder of any Trust Company Certificate or enforced by way of lien or otherwise against any of the shares of stock for which such certificate shall have been so deposited. If in the execution of this agreement the Depositary shall incur any liability for any loss or damage or otherwise not caused by lack of good faith or by gross negligence, the amount of such liability shall be deemed a part of the Depositary's expense as herein provided.

Wherever, as in this instrument provided, the Depositary shall pay to the holder of any certificate any dividend, the Committee shall have power and it shall be its duty in behalf of all holders of such certificates, and of every holder of any such certificate, to adjust and, when adjusted, to approve the account or accounts of the Depositary with respect to any such payment; and any such approval of the Committee shall be conclusive in favor of the Depositary.

The opinion or judgment of the Committee expressed in writing, shall, any-

thing in this agreement to the contrary notwithstanding, be full and complete protection and justification to the Depositary for any and every action taken or omitted to be taken according to such opinion or judgment. The Depositary shall not incur or be deemed to incur any liability by acting upon any certificate of stock or other certificate, signature, document or paper believed by it to be genuine.

The Depositary may treat any money received by it under the provisions of this agreement as a general deposit until it is required to pay out the same in conformity herewith.

#### *IV.—The Stockholders Committee*

The Committee undertakes in good faith to carry out the Plan and this agreement; but it is expressly understood that neither it nor any member of it assumes any responsibility for its success in such undertaking or any other responsibility except for the exercise of good faith. The Committee shall, in every case, act by a majority of its number; and any act of such majority shall be deemed the act of the entire Committee. No member of the Committee shall be held or in any way deemed responsible for the acts or omissions of any other member.

The Committee shall have power

- (a) To prescribe any rules or regulations for its government, and, among them, to provide that any member of the Committee may at any meeting of the Committee and with the assent of a majority of the members of the Committee, act and vote by proxy, PROVIDED, however, that no act of the Committee shall be valid without the personal approval of a majority of the persons who are members of the Committee at the time;
- (b) To fill any vacancies in the Committee which may result from death, resignation, disability or otherwise;
- (c) To form or promote the formation of the new Company mentioned in the Plan, to prepare its charter or certificate of incorporation, to prepare for it proper by-laws, and to arrange for the advance of the expense of the incorporation of such Company, and,—subject to the written directions of a majority in amount of the then outstanding Trust Company Certificates, issued hereunder, to designate its incorporators, and first directors and officers;
- (d) To require the assignment and transfer by the Depositary to the new Company of any shares of stock of the ..... Company for which Trust Company Certificates shall have been issued hereunder; and upon such requirement the Depositary shall make such transfer, PROVIDED, however, that the right to require such transfer shall be subject to the limitations prescribed by Article V of this agreement;
- (e) To prescribe the form and terms of the new securities to be issued upon the assignment to the new Company of such shares of stock and the manner and time of their issue, PROVIDED, however, that such securities shall in amount, character and otherwise, substantially conform to the provisions of the Plan and that the same shall be distributable to the holders of the Trust Company Certificates through the Depositary and that there shall be no preference of any one or more holders of Trust Company Certificates over other holders of such certificates of the same class, that is to say, certificates for preferred stock or for common stock as the case may be;
- (f) To provide for the issuance of scrip or other adjustment of the rights of

holders of the Trust Company Certificates in cases where the proportion of new certificates to be received would include fractions of bonds or shares of the new Company;

- (g) To declare the Plan operative, PROVIDED that such declaration shall be subject to the provisions of Article V of this agreement;
- (h) To provide, if and when the Committee sees fit, and upon such terms as it shall prescribe, for admission to the Plan of stockholders of the ..... Company assenting to the Plan after it shall have been declared by the Committee to be operative, and for the issue to such stockholders when so admitted, of the securities of the new Company to which they shall be entitled without the deposit of the corresponding certificates of stock of the ..... Company with the Depositary or the issue by it of a certificate of deposit therefor, PROVIDED, however, that the Committee shall in no case prescribe for any such stockholder not so depositing any better or additional provision over that conceded to the Depositing Stockholders;
- (i) Within the general scope of the Plan to carry out and effectuate the same and this agreement in whatever manner the Committee shall at the time deem most expedient, and generally to make and determine all arrangements and things which in its judgment are necessary or expedient to carry out such Plan or with respect to the new Company or its securities;
- (j) To construe this agreement including the Plan. Any such construction by the Committee or any action under any such construction in good faith shall be final and conclusive. Further to supply any defect or omission of or in the Plan or to reconcile inconsistencies in it in such manner and to such extent as shall be necessary or expedient to carry out the same properly and effectively; and the Committee shall be the sole judge of such necessity or expediency;
- (k) To act for and represent the Depositing Stockholders in all respects with reference to their shares of stock while deposited hereunder, and to authorize legal and other proper appearances for them in suits at law or other proceedings;
- (l) From time to time to make such modification of the Plan of this agreement as it may consider necessary or expedient; PROVIDED, however, that such modification shall be within the general purview of the Plan; and PROVIDED, further, that a written copy of any such change or modification shall be filed with the Depositary and notice of such filing given by advertisement not less than once a week for three consecutive weeks, in a newspaper published in the City of New York. Every holder of any such Trust Company Certificate who shall not within ten days after the last publication of such notice, file with the Depositary a written objection to the change or modification, shall be conclusively deemed to have personally and directly assented thereto; and
- (m) To act by any committee or agents and to delegate any authority as well as discretion to any such committee or agent.

The Committee shall be entitled to compensation payable as in the Plan mentioned.

#### *V.—Execution of the Plan.*

The Plan shall become operative only by the written declaration to that effect subscribed by not less than a majority of the Committee, and the filing thereof with the Depositary. The Committee may make and file such declara-

tion if and when there shall have been deposited hereunder with the Depositary, certificates representing a majority of the total capital stock of the ..... Company, PROVIDED, however, that in such majority is included at least twenty-five per cent. in amount of the preferred stock of the ..... Company. The Committee shall be bound to make and file such declaration if and when there shall have been so deposited with the Depositary on or prior to the date, therefor prescribed by the Committee pursuant to Article I hereof, certificates representing two-thirds in amount of the total capital stock of the ..... Company, without distinction between the preferred stock and common stock. In case there shall have been any error in the computation of the proportions or amounts of such capital stock deposited or deemed deposited hereunder, or any error or informality in deposit, the Committee shall, after any such declaration and prior to the actual transfer of shares of stock of the new company, have the power to withdraw such declaration.

If and when the Committee shall, as aforesaid, declare the Plan to be operative, it shall forthwith proceed as herein provided to the incorporation of the new Company and to procure the transfer to it of the shares of stock deposited hereunder.

The Committee shall, with respect to such transfer of such stock of the new Company and in all matters concerned with the execution of the Plan and within the purview of this agreement, have every right and power which any Depositing Stockholder would or could have or exercise if personally present and acting with respect to the stock represented by the Trust Company Certificates held by such Depositing Stockholder. And each and every Depositing Stockholder hereby constitutes and appoints the Committee or its nominee or nominees his true and lawful attorney or attorneys irrevocable with full power of substitution, for him and in his name, place and stead to do any and all acts of every nature within the general purview of the Plan or of this agreement which the Committee or any such nominee or substitute in its or his discretion may deem necessary or expedient in order fully to effectuate and accomplish the purposes of the Plan and of this agreement,—hereby ratifying and confirming all and any acts or things which such Committee or any nominee or substitute may do by virtue hereof.

If the Plan shall be declared operative, and the new Company formed thereunder, the Committee shall thereafter continue in existence until liquidation of the ..... Company, if such liquidation shall be had as in the Plan contemplated, and thereupon until the acquisition of its assets by the new Company so far as the new Company shall acquire such assets, and until the Committee shall be dissolved with the consent of the Board of Directors of the new Company, approved by a majority of the stock of the new Company, including not less than two-thirds of its outstanding preferred stock. The Committee shall be dissolved only by its own action. It shall promote such liquidation and the acquisition of such assets by the new Company, when, in its judgment, shall be consistent with the interests of the Depositing Stockholders and the new Company, and with respect to such liquidation or acquisition of assets the Committee shall, so far as it may, and subject to the provisions of this agreement, protect the interests of the Depositing Stockholders.

In computing the percentage of the shares of stock, either preferred or common, of the ..... Company which shall be deposited to make up the fractions required as aforesaid as a condition for declaring the Plan to be operative, there

shall be reckoned and included the shares of such preferred stock as to which an obligation to deposit them hereunder shall be made in form satisfactory to the Committee by a person or persons whose responsibility shall be satisfactory to the Committee; and the deposit with the Trust Company of such an obligation approved by the Committee shall, for the purposes of this agreement,—but subject to any conditions or terms to be prescribed by the Committee,—be equivalent to the deposit hereunder of the certificates for shares of such preferred stock called for by the obligation; but shall not entitle the depositor of any such obligation to the issuance of a certificate of deposit for such stock.

Any determination by the Committee that certificates for any given amount of shares of the ..... Company have been deposited hereunder, shall be conclusive upon all parties.

The Committee may from time to time make or adopt contracts with syndicates, bankers or others, to carry out the provisions of the Plan and of this agreement, PROVIDED, however, and it is expressly agreed, that in no case shall there be any power on the part of the Committee or Depositary or of any party or parties to this agreement, to create any charge or lien upon the shares of stock of the ..... Company, certificates for which shall be deposited, or to affect the same except as in this agreement provided.

The members of the Committee and the Depositary or any of them shall have the right to form or procure the formation of any syndicate or syndicates which they shall deem necessary or convenient for carrying out the purposes of the Plan or this agreement and may act as members or managers of any such syndicate or syndicates and may themselves be pecuniarily interested in any such syndicate or syndicates.

In case of the resignation of the Depositary or if for any reason, the Committee shall deem that any change of Depositary is necessary, the Committee shall have the power to arrange therefor as it may deem expedient.

The Committee may, in behalf of the Depositing Stockholders, consent to, or provide for the issue of interim receipts or certificates representing and entitling holders to receive securities of the new Company when issued.

The acceptance by any Depositing Stockholder of the securities of the New Company shall estop such Depositing Stockholder from questioning the conformity of such securities in any particular with the Plan or this agreement or the propriety or expediency of any act done or arrangement made by or on behalf of the Committee or the new Company in carrying the Plan into effect. Nor shall any depositor or holder of any Trust Company certificate have any interest in the disposition of any of the bonds or shares of stock of the new Company to be by it issued and delivered under or in consummation of the Plan to any other person, or the proceeds thereof.

#### *VI.—Termination of the Deposit.*

If the Plan shall not be declared operative as aforesaid within the time hereinbefore prescribed, or the extension of such time as hereinbefore prescribed, then the Committee may declare the Plan abandoned and thereupon the Depositary shall, upon demand by the holder of any Trust Company certificate and upon surrender of the same, deliver to him a certificate or certificates for the shares of stock represented by such Trust Company certificate; and such delivery shall be without any charge whatever against such Depositing Stockholder or his

shares of stock for the services of the Depositary or otherwise under or by reason of this agreement.

*VII.—Miscellaneous.*

1. The benefits of this agreement shall be confined strictly to the parties hereto. The same shall not be construed to create any trust or obligation to or in favor of any person or corporation other than the Committee, the New Company, the Depositary and the holders, from time to time, of the Trust Company certificates.

2. Every holder of a certificate of deposit shall, for all the purposes of this agreement, be deemed to be the sole Depositing Stockholder with respect to the shares of stock of the ..... Company represented by such Trust Company certificate and as such a party to this agreement entitled to all of its benefits and subject to all of its limitations and provisions.

3. Whenever the "Plan" is referred to in this agreement, it shall be deemed to include every modification of the same.

4. Any and every reference of this agreement to a Depositing Stockholder shall be deemed to refer to every Depositing Stockholder whether a natural person or a corporation.

5. Every notice in this agreement required to be published shall, unless herein otherwise prescribed, be published twice a week for two weeks in two daily newspapers reputed to be of good circulation among financial persons and corporations and published in the City of New York.

6. This agreement shall be deemed, according to its terms, to bind and benefit the several parties hereto, their and each of their survivors, executors, administrators and assigns.

IN WITNESS WHEREOF the parties of the first part have hereto set their hands and seals, the party of the third part has hereto caused its corporate seal to be affixed and attested by its Secretary, and these presents to be signed by its President or Vice-president, and the parties of the second part have become parties hereto either by subscription of their names hereto or by deposit of certificates of stock as aforesaid,—all the day and year first above written.

*Stockholders Committee:*

.....	[L. S.]
.....	[L. S.]
.....	[L. S.]
.....	[L. S.]
.....	[L. S.]
.....	[L. S.]
.....	[L. S.]
.....	[L. S.]
.....	[L. S.]

.....,

.....,

Vice-President.

[CORPORATE SEAL]

Attest:

.....

Secretary.

..... [L. S.]

## EXHIBIT "B."

THE ..... COMPANY.

OFFICE OF STOCKHOLDERS COMMITTEE:

No. .... Street, New York City.

....., 191...

To the Stockholders of the ..... Company:

The undersigned, upon the request of large holders of the capital stock of the ..... Company, as well as upon their own initiative, have undertaken to act as a committee in presenting a Plan for a readjustment of the affairs of the Company, which, it is believed, will materially promote the interests of the holders of its stock, both preferred and common. The Committee includes the President of the Company and the other four members of its Executive Committee; and to a large extent the reasons for the Plan now proposed have been suggested to them by their experience in practical and responsible administration of the Company.

Messrs. .... and ....., the President and Vice-President, respectively, of ..... of ....., who have acquired a substantial holding of the shares of this Company, recently asked the members of the Executive Committee of the ..... Company to consider the question of their co-operation with the other stockholders to promote the interests of its business. This plan has been prepared in conference with Messrs. .... and ....., and has their approval and support.

The stockholders of the Company are well aware that practical experience under its present charter has demonstrated that some readjustment of the rights of its stock, and especially of its administrative regulations, is necessary to full realization of the earning power of its business and the successful consummation of its purposes. The provision of the charter according to the preferred stock an ..... per cent. cumulative dividend has, by reason of the limited although very substantial earnings of the Company, resulted in an accumulation of dividends to the holders of such stock which will, on ..... , 191..., aggregate ..... per cent. of its par value. Dividends have for a considerable time been paid and are now being paid on such stock at the rate of ..... per cent. per annum, thus involving an annual increase of ..... per cent. in the arrears. The charter contains no provision authorizing an increase of the preferred stock; and the statute applicable requires for its issue the assents of two-thirds of each class of stock, preferred and common. And the charter contains a provision forbidding the Company,—without the consent of ..... per cent. of its outstanding preferred stock,—to incur any bonded or funded indebtedness other than the \$. .... of the present series of debentures of the Company; and they must be retired at the rate of \$. .... a year. These features of the charter are serious obstacles to the wholesome and necessary extension of the Company's business and to the acquisition of additional property; and they thus obstruct the development of the Company's full earning capacity.

The officers and other large stockholders of the Company have, besides, been convinced that the establishment of closer relations with interests with which this Company necessarily has large dealings and the vesting in them of substantial amounts of the securities of the Company, and especially of its common stock, will be a material benefit to the Company and to both classes of its stockholders.

THE PLAN.

1. A company to be formed to acquire not less than a majority of the entire capital stock of this Company, such acquisition not to take place until there shall be ready for transfer to the new company such amount of the outstanding shares of the preferred stock of the present company as shall be approved by this Committee, provided that such approval shall not be given until at least a majority of the entire stock of the present Company shall be so ready for transfer, including not less than one-quarter of its preferred stock, and provided further that such approval shall be given when two-thirds of the entire stock of the present Company shall be so ready for transfer.

2. The new company, it is expected, will, as soon as the support of the Plan by stockholders of the ..... Company shall be sufficient, in such lawful and suitable manner as shall be determined upon, acquire the physical assets of the present Company and thereupon directly take over and conduct its business. Pending the realization of this expectation, the new company will exercise such control in the operation and administration of the present Company as will lawfully and properly belong to the holders of a majority of its stock.

3. The new Company to have the following

AUTHORIZED CAPITALIZATION.

Twenty Year, Five Per cent. First Lien Gold Bonds, to stand secured, if and when the lands and assets now belonging to the ..... Company shall have been acquired by the new company, by a first lien upon the said assets, including a first mortgage of all lands owned by the ..... Company and a pledge of all the stocks and securities of lesser companies owned by the ..... Company. Pending the acquisition of such assets and lands by the new company, the bonds will be secured by a pledge of all the shares and securities of the ..... Company, or of its subsidiary companies, which may be acquired by the new company.. ..

Seven per cent. cumulative preferred stock.....

Common stock .....

4. The net and final distribution of securities of the new Company is intended to be as follows. The figures here given are on the basis of the assent of all outstanding shares of the present Company. On the assent of less than all the total amount of actual distribution to holders of such shares will, of course, be correspondingly reduced.

To holders of the Preferred stock of  
..... Company (\$..... now  
outstanding) for each share thereof  
with all its accumulated dividends:

New Company bonds \$.....

New Company Preferred stock ..... ..

New Company Common stock ..... ..

To holders of the Common stock of the ..... Company (\$. .... now outstanding) for each ten shares of said stock three shares of the Common stock of the new Company.....	.....
To new interests for their co-operation and for all services and expenses, whether legal, of committees, bankers or otherwise in consummating this pro- posed plan .....	.....
Reserved (a) to provide for the retire- ment and redemption of the outstand- ing debentures of the ..... Com- pany; (b) to acquire additional prop- erties; (c) to provide additional working capital; and (d) for the gen- eral purposes of the new Company....	.....
Total.....	.....

5. Those desiring to accept the above plan may do so by depositing the certificates for the shares of stock of the ..... Company held by them respectively, duly endorsed for transfer in blank, in and with the ..... Company of New York, on or before the .... day of ....., 19... The Committee reserves the privilege of fixing a day prior to said ....., after which no further deposits will be received and also of extending the time for making such deposits for what may seem to them good cause. In exchange for such deposits the ..... Company will issue negotiable certificates. The terms of such deposit, the respective powers and functions of said Committee and of said ..... Company, and generally the details of said trust arrangements, are more fully set forth in a certain agreement between said Committee and ..... Company and the depositing stockholders thereunder, bearing even date with this circular, to which agreement reference is hereby made. Dividends received upon shares while on deposit will be forthwith paid to holders of the corresponding ..... Company certificates.

In submitting this Plan we are authorized by Messrs. .... and ..... to say that they intend to remain substantial holders of the securities of the Company, to give the Company the benefit of such representation in the direction of the affairs of the Company as may be mutually agreed on, and to actively promote its interests.

The members of this Committee unhesitatingly recommend to both classes of stockholders of the ..... Company that they promptly deposit their holdings with the ..... Company of New York and thus become parties to the Agreement. The Committee believe that the successful consummation of the Plan will greatly tend to the advantage of all assenting stockholders. Upon an informal presentation of the Plan to a number of holders of

*Fifth:* We do surrender all rights and franchises.

Witness our hands this ..... day of ....., 191.., to this certificate in duplicate.

.....  
 .....  
 .....

[Add verifications.]

#### FORM NO. 127

##### *Notice of Directors' Meeting to Dissolve Voluntarily on Stockholders' Consent.*

Notice is hereby given that a special meeting of the board of directors of ....., Inc., will be held at ....., at ..... o'clock in the ..... noon of the ..... day of ....., 191.., for the purpose of voting upon a proposition to dissolve said corporation and submit the same to said corporation's stockholders.

.....,  
 Secretary.

#### FORM NO. 128.

##### *Minutes of Directors' Special Meeting to Dissolve Voluntarily on Stockholders' Consent.*

A special meeting of the board of directors of ....., Inc., was held at ....., at ..... o'clock in the ..... noon of the ..... day of ....., 191.., pursuant to the following notice:

[Take in Form No. 127.]

The President in the chair, the Secretary recording.

Present.—The full board.

The Secretary presented the affidavit of ....., verified the ..... day of ....., 191.., of the service upon each of the directors of the corporation of the foregoing notice at least three days before this meeting, viz., on the ..... day of ....., 191.., which, on motion duly seconded and unanimously carried, was ordered placed on file. The following preamble and resolutions were thereupon moved:

Whereas, [*state reasons why dissolution advisable*].

Resolved, that in the opinion of the directors of this corporation it is advisable to dissolve said corporation forthwith, and further

Resolved, that a meeting of the stockholders of this corporation be called for the purpose of voting upon the proposition that this corporation be forthwith dissolved; and further

Resolved, that the directors and officers of this corporation be and they hereby are authorized and directed to do any and all things necessary or proper

to call said meeting of stockholders and to dissolve this corporation if the required number of shares of stock of said corporation vote for such dissolution.

Said resolutions being duly seconded and put to vote were adopted and carried by the vote of ..... out of ..... votes, being a majority of the whole board.

There being no further business to come before the meeting, it was adjourned.

.....,  
Secretary.

#### FORM NO. 129.

##### *Notice of Stockholders' Meeting to Consent to Voluntary Dissolution.*

Notice is hereby given that a meeting of the stockholders of ....., Inc., will be held at ....., at ..... o'clock in the ..... noon of the ..... day of ....., 191.., for the purpose of voting upon a proposition that such corporation be forthwith dissolved.

.....,  
.....,  
.....,  
Directors.

#### FORM NO. 130.

##### *Minutes of Stockholders' Meeting to Consent to Voluntary Dissolution.*

A meeting of the stockholders of ....., Inc., was held at ....., at ..... o'clock in the ..... noon of the ..... day of ....., 191.., pursuant to the following notice:

[Take in Form No. 129.]

The President in the chair; the Secretary recording.

The Secretary presented the affidavit of ....., verified the ..... day of ....., 191.., showing that the foregoing notice was published in one or more newspapers published and circulating in the county wherein this corporation has its principal office, viz., in ..... and ....., in the county of ....., at least once a week for three weeks successively next preceding the time appointed for holding this meeting, and that on or before the day of the first publication of such notice a copy thereof was served personally on each stockholder or mailed to him at his last-known post-office address.

The Secretary stated that the outstanding stock of the corporation was ..... shares; that ..... shares were present at this meeting in person, and ..... shares by attorney and proxy.

On motion, duly seconded and unanimously carried, the foregoing affidavit of service of notice of this meeting was ordered placed on file.

The President stated that on the ..... day of ....., 191.., being not less than thirty nor more than sixty days before this meeting is held, the following preamble and resolutions were duly adopted by the directors of the corporation, and that this meeting was held pursuant thereto and pursuant to the foregoing notice given thereunder:

[Take in Resolutions from Form No. 128.]

The President further stated that the last preceding annual meeting of this corporation was held in the city [town or village] wherein this meeting is being held.

After discussion the following consent was presented to the meeting:

[Take in from Form No. 131.]

On motion it was

Resolved, that the foregoing consent be and it hereby is signed by the holders of two-thirds or more in amount of the stock of the . . . . ., Inc., now outstanding, in person or by attorney; and that this corporation file it, attested by its Secretary or Treasurer, and its President or Vice-President, together with the powers of attorney signed by such stockholders executing such consent by attorney, with the statement of the names and residences required by law with the Secretary of State; and that the directors and officers of this corporation be and they hereby are directed and authorized to do all things necessary and proper to consummate such dissolution.

Such motion was duly seconded, and on being put to vote was adopted and carried by . . . . . shares, being more than two-thirds in amount of the stock of the corporation outstanding.

Said consent was then executed by all those voting for the foregoing resolution and in the manner therein prescribed.

There being no further business to come before the meeting, it was adjourned.

.....,  
Secretary.

#### FORM NO. 131.

##### *Consent of Stockholders to Dissolve With Officers' Attest.*

We, the undersigned, being the holders of two-thirds and more in amount of the stock of . . . . ., Inc., now outstanding, do hereby in person or by attorney consent to its dissolution before the expiration of the time limited in its certificate of incorporation, and hereby signify such consent in writing.

Name.	No. of Shares.	By Attorney.
.....	.....	.....
.....	.....	.....
.....	.....	.....

And we, the undersigned, as Secretary (or Treasurer) and President (or Vice-President) of said corporation do hereby file the foregoing consent, attested by us as such officers, together with the powers of attorney signed by such stockholders executing such consent by attorney, with a statement of the names and residences of the now existing board of directors of said corporation and the names and residences of its officers duly verified by us, and do certify that the said consent was duly adopted and signed by . . . . . out of a total outstanding . . . . . shares of the stock of said corporation at a stockholders' meeting held pursuant to law.

Names of Existing

Board of Directors.

Residences of Same.

.....	.....
.....	.....
.....	.....
.....	.....

Names of Officers.	Residences of Same.
.....	.....
.....	.....
.....	.....
.....	.....
....., Inc.	

(CORPORATE SEAL.)

Attested by .....,

(Vice) President.

Attested by .....,

Secretary (or Treasurer).

[Annex powers of attorney.]

[Add verification for two officers signing.]

## FORM NO. 132

*Petition by Directors for Order Dissolving Corporation.*

SUPREME COURT ..... COUNTY.

In the Matter of the Petition of a Majority of the Directors of ....., Inc., for its Dissolution.	}
--	---

*To the Supreme Court:*

The petition of ..... and ....., respectfully shows:

*First.* That ....., Inc., is and at all times herein mentioned was a corporation created by or under the laws of New York State.

*Second.* That the directors of said corporation are ..... and ..... and ....., of whom the two last named are the petitioners herein; and that said directors have the management of the concerns of said corporation.

*Third.* That the stocks, effects and other property of said corporation are not sufficient to pay all just demands for which it is liable [or, to afford a reasonable security to those who may deal with it; or, that the undersigned deem it beneficial to the interests of the stockholders of said corporation that it be dissolved] for the following reasons: .....

*Fourth.* That annexed hereto and made part hereof is a schedule marked "A" containing the following matters as far as petitioners know or have the means of knowing the same:

A-1. A full and true account of all the creditors of said corporation and of all unsatisfied engagements entered into by and subsisting against it.

A-2. A statement of the name and place of residence of each creditor and of each person with whom such an engagement was made, and to whom it is to be performed, if known; or, if either is not known, a statement of that fact.

A-3. A statement of the sum owing to each creditor or other person specified in subdivision A-2, and the nature of each debt, demand or other engagement.

A-4. A statement of the true cause and consideration of the indebtedness to each creditor.

A-5. A full, just and true inventory of all the property of the corporation, and of all the books, vouchers and securities relating thereto.

A-6. A statement of each incumbrance upon the property of the corporation by judgment, mortgage, pledge or otherwise.

A-7. A full, just and true account of the capital stock of the corporation, specifying the name of each stockholder; his residence, if it is known, or if it is not known, stating that fact; the number of shares belonging to him; the amount paid in upon his shares, and the amount still due thereupon.

*Fifth.* That the county wherein the principal office of said corporation is located is .....

Wherefore, petitioners pray for a final order dissolving said corporation as prescribed in the Ninth Article of the General Corporation Law of New York State.

Dated, ....., .....

.....

.....

STATE OF NEW YORK, }  
County of ..... } ss.:

..... and ....., being duly and severally sworn, each for himself says: The matters of fact stated in the foregoing petition and schedule are just and true so far as I know or have the means of knowing the same.

.....

.....

Sworn to before me, this .....  
day of ....., 191..

#### FORM NO. 133.

#### *Order to Show Cause Why Corporation Should Not Be Dissolved on Directors' Petition.*

[*Title as in Form No. 132.*]

[*Special Term Court Caption.*]

On reading and filing the petition of ..... and ....., and the schedule thereto annexed, verified by their affidavit herein the ..... day of ....., 191.., from which it appears to the Court's satisfaction that this Court should entertain said petition and that cause should be shown why ....., Inc., a domestic corporation, should not be dissolved, it is, on motion of ....., Esq., attorney for petitioners,

Ordered, that all persons interested in said corporation show cause before this Court, at a Special Term, Part ..... thereof, [or before ....., Esq., Referee, if a referee is appointed] to be held on the ..... day of ....., 191.., at ..... o'clock in the ..... noon of that day, or as soon thereafter as counsel can be heard, why said corporation should not be dissolved; and further

Ordered, that a copy of this order be published at least once in each of the three weeks immediately preceding the time fixed herein for showing cause in the following newspapers published in the county (or city) wherein this order is entered, viz., the ..... and the ....., in the county (or city) of .....; and further

Ordered, that a copy of this order be served upon each of the persons specified in the schedule annexed to said petition as a creditor or stockholder of said corporation or as a person to whom an engagement of said corporation is to be performed, other than a person whose residence is stated to be unknown or to be without the United States, either personally at least ten days before the time herein appointed for the hearing, or by depositing a copy of this order at least twenty days before the time so appointed in the post-office, inclosed in a post-paid wrapper, addressed to the person to be served at his residence as stated in said schedule.

Enter

.....,  
J. S. C.

### FORM NO. 134.

#### *Final Order Dissolving Corporation on Directors' Petition.*

[Title as in Form No. 132.]

[Caption of Court Order.]

On the petition and annexed schedule of ..... and ....., verified by their affidavit herein the ..... day of ....., 191..; and the order to show cause entered herein the ..... day of ....., 191.., and the affidavits of ..... and ....., verified herein respectively the ..... day of ....., 191.., from which it appears to the satisfaction of the court that due publication and service of said order to show cause has been made as required by law, said order to show cause having been entered and said papers filed within ten days after said order was made with the clerk of the county where the principal office of said corporation is located; and the court having, at the time and place in said order specified, heard the allegations and proofs of the parties and determined the facts and made and filed its decision; and upon reading and filing the notice of motion for final order herein and the affidavit of ....., verified herein the ..... day of ....., 191.., from which it appears to the Court's satisfaction that notice of said motion has been duly and timely served upon each person who has made himself a party to the proceedings herein by filing with the clerk before the close of the hearing herein a notice of his appearance in person or by attorney, specifying a post-office within the state where such notice might be served, now, after hearing ....., Esq., of counsel for said petitioners, in support of said petition, and ....., Esq., of counsel for ....., in opposition, and it appearing to the court that said corporation is insolvent, it is, on motion of ....., Esq., attorney for petitioners,

Ordered, that said corporation be and it hereby is dissolved, and further

Ordered, that ... and ..., be and they hereby are appointed receivers of its property, with all the powers, duties and liabilities of receivers under the eleventh article of the General Corporation Law of the State of New York.

Enter

.....,  
J. S. C.

## FORM NO. 135.

*Notice of Meeting of Stockholders to Consent to Sale of Corporate Property and Franchises.*

Notice is hereby given that a special meeting of the stockholders of ..... Inc., will be held at ..... at ..... o'clock in the ..... noon of the ..... day of ....., 191.., for the purpose of voting upon a proposition to sell and convey all said corporation's property, rights, privileges and franchises to ....., Inc., a domestic corporation.

Dated, .....

.....,  
Secretary.

## FORM NO. 136.

*Minutes of Meeting of Stockholders to Consent to Sale of Corporate Property and Franchises.*

A special meeting of the stockholders of ....., Inc., was held at ....., at ..... o'clock in the ..... noon of the ..... day of ....., 191.., pursuant to the following notice:

[Take in from Form No. 135.]

The President in the chair and the Secretary recording.

The Secretary reported the stock of the corporation to be ..... shares, of which ..... were present in person and ..... by proxies on file with him and correct.

The Secretary presented the affidavit of ....., verified the ..... day of ....., 191.., showing the calling of this meeting upon like notice as that required for an annual meeting; and on motion duly seconded and unanimously carried said affidavit was ordered on file.

The following proposition for the purchase of this corporation's property, rights, privileges and franchises was submitted:

[Take in.]

After discussion the following resolutions and preambles were moved:

Whereas, ....., Inc., a domestic corporation engaged in a business of the same general character as this corporation has offered to buy and accept all this corporation's property, rights, privileges and franchises for \$. ....., and the stockholders of this corporation in meeting duly called for the purpose of considering said offer believe it to be to the interest of this corporation to accept said offer, ✓

Resolved, that said offer be and it hereby is accepted and that this corporation sell and convey its property, rights, privileges and franchises to ....., Inc., for \$. .....,; and further

Resolved, that the proper officers of this corporation be and they hereby are authorized and directed to do any and all things necessary to consummate said sale.

Said preambles and resolutions being duly seconded were carried by the vote of ..... shares, being two-thirds and over of said corporation's stock.

There being no further business to come before the meeting, it was adjourned.

.....,  
Secretary.

## FORM NO. 137.

*Notice by Stockholder of Objection to Voluntary Sale of Corporation's Franchise and Property.*

*(Adapt from Form No. 119.)*

## FORM NO. 138.

*Notice by Stockholder, Objecting to Sale of Corporate Franchise and Property, to Corporation, of Application to Court for Appointment of Appraisers to Value His Stock.*

*(Adapt from Form No. 120.)*

## FORM NO. 139.

*Petition by Stockholder Dissenting from Sale of Corporate Franchise and Property for Appointment of Appraisers to Value His Stock.*

*(Adapt from Form No. 121.)*

## FORM NO. 140.

*Order Appointing Appraisers to Value Stock of Stockholder Dissenting from Sale of Corporate Franchise and Property.*

*(Adapt from Form No. 122.)*

## FORM NO. 141.

*Oath of Appraisers Appointed to Value Stock of Stockholder Dissenting from Sale of Corporate Franchise and Property.*

*(Adapt from Form No. 123.)*

## FORM NO. 142.

*Certificate by Appraisers of Value of Stock of Stockholder Dissenting from Sale of Corporate Franchise and Property.*

*(Adapt from Form No. 124.)*

## FORM NO. 143.

*Notice of Motion for Appointment of Receiver.*

SUPREME COURT, ..... COUNTY.

....., suing on his own behalf and on  
behalf of any and all other creditors of  
..... Company who may elect to be-  
come parties to this action,

Plaintiff,

against

..... Company,  
Defendant.

## NOTICE OF MOTION FOR APPOINTMENT OF RECEIVER.

*To the Above-named Defendant :*

PLEASE TAKE NOTICE that upon the annexed summons and complaint herewith served upon you, the undersigned will apply to this Court at a Special Term,

[Part I thereof] held at ..... in ..... on the ..... day of ....., 191.., at ..... o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order appointing a receiver of the property of the defendant, and for such other and further relief as to the Court may seem proper.

Dated, ....., 191...

Yours, etc.,

.....  
Attorneys for Plaintiff,  
Office and Post-office Address etc.

#### FORM NO. 144.

##### *Consent to Appointment of Receiver.*

[Title as in Form No. 143.]

The defendant, ..... Company, hereby appears by its attorneys and hereby accepts the short notice of motion for the appointment of a receiver of its property and consents to the hearing of said motion at the time and place stated in said notice of motion; and further consents to the appointment of a receiver of the property of the defendant.

.....  
Attorneys for Defendant,  
Office and Post-office Address, etc.

#### FORM NO. 145.

##### *Complaint for Appointment of Receiver.*

[Title as in Form No. 143.]

Plaintiff, by ....., his attorneys, complaining of the defendant, alleges:

*First:* That the defendant is a domestic corporation conducting a general contracting business, with its principal office and place of business at No. ...., in .....

*Second:* That this action is brought by the plaintiff on his own behalf as one of the creditors of the defendant, and on behalf of any and all other creditors of the defendant who may elect to become parties to this action:

*Third:* That on the ..... day of ....., 191.., plaintiff loaned to the defendant at its request the sum of ..... (\$.....), which said sum the defendant promised to repay to the plaintiff on demand; that on the ..... day of ....., 191.., plaintiff duly demanded the repayment of said loan from the defendant and said demand was refused, and no part of said loan has been paid by the defendant to the plaintiff, and the defendant is justly indebted to the plaintiff, by reason of the premises, in the sum of ..... dollars (\$.....) with interest thereon from the ..... day of ....., 191...

*Fourth:* Upon information and belief, that the defendant is the owner of the entire capital stock of a domestic corporation known as ....., Incorporated, and the defendant has done and is doing part of its business under its own name and part under the name of ....., Incorporated.

*Fifth:* Upon information and belief, that the business affairs of the defendant have become greatly complicated and involved, and the defendant is indebted to sub-contractors in large sums of money; that the defendant's pay-rolls amount to about ..... dollars (\$.....) per week; that the defendant has undertaken the performance of, and is now engaged in executing many important construction contracts in different parts of the United States which require the expenditure of large sums of money weekly in order to prevent default by the defendant thereunder; that the greater part of the assets of the defendant have been hypothecated or pledged in order to obtain working capital, and that the rights and interests therein of said pledgees are conflicting and uncertain; and that the working capital of the defendant has been so depleted that it is unable to meet its obligations at maturity and to pay its debts in the ordinary and usual course of business, due regard being had for the rights and interests of its creditors.

*Sixth:* Upon information and belief, that it is of the utmost importance to the creditors of the defendant, including the plaintiff, and to its stockholders, that the necessary pecuniary arrangements should be made to prevent a default by the defendant on its existing profitable construction contracts, and that such arrangements cannot be made unless a receiver of the assets and property of the defendant is appointed by this Court.

*Seventh:* Upon information and belief, that for many months past the defendant has been making unreasonable sacrifices and paying unreasonable commissions in order to obtain the money needed to meet its pay-rolls and other necessary expenses, and that the situation has now become so grave that unless this Court, through a receiver appointed by it, will take possession of the defendant's property and business, and control, manage and conduct the same for the general interest of its creditors, numerous litigations will be begun against the defendant in different States of the United States and in different courts of the State of New York; that the property of the defendant will be attached and a race of diligence will be begun by said creditors, each trying to collect his own debts in his own way; that the defendant will be forced to suspend work on its existing profitable construction contracts, and a large part of its assets and property will be lost or destroyed, and such part of said assets and property as is not so lost or destroyed will be appropriated for unjust priorities or preferences as between the defendant's creditors.

*Eighth:* Upon information and belief, that by reason of the aforesaid facts the defendant is insolvent.

*Ninth:* Upon information and belief, that the continuance of the business of the defendant under existing conditions would be a waste of its working capital and assets and of the fund to which the creditors must look for the payment of their respective claims against it.

*Tenth:* Upon information and belief, that in order to preserve and save the assets and property of the defendant from waste, and to preserve and protect the rights of its creditors and stockholders, it is necessary that its assets and property should be placed in the hands of a receiver in order that the same may be marshalled and that the several respective liens and priorities thereon may be ascertained, and the rights, liens and equities of the creditors of the defendant may be decreed and enforced.

*Eleventh:* That the plaintiff has no adequate remedy at law for the protection of his rights in the premises.

WHEREFORE, plaintiff demands judgment, as follows:

1. That the rights of the plaintiff and of all other creditors of the defendant may be ascertained and decreed, and that this Court shall fully administer all the assets and property of the defendant, and for such purpose shall marshal all the assets of the defendant and ascertain the several respective liens and priorities existing thereon and decree and enforce the respective rights, liens and equities of the creditors of the defendant as the same may be finally ascertained and decreed upon the respective intervention or application of each and every creditor or lienor in and to each and every portion of the assets and property of the defendant.

2. That for the purpose of preserving the assets and property of the defendant, to prevent unjust priorities or preferences, and to prevent default by the defendant on its existing profitable construction contracts, a receiver may be appointed of all the property, real, personal and mixed, of the defendant, of whatsoever kind or description and wheresoever situated, with full power to sue for, collect and receive and take into his possession the goods, chattels, rights, credits, moneys, effects, lands, tenements, hereditaments, books, papers, property and assets of every description whatsoever of the defendant, and with all the incidental powers ordinarily vested in receivers of the property of corporations in like cases.

3. That temporarily and pending this suit, an injunction may issue against the defendant and all persons claiming and acting by, through or under it, and against all other persons enjoining and restraining them from interfering in any way with said receiver or with said property or with the property which shall at any time come and be in his hands.

4. That the plaintiff may have such other and further relief in the premises as to the Court may seem proper and equitable.

.....

Attorneys for Plaintiff,

Office and Post-office Address, etc.

(Add verification.)

FORM NO. 145-A.

*Answer to Complaint for Receiver.*

[Title as in Form No. 143.]

The defendant, ..... Company, appearing by ....., its attorney, and answering the bill of complaint herein, alleges:

I. That at a meeting of the board of directors of the defendant corporation, held pursuant to call, on the ..... day of ....., 191..., there being present at said meeting a quorum of said board of directors, a resolution was duly adopted and passed by the unanimous vote of the members of said board of directors present at said meeting, as follows:

"Whereas, the working capital of this Company has been so depleted that it is unable to meet its obligations at maturity and to pay its debts in the ordinary and usual course of business, due regard being had to the rights and interests of its creditors; and

"Whereas, the business affairs of this Company have become so complicated and involved that it is for the interest of all its creditors and

stockholders that its assets should be marshalled, that the respective liens and priorities thereon should be ascertained, and that the rights, liens and equities of the creditors of this Company should be decreed and enforced; and

"Whereas, it is of the utmost importance to said creditors and stockholders that the necessary pecuniary arrangements should be made to prevent a default by this Company on its existing profitable construction contracts;

"Now, Resolved, that the officers of this Company be and they hereby are authorized and directed to take all such proceedings as in their opinion may be necessary or proper for the following purposes; to wit: to preserve the property and assets of this corporation; to prevent unjust priorities and preferences; to complete all existing favorable construction contracts; and to secure the appointment of a receiver of all the property—real, personal and mixed—of this corporation, with all the powers ordinarily vested in receivers of the property of corporations in like cases, including the right to complete all existing construction contracts, the completion of which will be profitable to this corporation."

II. The defendant admits all the allegations of said complaint.

Wherefore defendant demands judgment, as follows:

1. That the rights of the plaintiff and of all other creditors of the defendant may be ascertained and decreed, and that this Court shall fully administer all the assets and property of the defendant, and for such purpose shall marshal all the assets of the defendant and ascertain the several respective liens and priorities existing thereon and decree and enforce the respective rights, liens and equities of the creditors of the defendant as the same may be finally ascertained and decreed upon the respective intervention or application of each and every creditor or lienor in and to each and every portion of the assets and property of the defendant.

2. That for the purpose of preserving the assets and property of the defendant, to prevent unjust priorities or preferences, and to prevent default by the defendant on its existing profitable construction contracts, a receiver may be appointed of all the property, real, personal and mixed, of the defendant, of whatsoever kind or description and wheresoever situated, with full power to sue for, collect and receive and take into his possession the goods, chattels, rights, credits, moneys, effects, lands, tenements, hereditaments, books, papers, property and assets of every description whatsoever of the defendant, and with all the incidental powers ordinarily vested in receivers of the property of corporations in like cases.

3. That temporarily and pending this suit, an injunction may issue against the defendant and all persons claiming and acting by, through or under it, and against all other persons, enjoining and restraining them from interfering in any way with said receiver or with said property or with the property which shall at any time come and be in his hands.

4. That the plaintiff may have such other and further relief in the premises as to the Court may seem proper and equitable.

.....  
Attorney for Defendant,  
Office and Post-Office Address, etc.

## FORM NO. 145-B.

*Order Appointing Receiver.**[Title of Form No. 143, Caption of Court Order.]*

On reading and filing the summons and complaint in the above-entitled action, the notice of motion for the appointment of a receiver herein, the affidavit of service of the aforesaid papers on the defendant, the consent of the defendant to the appointment of a receiver of the assets and property of the defendant, and the answer of the defendant herein, in which the defendant unites in the prayer of the plaintiff for the appointment of a receiver; and after hearing ..... Esq., for the plaintiff and ..... Esq., for the defendant, and due deliberation having been had, it is

Ordered, adjudged and decreed, that ..... be, and he hereby is, appointed receiver of all the property of the defendant ..... Company, real, personal and mixed, of whatsoever kind or character and wheresoever situated, including its real estate, buildings, plant, machinery, tools, merchandise, contracts, bills and accounts receivable, cash on hand and in bank, and all its rights, privileges, franchises, good-will, patents, and trade marks, and all assets and property of every kind whatsoever, with all the incidental powers ordinarily vested in receivers of the property of corporations in like cases;

Further ordered, that the said Receiver be, and he hereby is, authorized to immediately take possession of all the assets and property of the defendant, and to run, manage and operate the same, and to continue to prosecute all work being done and contracts being performed by the defendant until the further order of this Court, and to make and enter into a contract or contracts to sublet any and all parts of work and contracts remaining to be done; and said Receiver is authorized in his discretion to employ, discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees, and to make such payments and disbursements as may be needful and proper in so doing, and to collect and receive all rents, income and profits from said work and contracts and to make appropriate payments therefrom on account of accruing rents and other necessary and proper charges; and the said Receiver is hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in his judgment for the proper protection of the property and trust hereby reposed in him, and likewise to defend all actions instituted against him as Receiver, and to appear in and conduct the prosecution or defense of any suit or suits now pending in any court against the defendant, the prosecution or defense of which will, in the judgment of said Receiver, be necessary for the proper protection of the property placed in his hands, or the interests and rights of the creditors connected therewith; and the said Receiver is hereby authorized in his discretion from time to time out of the funds coming into his hands, to pay the expense of conducting the business of the defendant and operating its plants and continuing its said work and contracts, and all taxes and assessments upon the property of the defendant or any part thereof; and it is

Further ordered, that the said Receiver before entering upon the discharge of his duties as Receiver shall file with the clerk of this Court a bond, with good and sufficient sureties, in the sum of ..... dollars (\$——); conditioned that he will well and truly perform the duties of

his office and duly account for all moneys or property which may come into his hands, abide by all orders of this Court to do and perform such things as he shall be directed to do; said bond to be approved by a Justice of this Court; an it is

Further ordered, that each and every of the officers, directors, agents and employees of the defendant, ..... Company, and all other persons whatsoever, be, and they hereby are, required and commanded forthwith upon demand of said Receiver or his duly authorized agent, to turn over and deliver to the said Receiver or his duly authorized representative any and all books of accounts, vouchers, papers, leases, deeds, contracts, bills, notes on hand, moneys or other assets or property in his hands or under his control; and each of the said directors, officers, agents and employees is hereby commanded and required to obey such orders as may be given from time to time by the said Receiver or his duly authorized representative, in conducting the operations of the said business and in the discharge of his duties as Receiver;

And it is further ordered, that the defendant and its officers, directors, agents and employees, and all other persons claiming by, through or under the defendant, ..... Company, and all other persons whomsoever, are hereby enjoined from interfering in any way whatever with the possession or management of any part of the property over which the Receiver is hereby appointed, or interfering in any way to prevent the discharge of his duties.

Enter,

.....

Justice Supreme Court.

FORM NO. 145-C.

***Order Discharging Receiver and Cancelling Bond.***

*[Title in Form No. 143, Caption of Court Order.]*

On reading and filing the annexed affidavit of ....., verified the ..... day of ....., 191.., and all the vouchers and evidences of payment annexed thereto, and on reading and filing the annexed consent duly executed by the ..... Company, which shows that all the property, assets and cash in the said Receiver's hands after the payment of the sums directed to be paid by the order of the Supreme Court dated ..... , 191.., have been turned over to the said ..... Company, and on reading and filing the annexed consent of the ..... Company, the surety on the bond of ....., as Receiver of the property of the ..... Company, to the entry of this order,

Now, on motion of ....., attorney for ....., as Receiver as aforesaid, it is

Ordered, adjudged and decreed, that the said ..... be and he hereby is discharged and released of and from all further liability as Receiver, etc., of the said ..... Company, and the said receivership be and hereby is terminated, and that the bond of the said Receiver be and it hereby is cancelled.

Enter,

.....

Justice Supreme Court.

## FORM NO. 146.

*Order for Receiver's Certificates.**(Title and caption of action, continuing:)*

Upon reading and filing the petition of ....., Receiver herein of the property of the defendant company, praying that he be authorized to issue his Receiver's Certificates of indebtedness in the sum of \$.....; and ..... and ....., plaintiffs in the action entitled ....., plaintiffs, against ....., defendant, which action was duly consolidated under the title of and with the action above entitled by order herein bearing even date herewith; and ....., as Trustee under the first mortgage of said defendant company, plaintiff in the action above entitled; and ....., defendant in both of said actions; and the Bondholders' Protective Committee, consisting of ..... and ....., severally appearing by their respective counsel and consenting in open court to the entry of this order; and it appearing by the orders appointing the Receiver entered on ....., 191., and on ....., 191., that the said Receiver was authorized and directed to take possession of all the assets and property of the defendant company and to run, manage and operate its business and property in such manner as would, in his judgment, produce the most satisfactory results so that the operation of the business should be continued in substantially the same manner as theretofore, and preserved and protected in proper condition; and it further appearing to the satisfaction of the Court that to enable the Receiver to carry on said business, and otherwise to preserve and protect the value of the property and assets of the defendant, both mortgaged and unmortgaged, and to redeem an original issue of \$..... of Receiver's Certificates authorized in the action entitled ....., Plaintiff, against ....., Defendant, on ....., 191., it is necessary to authorize said Receiver to borrow additional funds, and for that purpose to issue his Receiver's Certificates of Indebtedness, subject to the conditions hereinafter stated; and it further appearing that the said Committee of Bondholders holding \$..... out of \$..... of first mortgage bonds issued and outstanding have authorized this application by the Receiver and consented to the making of this order; and the Court being satisfied that it is for the best interests of the receivership estate that the prayer of said petition be granted, and due deliberation having been had, it is

On motion of ....., attorneys for the Receiver,

ORDERED, ADJUDGED AND DECREED:

That ....., as Receiver of all the property and assets of the defendant ....., or his successor as such Receiver, for the purpose of enabling him to borrow the funds required to carry on the business of the defendant company, and otherwise to preserve and protect the value of its property and assets, and to redeem his original issue of Receiver's Certificates, amounting to \$....., be and he hereby is authorized and empowered to execute, issue and sell, as Receiver, his Certificates of Indebtedness up to the principal amount of \$..... That said Certificates shall be dated ....., 191., and shall be payable not later than ....., 191., and shall bear interest at the rate of six per centum per annum from the date of issuance thereof, payable each year upon the ..... days of ..... and

....., or upon redemption; and that all of said Certificates shall be redeemable at the option of said Receiver at any time before maturity at par and accrued interest upon thirty days' notice. Notice of redemption shall be published once a week for two successive weeks in two daily newspapers, published in the City of New York, the first publication being at least thirty days prior to the date fixed for redemption. On the date so fixed for redemption the principal of said Certificates shall become due and payable, and interest thereon shall cease to accrue after said date.

The said certificates shall be negotiable in form, and shall be issued and sold by the Receiver for not less than 98% of their par value.

All said certificates shall be of equal standing and priority and shall be secured by and are hereby declared to be a lien in the first instance upon all free assets now or hereafter in the hands of the Receiver, and also upon all the net earnings and income derived from the conduct of the business in charge of said Receiver; and, secondly, upon any and all property of the defendant subject to the first mortgage of the defendant, which lien shall be prior to the said first mortgage. In case of default upon the said certificates, the free assets in the hands of the Receiver shall first be applied to the payment of the said certificates, with interest, before any mortgaged assets shall be sold or otherwise used to satisfy the same. The Receiver, however, shall himself specifically set aside in a separate account and/or may pledge specifically with the ....., as Trustee, as security for the payment of the said \$..... of certificates, cash equal in amount to 100 per cent. of all or any part of the principal amount, with accrued interest, of the said Receiver's Certificates from time to time outstanding, and/ or notes, bills and accounts receivable at least equal to 150 per cent. of any balance not so secured by cash, with power from time to time to withdraw any or all of such collateral upon substitution thereof of collateral of a value equal to or greater than the value of the collateral withdrawn. In case of default the cash, bills, notes and accounts receivable so set aside or pledged shall first be applied to the payment of the Receiver's Certificates and interest before any other property is sold or disposed of to satisfy the same. Said certificates shall be subject to the issue of \$..... of certificates issued by the Receiver under said order dated ....., 191., until the same shall be paid or redeemed as provided therein and herein, and also to the right of the Receiver to utilize and dispose of the personal property and assets, including cash, bills, notes and accounts receivable (except in so far as the same may be specifically set aside or pledged) now in his hands or which may hereafter come into his hands in the conduct of the business in his charge, and to his right to apply the cash now in his hands, or which may hereafter come into his hands, to the payment of the expenses, payrolls, salaries, merchandise debts and other indebtedness incurred by him in the conduct of said business and in the administration of the estate, provided, however, that the fair value of the cash, notes, bills and accounts receivable, specifically set aside by the Receiver or pledged with the Trustee, as above provided, as security for the payment of these certificates, shall always be of the percentages above provided of the total par value of certificates issued and outstanding; and the said Receiver is hereby authorized to enter into such agreement with the said ..... as Trustee for the pledge of bills, notes and accounts receivable as may be necessary or desirable in order to carry out the foregoing provisions.

That the certificate to be issued hereunder shall be substantially in the form attached to this order, with or without coupons at the option of the Receiver, and shall be valid only when countersigned by ..... under the seal of ..... Temporary certificates of such form, not inconsistent with the terms of this order, and denomination, as the Receiver may determine, to be executed by the Receiver and countersigned by ..... in like manner as permanent certificates, may be issued by the Receiver at his option and delivered in lieu of a like amount of the permanent certificates in this order authorized, provided that the said temporary certificates shall have printed or written upon the face thereof the words "Temporary Certificate," and such temporary certificates shall be surrendered and exchanged for a like amount of permanent certificates as soon as the permanent certificates shall be ready for issue.

That the purchaser or purchasers of said certificates shall not be under any obligation to inquire into the application of the proceeds derived from the sale thereof

That the Receiver shall use the funds derived from the sale of such certificates of indebtedness for the purposes aforesaid, including the payment and redemption, on or before ....., 191., of the present outstanding \$..... of Receiver's Certificates, issued under order of this Court dated ....., 191., and shall make report to this Court from time to time of the action taken by him under this order.

Dated, New York, ....., 191...

.....

#### FORM NO. 147.

##### *Form of Receiver's Certificate.*

\$.....

No.....

....., Inc.

##### *Receiver's Certificate.*

Authorized by order of the ..... Court of the State of New York entered ....., 191...

For Value Received, ....., Receiver of the assets and property of ....., Inc. and his successor, if any, as such Receiver promises to pay the bearer hereof ..... dollars, at ....., on the ..... day of ....., 191., with interest at .... per centum yearly from the date of issuance hereof until paid. All, but not a part, of the certificates of this issue may be redeemed at any time before maturity at par and accrued interest on thirty days' notice. Notice of redemption shall be published once a week for two successive weeks in two daily newspapers published in the City of New York, the first publication being at least thirty days prior to the date fixed for the redemption. On the date so fixed for redemption the principal of this certificate of indebtedness shall become due and payable, and interest thereon shall cease to accrue after said date.

The bearer hereof is the holder of the proportionate part first above noted of a total issue of certificates of not more than ..... dollars under said order in two certain actions pending in said Court entitled "..... and ....., Plaintiffs, against ....., Defendant," and "....., as Trustee, Plaintiff, against ....., Defendant," which actions were duly consolidated on the ..... day of ....., 191.., under the title of ....., as Trustee, Plaintiff, against ..... Defendant.

This certificate shall be of equal standing and priority and is secured by and declared to be a lien in the first instance upon all free assets now or hereafter in the hands of the Receiver, and also upon all the net earnings and income derived from the conduct of the business in charge of said Receiver; and, secondly, upon any and all property of the defendant subject to the first mortgage of the defendant, which lien shall be prior to the said first mortgage. In case of default upon the said certificates, the free assets in the hands of the Receiver shall first be applied to the payment of the said certificates, with interest, before any mortgaged assets shall be sold or otherwise used to satisfy the same. As provided in said order, the Receiver, however, shall himself specifically set aside in a separate account, and/or may pledge specifically with the ....., as Trustee, as security for the payment of the said \$..... of certificates cash equal in amount to 100 per cent. of all or any part of the principal amount, with accrued interest, of the said Receiver's Certificates from time to time outstanding, and/or notes, bills and accounts receivable at least equal to 150 per cent. of any balance not so secured by cash, with power from time to time to withdraw any or all of such collateral upon substitution therefor of collateral of a value equal to or greater than the value of the collateral withdrawn. In case of default the cash, bills, notes and accounts receivable so set aside or pledged shall first be applied to the payment of the Receiver's Certificates and interest before any other property is sold or disposed of to satisfy the same, and the holder of this certificate shall have a pro rata benefit with all other holders of certificates issued and outstanding of any security so pledged in accordance with the terms of any agreement of pledge made or to be made by the said Receiver with the ..... as Trustee. Said certificates shall be subject to the issue of \$..... and interest of certificates issued by the Receiver under order dated ....., 191.., and issued in the cause first above recited until the same shall be paid or redeemed as provided therein and herein, and also to the right of the Receiver to utilize and dispose of the personal property and assets, including cash, bills, notes and accounts receivable (except in so far as the same may be specifically set aside or pledged) now in his hands or which may hereafter come into his hands in the conduct of the business in his charge, and to his right to apply the cash now in his hands or which may hereafter come into his hands, to the payment of the expenses, payrolls, salaries, merchandise debts and other indebtedness incurred by him in the conduct of said business and in the administration of the estate, provided, however, that the fair value of the cash, notes, bills and accounts receivable specifically set aside by the Receiver or pledged with the Trustee as above provided as security for the payment of these certificates shall always be of the percentage above provided of the total par value of certificates issued and outstanding.

This certificate is negotiable but shall be valid only when signed by the Receiver and countersigned by ....., under the seal of ..... and holders hereof shall not be bound to inquire into the application of the proceeds derived from the sale of this certificate.

In witness whereof, the said Receiver has, pursuant to said order, signed this certificate as of the ..... day of ....., 191...

Date of issuance of this Certificate, ....., 191...

As Receiver of the Property and Assets of ..... Company,  
but not individually.

Countersigned:

.....

#### FORM NO. 148.

#### *Petition for Receiver's Certificates.*

(*Title and caption of action, continuing:*)

To the Supreme Court of the State of New York:

The petition of ....., as Receiver of the property of the defendant ..... herein respectfully shows to the Court as follows:

FIRST: That on the ..... day of ....., 191..., ..... and ....., as plaintiffs, creditors of the defendant corporation, filed their complaint, upon which and upon the consent of the defendant company your petitioner was appointed Receiver of all the property and assets of the company by order duly filed and entered on said date. That in said action the defendant duly file its answer on ....., 191... That said action is now at issue.

SECOND: That by said order of appointment your petitioner was directed to take possession of all the property of the defendant, and to run, manage and operate its business and property in such manner as would in his judgment produce the most satisfactory results, so that the operation of the said business should be continued in substantially the same manner as theretofore, and preserved and protected in proper condition. Your petitioner was also authorized, if needful in his judgment, to borrow money in order to comply with such direction, but in no event above the sum of \$....., and also to pay for current necessities, and for labor, material and supplies.

THIRD: That pursuant to said order, your petitioner borrowed \$..... from the ..... Company of New York, on the collateral of outstanding accounts of the defendant corporation.

FOURTH: Your petitioner found upon taking possession of the offices and factory of the defendant company that it owed substantially \$..... for unpaid payrolls, \$..... for salaries in arrears, \$..... for three months' rent in arrears, and \$..... for the purchase of electric power and light in arrears.

FIFTH: The above referred to creditors and wage-earners of the corporation threatened at that time to throw the company into bankruptcy unless they were

paid, and in order to pay these obligations, and in order to operate the business of the company in accordance with the said order of appointment of this Court, the Receiver applied for an issuance of Receiver's Certificates in the sum of \$..... to be used for these purposes, and to take up the original loan of \$....., by a petition in said cause, verified the ..... day of ....., 191... At the time of filing that petition, the Receiver stated to the Court that there would probably be an actual loss from operation (not including depreciation and interest on the bonds and gold notes), and that there would be a tie-up of new money of approximately \$..... a week. Instead of there being an actual loss from operation there has been a profit of about \$..... to date. This, too, with the limited amount of capital at the Receiver's disposal, which permitted of the business to be run on only a minimum of capital and the organization maintained with a full overhead while in its nature it must be run to full normal capacity to show large profits. Furthermore, the Receiver, on the sale of said certificates, was supplied with \$..... cash, and of this amount there was applied, pursuant to the orders of the Court, to the payment of previously incurred indebtedness in the form of past due wages, salaries, etc., the sum of \$....., and for any such legal expenses incident to the patent litigation in which the Company is engaged \$....., making a total of \$....., and leaving the sum of only about \$..... available for the purposes of running the business. At the time of the Receiver entering upon his duties there was a cash balance in the banks of \$....., and practically no quick assets. At the present time there is a cash balance and assets available within thirty days of about \$..... It thus appears that the tie-up of new money has been approximately \$..... per week, the same being represented by accounts, bills receivable, etc., in greater sum. During this period the Company's obligations, on which it was paying excessive interest charges, running in some cases as high as 30%, have been reduced by at least \$....., and the unencumbered cash, bills and accounts receivable have been increased by about \$..... Including the above items, the Company has at this time free assets to a total of over \$..... This tie-up of new money will be materially increased each week as the business is run at fuller capacity and profits augmented thereby.

SIXTH: Also, under his original petition in said cause, the Receiver stated that he was informed that a plan would probably be devised for the reorganization of the company and capital provided to continue its business, provided the company could meanwhile be kept as a going concern, and that your petitioner was convinced that to protect and preserve the value of the property of the company pending its ultimate sale or reorganization, it was essential that the company's business and organization should be carried on without interruption. That the value of the plant was dependent in a large measure upon the organization and the maintenance of the good will which had been built up during the period of its operation, and that your petitioner believed that this would be largely, if not entirely destroyed if the plant should cease to be operated as a going concern. Also that by stopping the operation of the plant the corporation would suffer greatly through the loss of its skilled employees and mechanics. For these reasons the application for the first issue of Receiver's Certificates was made, and this Court authorized the issuance of \$..... of Receiver's Certificates, which have all been subscribed for and issued.

SEVENTH: The order authorizing said original issue of \$. . . . . of Receiver's Certificates bears date . . . . ., 191.. and the Certificates of said original issue bear date the . . . . . day of . . . . ., 191.., and are made payable on the . . . . . day of . . . . ., 191.., but provide that all, but not a part, of the Certificates of this issue may be redeemed at any time before maturity at par and accrued interest on thirty days' notice, by publication.

EIGHTH: On the . . . . . day of . . . . ., 191.., the . . . . . Company of New York, as Trustee under a first mortgage dated . . . . ., 191.., filed its bill of complaint to foreclose the mortgage covering the property of the defendant, upon which and upon the answer of the defendant company your petitioner was, by an order duly filed and entered on said date, again appointed Receiver of all the property of the defendant company covered by and embraced in the aforesaid mortgage.

NINTH: That the two actions above referred to were duly consolidated under the title herein by order of this Court bearing even date herewith.

TENTH: In order to continue the business of the corporation in such a manner and with such results as it has been continued under the Receiver heretofore, until the close of the current year, it is necessary that the Receiver have additional capital with which to work.

The normal annual output of machines is . . . . . To manufacture, sell and erect each of these machines costs (including overhead charges) \$. . . . . Each of the more popular models sells for \$. . . . ., giving a net profit per machine of \$. . . . .

These machines, however, are sold on approximately the following terms: 25% cash; 75% in equal monthly instalments, spread through a period of 36 months, beginning 90 days after date of installation of the machine.

This plan of deferred payments is the most favorable on which, in general, this machine can be sold to the trade. This method of carrying on the business, while it involves a very considerable lock-up of capital, is free from any undue business risk since by the terms of sale the title to the machine, either through a conditional bill of sale or a chattel mortgage, remains in the vendor until the completion of all deferred payments. Should the vendee under these conditions default in his deferred payments the prior payments become unconditionally the property of the vendor, and it has been conclusively demonstrated by past experience that the machine, if repossessed by the vendor under these conditions, can be readily resold to a new vendee for at least as much and generally more than is sufficient to cover the remaining deferred payments, together with the cost of removal, renovation and re-erection.

It follows, therefore, that during one year there has to be disbursed in cash for the manufacture and sale of these . . . . . machines

about ( . . . x . . . )	
against which there is received as initial cash payments	
about ( . . . x . . . )	\$ . . . . .
and deferred payments, . . . . (machines) x . . (months)	
x \$. . . . (monthly payments)	. . . . .

or a total of about	. . . . .
---------------------	-----------

leaving a first year lock-up of	\$ . . . . .
---------------------------------	--------------

This amount may be increased by there being accepted as part payment for new machines old machines, which, before realized upon, must be rebuilt and resold on terms similar to the new machines. It may on the other hand be decreased by a certain number of the new machines being sold for spot cash.

In addition to the manufacture and sale of machines the company also manufactures each month supplies and matrices costing from \$..... to \$....., and which are sold at a handsome profit on 60 days' time. This part of the business necessarily absorbs a working capital of from \$..... to \$....., turning over about once in every two months.

Until the payments received on the deferred payment plan equal the amount of cash being absorbed by sales under that plan, the company necessarily locks up working capital on a gradually diminishing and easily calculated scale. As will have been seen from the above, the amount of such working capital required under present conditions for its first year's operation, were it to operate at normal volume, would be for machine manufacture and disposal \$.....  
for supplies and matrices .....

or a total of

\$.....

or say approximately \$..... per month.

It will, however, be manifestly impossible to jump the manufacture and sale of machines at once from the present volume to the normal volume.

It is the Receiver's opinion, therefore, that in order to operate the factory on a scale that will best preserve to those interested the value of the property and meanwhile develop, manage and put the company's assets into more readily realizable form, there should be supplied an average monthly working capital of about \$....., or for the six months about \$..... After very careful consideration, it is the opinion of the Receiver that, if the funds prayed for as above be furnished, the property will be, at the end of six months, by their use, so materially enhanced in value that no further application for the issuance of Receiver's certificates will be necessary.

It will be necessary, in order to raise such capital, that Receiver's Certificates be issued for this amount of additional capital. These Certificates must be placed upon an equal footing with the original Certificates issued pursuant to the order of this Court dated ....., 191., above referred to and as that issue was made to cover all the assets of the corporation, both mortgaged and unmortgaged, then or thereafter to come into the hands of the Receiver, it will be impossible, without the consent of all the original Certificate holders, to give the new issue a lien equal to that of the old issue. The new issue will be a second issue, subject to the lien of the first issue. It is, therefore, necessary that this first issue be paid off, in accordance with the provisions thereof, and that the Receiver be authorized to sell a sufficient amount of certificates, so that \$..... of the proceeds for the sale thereof may be used to pay off the original issue. This issue must, therefore, be of the amount of \$..... par value, all the Certificates under which shall be of equal standing and priority, which from the results of the operation while under his control, your petitioner believes will be amply secured by assets of the company in the form of cash, customers' notes and accounts receivable, in the aggregate of more than \$....., at the expiration of the period during which your petitioner will run the business on this new capital. In order to fully protect the interests of the holders of the First Mortgage Bonds, to facilitate the sale of said certificates

and to insure the purchasers thereof of the security of their investment, the Receiver believes it will be for the best interests of the company for him to be directed himself to set aside specifically in a separate account and/or authorized to pledge specifically, with a Trustee as security for the payment of these Certificates cash equal in amount to one hundred per cent. of all or any part of the principal amount with accrued interest of the said Receiver's Certificates from time to time outstanding and/or notes, bills and accounts receivable at least equal to one hundred and fifty per cent. of any balance not so secured by cash. This collateral so pledged shall be subject primarily to the lien of the certificates, and before resort should be had to the other assets of the company this collateral should be sold and used to pay the Receiver's Certificates. The Receiver should also be authorized to withdraw any collateral so pledged with the Trustee upon substitution therefor of other collateral of equal or greater value as fairly appraised.

ELEVENTH: That the original issue of Receiver's Certificates provided that they should be sold at par only to the bondholders of the corporation, after \$..... thereof had been actually subscribed for by bondholders. That your petitioner believes that the bondholders will subscribe for some part of the new certificates, but he is also informed and believes that, owing to the improved condition of the property during the receivership, a large amount of a new issue of Receiver's Certificates can be sold to outside persons and corporations other than the holders of the first mortgage bonds, particularly if your petitioner is allowed to sell said certificates at ninety-eight. As soon as the old issue is paid off this new issue of certificates should be given a lien upon all the assets of the company, and the Receiver should be authorized to pledge, in his discretion, a certain amount of these assets, as set forth in paragraph Tenth, *supra*, as security for the payment of these Receiver's Certificates, which pledged security shall first be applicable to the payment of the Receiver's Certificates in case of default.

TWELFTH: Enough has been set forth above to show in a general way the uses which the Receiver has made of the original \$..... of cash advanced. The new money will be used for purchasing necessary material and manufacturing supplies, payment of salaries, wages, labor and overhead charges—such as rent, insurance, light, heat, power, etc.—incident and necessary to the manufacture and sale of the company's output. In your petitioner's opinion, judging from the results of operation during the past six months on the proceeds of the original issue of \$..... Receiver's Certificates, on which the Receiver could only operate the plant to about 35% of normal, by using these new funds as above indicated there should result, after providing for all charges except interest on the bonds and unsecured notes, readily salable merchandise and/or negotiable accounts and secured interest-bearing bills receivable to a minimum amount of 120% of the new funds so placed at his disposal.

Furthermore, in the event that the Receiver can obtain no additional funds, it is his belief that he cannot continue to operate the business after ....., 191., for the reason that all of his present available working capital will have been absorbed by that date.

WHEREFORE, your petitioner prays:

(1) That for the purpose of enabling him to borrow the funds required to carry on the business of the defendant company and otherwise to protect and preserve the value of its property and assets, he be authorized to issue and sell

as Receiver his negotiable certificates of indebtedness, in the total principal amount of \$....., or any part thereof, at a price not less than 98% of the par value thereof, the said certificates to be dated ....., 191., to be payable ....., 191., and to bear interest at the rate of 6% per annum, payable on the ..... days of ..... and ..... or upon redemption, and all of such certificates to be redeemable at the option of your petitioner, at any time before maturity, at par and accrued interest upon thirty days' notice, duly published, and shall be secured by a lien in the first instance upon all free assets now or hereafter in the hands of the Receiver, and also upon all the net earnings and income derived from the conduct of the business in charge of said Receiver; and, secondly, upon any and all property of the defendant subject to the first mortgage of the defendant, which lien shall be prior to the said first mortgage. In case of default upon the said certificates, the free assets in the hands of the Receiver should first be applied to the payment of the said certificates, with interest, before any mortgaged assets should be sold or otherwise used to satisfy the same. The Receiver, however, should be directed to specifically set aside in a separate account or be authorized to pledge specifically with a Trustee, as security for the payment of the said \$..... of certificates cash equal in amount to 100 per cent. of all or any part of the principal amount, with accrued interest, of the said Receiver's Certificates from time to time outstanding, and notes, bills and accounts receivable at least equal to 150 per cent. of any balance not so secured by cash, with power from time to time to withdraw any or all of such collateral upon substitution therefor of collateral of a value equal to or greater than the value of the collateral withdrawn. In case of default the cash, bills, notes and accounts receivable so set aside or pledged should first be applied to the payment of the Receiver's Certificates and interest before any other property is sold or disposed of to satisfy the same. Said certificates should be subject to the issue of \$..... of certificates issued by the Receiver under order dated ....., 191., and issued in the action entitled ..... and ....., plaintiffs, against ....., defendant, until the same shall be paid or redeemed as provided therein and in any order issued pursuant to petition, and also to the right of the Receiver to utilize and dispose of the personal property and assets, including cash, bills, notes and accounts receivable (except in so far as the same may be specifically set aside or pledged) now in his hands or which may hereafter come into his hands in the conduct of the business in his charge, and to his right to apply the cash now in his hands or which may hereafter come into his hands, to the payment of the expenses, payrolls, salaries, merchandise debts and other indebtedness incurred by him in the conduct of said business and in the administration of the estate, provided, however, that the fair value of cash, notes, bills and accounts receivable specifically set aside by the Receiver or pledged with the Trustee as above provided as security for the payment of these certificates shall always be of the percentages above provided of the total par value of certificates issued and outstanding.

(2) That your petitioner be authorized to apply \$..... of the proceeds of the sale of this issue of Receiver's Certificates to the redemption of the \$..... Receiver's Certificates originally authorized and issued under and pursuant to the order dated ....., 191., hereinbefore referred to, in accordance with the provisions thereof.

(3) That the petitioner be authorized and in his discretion to pledge with a

trustee appointed by this Court, as security for the payment of this issue of Receiver's Certificates, cash, notes, bills and accounts receivable in his hands as stated in (1) above, and that he be authorized to withdraw any collateral so pledged with the trustee upon substitution therefor of other collateral of equal or greater value, as fairly appraised, and that he be authorized to make such contract of pledge with said Trustee as may be necessary or desirable to carry out the foregoing provisions.

Dated New York, ....., 191..

.....,  
Petitioner.

[Verification.]

FORM NO. 149.

*State-Income-Franchise Tax Report of Domestic or Foreign Corporation.*

1918

STATE OF NEW YORK

Taxation of Corporate Franchises Under Article 9-a of the Tax Law for the Tax Year Beginning November 1, 1918.

This report is due July 1, 1918, or within thirty days after filing report with the United States Treasury Department.

File with  
State Tax Department  
Albany, N. Y.

As.....of the.....Company

I make the following report of such company for the year ending\*.....  
....., 191.., pursuant to Article 9-a of the Tax Law.

- (1) Organized....., 19.., under the Laws of.....
- (2) Began business in New York....., 19.....
- (3) Issued capital stock, \$.....  
(If organized with shares without par value, insert the amount of paid in capital.)

(4) Amount of indebtedness at end of year, \$.....

(5) Net income for the { fiscal } year ending†.....,  
                                  { calendar }  
191.., as determined by the United States Treasury Department, \$.....

Corporations organized under the laws of foreign countries should return their entire net income, \$.....

(6) If the amount reported above is not correct, state the amount claimed to be correct, \$.....

(7) Nature of business and how transacted.....

(8) Place, street and number where such business is conducted.....

(9) Where will mail reach the company?.....

(10) State the city or town, street number and state where this company *maintained* and store, warehouse, factory or other place of business outside the State of New York.

(11) Any corporation taxable hereunder may omit from this report the segregation of assets on this page *only* by signing the following consent:

I am authorized by the Board of Directors of this corporation to consent and I do hereby consent that said corporation be taxed upon its entire net income.

Do not sign consent unless taxable by the State of New York on entire income.

(Official title)

### TOTAL SEGREGATED ASSETS WHEREVER LOCATED.

Average monthly value of bills and accounts receivable for —					
(a) Personal property manufactured by it	\$				
(b) Personal property sold by the corporation from merchandise owned by it at the time of acceptance of order but <i>not</i> manufactured by it	\$				
(c) Services performed, based on orders received at offices maintained by the corporation, excluding bills and accounts receivable on orders filled from a stock of merchandise or other property maintained by the corporation	\$				
†Average monthly value of all real property wherever located (actual value)	\$				
†Average monthly value of all its tangible personal property wherever located (actual value)	\$				
Total	\$				\$
§Average total <i>actual</i> value of shares of stocks of other corporations owned by this corporation	\$				\$
<b>ASSETS SEGREGATED TO NEW YORK STATE</b>					
Average monthly value of bills and accounts receivable for —					
(a) Personal property manufactured by it within this state	\$				
(b) Personal property sold by it from merchandise owned by it and located in this state at the time of acceptance of the order, but not manufactured by it within this state	\$				
(c) Services performed, based on orders received at offices maintained by the corporation within this state, excluding bills and accounts receivable arising from sales made from a stock of merchandise or other property at a place of business maintained by the corporation within this state	\$				
†Average monthly value of its real property within this state as detailed in this report (actual value)	\$				
†Average monthly value of its tangible personal property in New York State as detailed in this report (actual value)	\$				
Total	\$				\$
§Average total <i>actual</i> value of shares of stocks of other corporations owned by it and allocated to this state by rule below	\$				\$

Not to be filled.

Not to be filled.

\* Insert the calendar year ending December 31, 1917, or the fiscal year as reported to the United States treasury department.

† The amount of the annual net income must be identical with that reported to the United States treasury department.

‡ Real property and tangible personal property shall be taken as its actual value where located.

§ The value of share of stock of another corporation owned by a corporation liable hereunder shall for purposes of allocation of assets be apportioned in and out of the State in accordance with the value of the physical property in and out of the State representing such share stock.

NOTE — If the amount of the annual net income of any corporation taxable under this article as returned to the United States treasury department is changed or corrected by a commissioner of internal revenue or other officer of the United States, such corporation, within ten days after receipt of such notification of change or correction, shall make return under oath or affirmation to the Tax Commission of such changed or corrected net income upon which the tax is required to be paid to the United States.

FORM 3 IT.

Penalty Notice

Any corporation which fails to make any report required by this article shall be liable to a penalty of not more than five thousand dollars to be paid to the State to be collected in a civil action, at the instance of the Commission; and any officer of any such corporation who makes a fraudulent return or statement with intent to defeat or evade the payment of the taxes prescribed by this article shall be liable to a penalty of not more than one thousand dollars, to be recovered by the State. (Tax Law, § 216.)

No. ....

.....Co.,

STATE TAX COMMISSION,

Receiving stamp

INSTRUCTION.

If the company has no real or tangible personal property in this State it should give the name of the city, town, or incorporated village where its principal financial concerns are transacted within the State in panel 1 at the right and the word "none" should be entered in panel 2.

If the company's entire real and tangible personal property in this State is in one city, or in one town outside a city or incorporated village, the schedules below need not be made, but the name of the city or town, and of the county where located must be entered in panel 3.

City or Town ..... 3

.....County.

If the company has real or tangible personal property in an incorporated village (or villages) in this State the name of such village and the town and county where such village is located must be entered below, together with the value of such property.

Incorporated village of	In the town of	County of	Personal	Real
			\$	\$

(If more space is needed add a paster)

The values of real and tangible personal property in villages must be distributed to the proper TOWNS in the table below. Do not confuse the political subdivisions "incorporated village" and "town." Names of hamlets or post-offices other than incorporated villages are *not* wanted.

SCHEDULE OF REAL AND *Tangible* PERSONAL PROPERTY  
IN NEW YORK STATE BY CITIES AND TOWNS

Personal,  
actual  
value

Real estate,  
actual  
value

Real estate,  
assessed  
value

City of.....County of.....				
Street address.....	\$.....		\$.....	\$.....
City of.....County of.....				
Street address.....	\$.....		\$.....	\$.....
City of.....County of.....				
Street address.....	\$.....		\$.....	\$.....
City of.....County of.....				
Street address.....	\$.....		\$.....	\$.....
City of.....County of.....				
Street address.....	\$.....		\$.....	\$.....
City of.....County of.....				
Street address.....	\$.....		\$.....	\$.....
Town of.....County of.....				
Town of.....County of.....				
Town of.....County of.....				
Town of.....County of.....				
Town of.....County of.....				
Town of.....County of.....				

(If more space is needed add a paster)

AFFIDAVIT OF PRESIDENT, VICE-PRESIDENT, SECRETARY OR  
TREASURER.

STATE OF NEW YORK, } ss:  
County of.....

On this.....day of.....A. D. 191.., personally appeared before me, a Notary Public in and for the County of....., of the above-named company, who, being duly sworn according to law, did depose and say that the foregoing report is just, true and correct and that it includes a true statement of the annual net income of said company for the year.

.....  
.....  
(official title)

Sworn to before me the day and year aforesaid.

.....  
Notary Public.

## FORM NO. 150.

*State-Franchise-Capital-Stock Tax Report of Domestic Corporation.*

Corporations liable to taxation under Article 9-a of the Tax Law should not make this report.

This report is NOT to be made before October 31, 1917.

When completed MAIL to State Tax Department, Albany, N. Y., to arrive not later than December 15, 1917.

(See Penalty Notice)

As.....of the..... Company

I make the following report of such company for the year ending October 31, 1917, pursuant to the provisions of Section 192, Chapter 60 of the Consolidated Laws:

- (1) The last preceding report made by this Company to the State of New York under the provisions of the above acts was for the year ending October 31, 191..
- (2) Organized ....., 19.., under the laws of .....
- (3) This company began business in the State of New York on ..... 19..
- (4) Authorized capital stock of Company ..... \$.....
- (5) Number of shares of stock authorized: Common ....., Preferred .....
- (6) Number of shares of stock issued: Common ....., Preferred .....
- (7) Par value of each share: Common, \$....., Preferred, \$.....
- (8) Amount paid into Treasury of Company on each share: Common, \$....., Preferred, \$.....
- (9) Amount of Capital stock issued for cash or property except as in (10) ....., \$.....
- (10) Amount of Capital stock issued for good will, copyrights, brands, patents, trade-marks, formulæ, services, etc., other than cash or property as in (9) ....., \$.....
- (11) 

Dividends made or declared during year ending October 31, 1917

 { Amount of common stock on which dividends were declared .....
- (12) { \$.....
- (13) { Amount and date of each dividend on common stock .....
- (14) { Rate per cent per annum of dividends on common stock .....
- (15) { Amount of preferred stock on which dividends were declared .....
- (16) { Amount and date of each dividend on preferred stock .....
- (17) { Rate per cent per annum of dividends on preferred stock .....
- (17) Nature of business in State of New York and how transacted .....
- (18) (a) Place, street and number where such business is conducted .....
- (b) Where will mail reach Company? .....

(Place, street and number)

- (19) Give the exact location where this corporation maintained any store, warehouse, factory or place of business outside the State of New York .....

- (20) Highest bona fide price at which  
stock sold during the year  
ending October 31, 1917..... Preferred, \$....., Common, \$.....
- (21) Lowest bona fide price at which  
stock sold during the year  
ending October 31, 1917..... Preferred, \$....., Common, \$.....

*All amounts inserted below should be for the year ending October 31, 1917.*  
Foreign and Domestic corporations must answer all paragraphs 24-37  
inclusive. Property classified under paragraph 10, page 1, should not  
appear below.

#### IN NEW YORK STATE.

- (22) Average value of stock in trade carried during the year.. \$.....
- (23) Average monthly bank and cash balance employed during the year..... \$.....
- (24)† Average value of bills and accounts receivable during the year ..... \$.....
- (25)\* Average cash value of shares of stock of other corporations doing business in the State of New York and owned by this Company during the year..... \$.....
- (26)‡ Average value of bonds, loans on call and other financial securities held, used or employed in New York during the year ..... \$.....
- (27) Average value of all personal property other than heretofore mentioned during the year..... \$.....
- (28) Average gross actual value of real estate located in the State of New York and owned by this Company during the year ..... \$.....
- (28a) Average assessed value of above real estate..... \$.....
- Location .....
- Location .....
- Location .....

#### OUTSIDE NEW YORK STATE.

- (29) Average value of stock in trade carried during the year.. \$.....
- (30) Average monthly bank and cash balance employed during the year ..... \$.....
- (31)† Average value of bills and accounts receivable during the year ..... \$.....
- (32)\* Average cash value of shares of stocks of other corporations owned by this corporation where such corporations are doing business wholly without the State of New York ..... \$.....
- (33)‡ Average value of bonds, loans on call and other financial securities held, used or employed outside the State of New York during the year..... \$.....
- (34) Average value of personal property, other than heretofore mentioned during the year..... \$.....

- (35) Average gross actual value of real estate located outside the State of New York and owned by this Company during the year, and where situated..... \$.....
- (35a) Average assessed value of above real estate..... \$.....
- .....
- .....

(In stating location, city or village or town must be given, with street and number.)

- Total of assets above enumerated located in the State of New York during the year ending October 31, 1917..... \$.....
- Total of assets above enumerated located outside the State of New York during the year ending October 31, 1917..... \$.....

The word "average" wherever it appears in this report has its plain, ordinary significance; neither the highest amount nor the lowest, but the mean. The same method employed in determining average assets should be used in determining average liabilities.

† Bills and accounts receivable are generally located at the place from which the goods are shipped, provided the corporation there maintains at its own expense a place of business, including a store or warehouse. The residence of the debtor is of no importance.

\* In answering Nos. 25 and 32, if the assets of the company whose stock is owned by your corporation are employed both "In" and "Outside" New York, an apportionment of your holdings may be made on the basis of employment.

‡ Assets in Nos. 26 and 33 should be considered as located where the same are held.

(36) AVERAGE LIABILITIES:

- Bonds not secured by mortgage, average..... \$.....
- mortgages, average ..... \$.....
- bills payable, average..... \$.....
- Accounts payable, average..... \$.....
- Other liabilities, not including capital stock, average as explained below..... \$.....
- Total average liabilities..... \$.....

- (37) Percentage of total assets of the Company employed in manufacturing by the Company in the State of New York during the year ending October 31, 1917, and in the sale of the products so manufactured .....

- (38) Are goods handled by you manufactured for you by others or bought for sale? .....

- (39) Do you operate a factory? ..... If so, where?.....

REMARKS.

.....

.....

.....

Officers Names:

- .....President, .....Secretary,
- .....Vice-President, .....Treasurer.

The undersigned, being the ..... of the above  
Company, estimates and appraises the Capital Stock of said Company  
as follows:

..... shares at ..... dollars  
..... cents per share, amounting in the whole to .....  
..... 100 dollars

IN WITNESS WHEREOF, I have set my hand this ..... day of .....,  
191..

.....  
.....

(Official title)

NOTE.—Corporations paying six or more than six per centum on their *Entire*  
issued capital stock need not appraise their capital stock; all others must  
appraise.

STATE OF NEW YORK, }  
County of ..... } ss.:

on this ..... day of ....., A. D. 191.., personally appeared before  
me, a Notary Public in and for the County of .....  
....., of the above named Company, who, being duly sworn  
according to law, did depose and say that the foregoing report is just, true and  
correct and that it includes all dividends of any description declared by said  
Company during the year ending October 31, 1917, and that he has, according  
to his best knowledge and belief, appraised the Capital Stock of the Company  
as provided by statute, at not less than the average price at which it sold and  
not less than the difference between its assets and liabilities, exclusive of capital  
stock.

Sworn to before me the day and year aforesaid.

.....  
Notary Public.

#### PENALTY NOTICE.

Every corporation, association, joint-stock company, person or partnership  
failing to make the annual report required by this article, or failing to make  
any special report required by the commission, within any reasonable time to be  
specified by the commission shall forfeit to the people of the state the sum of  
one hundred dollars for every such failure, and the additional sum of ten dollars  
for each day that such failure continues. (Tax Law, section 197.)

#### FORM NO. 151.

##### *State Capital Stock Foreign Corporation License Fee Report.*

Each statement must be full and explicit.

To the State Tax Department:

As ..... of the ..... Company  
I make the following report of such Company for the year ending .....,  
19.., pursuant to the provisions of Section 181, Chapter 908, Laws of 1896, and  
acts amendatory thereof:

- (1) Organized ....., 191..
- (2) Under the laws of .....

- (3) This Company began business in the State of New York on....., 191..
- (4) Authorized capital stock of Company ..... \$.....
- (5) Number of shares of stock *authorized* { Common.....  
Preferred.....
- (6) Number of shares of stock *issued* { Common.....  
Preferred.....
- (7) *Par value of each share* { Common..... \$.....  
Preferred..... \$.....
- (8) Amount paid into Treasury of Company { Common..... \$.....  
on each share..... } Preferred..... \$.....
- (9) Amount of Capital stock issued for cash or property..... \$.....
- (10) Amount of Capital stock issued for good will, copyrights, brands, patents, trade-marks, formulae, services, etc., other than cash or property..... \$.....
- (11) Amount of common stock on which dividends were declared..... \$.....
- (12) Amount and date of each dividend on common stock.....
- (13) Rate per cent. per annum of dividends on common stock.....
- (14) Amount of preferred stock on which dividends were declared..... \$.....
- (15) Amount and date of each dividend on preferred stock..... \$.....
- (16) Rate per cent. per annum of dividends on preferred stock.. \$.....
- (17) Nature of business in State of New York and how transacted.....
- (18) *a* Place, street and number where such business was conducted.....
- b* Office of the Company.....
- (19) Average value of stock in trade carried in the State of New York during the year ending....., 191..... \$.....
- (20) Average monthly bank balance employed in the State of New York during the year ending....., 191.. \$.....
- (21) Average value of bills and accounts receivable in State of New York during the year ending....., 191..... \$.....
- (22) Average value of shares of stocks of other corporations doing business in the State of New York and owned by this company during the year ending....., 191.. \$.....
- (23) Average value of personal property including bonds, loans on call and other financial securities employed in the State of New York, other than heretofore mentioned, during the year ending....., 191..... \$.....
- (24) Capital invested in real estate located in the State of New York during the year ending....., 191., and where situated..... \$.....
- .....
- .....
- .....

- (25)                   Total of assets above enumerated located  
                          in the State of New York during the  
                          year ending ..... , 191..... \$.....
- (26) Average value of stock in trade carried outside the State  
      of New York during the year ending ..... , 191.... \$.....
- (27) Average monthly bank balance employed outside the State  
      of New York during the year ending ..... , 191.... \$.....
- (28) Average value of bills and accounts receivable outside the  
      State of New York during the year ending ..... , 191.. \$.....
- (29) Average value of shares of stocks of other corporations  
      owned by this corporation, where such corporations are  
      doing business wholly without the State of New York.. \$.....
- (30) Average value of personal property including bonds, loans  
      on call and other financial securities employed outside  
      the State of New York, other than heretofore men-  
      tioned, during the year ending ..... , 191.. \$.....
- (31) Capital invested in real estate located outside the State  
      of New York, during the year ending ..... ,  
      191.., and where situated..... \$.....  
      .....  
      .....
- (32)                   Total of assets located outside the State  
                          of New York during the year ending  
                          ..... , 191..... \$.....

LIABILITIES:

- Bonds ..... \$.....
- Mortgages not secured by bonds..... \$.....
- Bills payable ..... \$.....
- Accounts payable ..... \$.....
- Other liabilities, excluding capital stock..... \$.....
- Total liabilities ..... \$.....
- (33) Highest bona fide price at which stock sold {Preferred.... \$.....  
      during year ending ..... , 191.... } Common.... \$.....
- (34) Lowest bona fide price at which stock sold {Preferred.... \$.....  
      during year ending ..... , 191.... } Common.... \$.....
- (35) Percentage of capital stock of the company employed in the State of New  
      York during the year ending ..... , 191.., in manufacturing and  
      in the sale of the product of such manufacture .....
- (36) Are your goods manufactured for you by others? .....
- (37) Do you operate a factory? .....

REMARKS.

.....  
.....  
.....  
The undersigned, being the ..... of the above Company,  
estimates and appraises the Capital Stock of said Company as follows:  
      ..... shares at ..... dollars  
      ..... cents per share, amounting in the whole to .....  
      ..... 100 dollars.

IN WITNESS WHEREOF, I have set my hand this ..... day of .....,  
191....

.....  
.....  
(Official Title)

STATE OF NEW YORK, }  
County of ..... } ss..

On this ..... day of ....., A. D. 191..., personally appeared before me, a Notary Public in and for the County of ....., of the above named Company, who, being duly sworn according to law, did depose and say that the foregoing report is just, true and correct and that it includes all dividends of any description declared by said Company during the year ending ....., 191..., and that he has, according to his best knowledge and belief, appraised the Capital Stock of the Company as provided by statute, at not less than the average price at which it sold and not less than the difference between its assets and liabilities, exclusive of capital stock.

Sworn to before me the day and year aforesaid.

.....  
Notary Public.

#### FORM NO. 151-A.

#### *Statement and Affidavit Claiming Exemption from Making Tax Reports and Paying Taxes.*

When Completed Mail to State Tax Department, Albany, N. Y.

REPLIES TO QUESTIONS SHOULD BE EXPLICIT.

STATEMENT and affidavit of .....,  
of ..... Company claiming exemption from making reports, and the payment of tax as levied and assessed under chapter 62, Laws of New York, 1909, and acts amendatory thereof.

1. Full name of the corporation, joint-stock company or association.
2. Name and title of officer making this statement.
3. Under what law of what state or county was the corporation, joint-stock company or association incorporated, organized or formed?
4. Date of organization.
5. For what purpose? (To be stated as shown in charter.)
6. Nature of business transacted. (A statement in detail is required showing in what manner the company now carries on its manufacturing business in New York State.)
7. If a mining company, state where the mines are located.
8. If an agricultural company, state where the company's plant is situated.
9. If a manufacturing company, state where factory is located in New York State.
10. Does the company maintain and operate through its own employees the plant or factory?
11. Does the company sell any goods, wares or merchandise which it does not manufacture?

12. What percentage of the company's business in New York consists of the sale of goods not made by it in New York State?

13. Does the company lease to other parties the right to manufacture goods sold by it?

14. Does the company cause any of the products that it uses or sells in this state to be manufactured by others?

15. Location of main business office of the company.

16. Exclusive of intangible property what percentage of the company's entire assets is actually employed in manufacturing in New York State?

17. In answer to paragraph 16 have you included any good will, patents or patent rights, copyrights, trade-marks, formulae, services, or any other than actual physical property, and if so at what value?

#### REMARKS.

.....  
 .....  
 .....

STATE OF NEW YORK, }  
 County of ..... } ss.:

....., of the ..... Company, being  
 duly sworn, deposes and says that the answers to the above questions as set  
 down by him and remarks, are true and correct.

Sworn and subscribed before me this  
 ..... day of .....

.....  
*Notary Public.*

#### FORM NO. 152.

#### *Petition for Writ of Certiorari.*

SUPREME COURT, ..... COUNTY.

The People of the State of New York on the  
 relation of the ..... Company,  
*against*

.....  
 and ....., Constituting the  
 State Board of Tax Commissioners of the  
 State of New York.

} Petition.

*To the Supreme Court of the State of New York:*

The petition of the ..... Company respectfully shows to the Court:  
 That petitioner is a corporation duly incorporated and existing under the  
 laws of the State of New York and located and doing business and having its  
 principal place of business in the City of New York.

That at all the times hereinafter mentioned petitioner was and still is the  
 owner of certain cables and wires laid or placed in certain streets, highways or  
 public places in the Boroughs of Brooklyn, Manhattan and the Bronx in the  
 City of New York, together with franchises, rights, permissions and consents to

maintain and operate in the streets, highways and public places of said boroughs cables and wires for conducting and transmitting electricity; each of said franchises, rights, permissions and consents, with the said tangible property in connection therewith, being denominated in the Tax Law of the State a special franchise.

That at all times hereinafter mentioned the respondents, ....., ....., and ....., constituted and still constitute the State Board of Tax Commissioners.

That pursuant to section 43 of the Tax Law, and within the time limited thereby, petitioner duly made a written report to said State Board of Tax Commissioners, as to each of said special franchises owned by it as aforesaid, and as to all matters required by said section to be reported to said Board, and has in the manner required by law made all reports and supplemental reports required by law or by said State Board to be made to it.

That said State Board, claiming to act under and pursuant to the provisions of the Tax Law of this State relating to taxation of public franchises as real property, did on or about the ..... day of ....., 191., fix and determine the valuation of the special franchises owned and operated by your petitioner as aforesaid for purposes of taxation, in the Borough of Manhattan at the sum of ..... dollars, in the Borough of Brooklyn at the sum of ..... dollars, and in the Borough of the Bronx at the sum of ..... dollars, aggregating ..... dollars.

That immediately thereafter said board gave notice in writing to your petitioner that said valuation had been made at the aforesaid sum, and that the said State Board would meet at its office in the City of Albany on the ..... day of ....., 191., to hear and determine any complaint concerning said assessment. That pursuant to such notice your petitioner attended before said Board and complained of said assessment, specifying as the grounds of its complaint all of the grounds hereinafter set forth in this petition as the grounds for reducing said assessment as herein prayed for, and said Board at said hearing waived the filing of a written statement under oath specifying the grounds of petitioner's complaint.

That thereafter the said Board, claiming to act pursuant to the Tax Law, finally determined the valuation of said special franchise of petitioner in the Borough of Manhattan to be the sum of ..... dollars, in the Borough of Brooklyn to be the sum of ..... dollars, and in the Borough of the Bronx to be the sum of ..... dollars, aggregating ..... dollars, and on or about the ..... day of ....., 191., said Board filed with the Department of Taxes and Assessments in the City of New York a written statement of such valuation as finally fixed and determined by said State Board, and at or about the same time gave notice in writing to your petitioner that such written statement had been filed with the Department of Taxes and Assessments of the City of New York.

That by the provisions of the charter of the City of New York the Board of Taxes and Assessments of the City of New York is the head of the Department of Taxes and Assessments of said city and is required by law, beginning with the ..... day of ..... in each year, to prepare assessments rolls for the various boroughs of said city, containing valuations of real and personal property subject to taxation, and to certify and deliver said assessment rolls to the Board of Aldermen of said city on the ..... day of ....., in each year.

That said Board of Taxes and Assessments, since the . . . . day of . . . . , 191. . , prepared the assessment rolls of said real and personal property of the several boroughs of said city for the year 191. . , and entered thereon, before the final revision on certification of such rolls by them, the valuation of said special franchises of your petitioner at the amount fixed by the said State Board as aforesaid, and duly verified and delivered the said assessment rolls to the Board of Aldermen of said city on the . . . . . Monday of . . . . . , 191. . .

That said assessment of petitioner's special franchise is erroneous by reason of over-valuation. The aforesaid assessment and valuation made by the said State Board greatly exceeds the actual and true value of petitioner's special franchises and the amount for which the same would sell under ordinary circumstances. The actual and true valuation of petitioner's special franchises, in the Borough of Manhattan, in the City of New York, and the amount for which the same would sell under ordinary circumstances, does not exceed the sum of . . . . . dollars. The actual and true value of petitioner's said special franchises in the Borough of Brooklyn, in the City of New York, and the amount for which the same would sell under ordinary circumstances, does not exceed the sum of . . . . . dollars. The actual and true value of petitioner's said special franchises in the Borough of the Bronx, in the City of New York, and the amount for which the same would sell under ordinary circumstances, does not exceed the sum of . . . . . dollars. And the actual and true value of petitioner's said special franchises in the three Boroughs heretofore mentioned of the City of New York and the amount for which the same would sell under ordinary circumstances does not exceed in the aggregate the sum of . . . . . dollars. The extent of the said over-valuation is . . . . . dollars.

That said assessment of petitioner's special franchise is unequal in that the same has been made at a higher proportionate valuation than the assessment of all other land, real estate and real property in the City of New York upon the same assessment rolls made by the same officers, to wit, by the said State Board of Tax Commissioners and by the said Board of Taxes and Assessments of the City of New York; and your petitioner specifies the assessment of all the land, real estate and real property in the City of New York and of each and every parcel thereof upon the assessment rolls of said city as instances in which the said inequality exists and of the extent thereof. That said State Board, in making the aforesaid assessment of petitioner's special franchises, fixed and determined said valuation at a sum in excess of the full and true value of said special franchises. Upon information and belief, that in the City of New York other real property is not assessed at its full and true value, but the assessment of all other land, real estate and real property in said city for the year 191. . has been made at an amount equal to only seventy-five per centum of the full and true value of the land, real estate and real property so assessed. That the said assessment of petitioner's special franchises, to the extent that the same exceeds seventy-five per centum of the full and true value of said special franchises, as hereinbefore set forth, is unequal, disproportionate and erroneous. That it is the official duty of the said State Board to investigate and examine the methods of assessment throughout the State and to furnish local assessors information to aid them in making assessments of real and personal property, and, upon information and belief, said State Board and each of its members

well knew, in making the assessments of said special franchises as aforesaid, that other land, real estate and real property within the State, and especially within the City of New York, was assessed at less than its full value.

Your petitioner further shows that the said assessment is unequal in that it has been made at a higher proportionate valuation than the assessments placed on all similar real property in said State of New York by said Board, and petitioner cites as instances of said inequality and of the extent thereof, each and every assessment upon special franchises in said State of New York, as fixed and determined by said State Board.

That the said assessment of petitioner's special franchise is illegal and void in that the same is in conflict with and violates those provisions of the Constitution of the United States of America and of the Constitution of the State of New York which prohibit the taking of property without due process of law, for the reason that the said State Board, in fixing the amount of the aforesaid assessment as the basis upon which taxes will be levied and collected from petitioner upon its special franchises, did not follow or apply any rule, method or principal of valuation, and did not determine and ascertain the value of said special franchises, but fixed the aforesaid amount arbitrarily and without reference to the value of said special franchises, and that the said assessment is the result of mere guess work and conjecture on the part of the said State Board of Tax Commissioners.

That said assessment of petitioner's special franchise is illegal and void in that the same is in conflict with and violates the provisions of the Constitution of the United States, which prohibit the denial to any person of the equal protection of the laws, for the reason that the assessment for the taxation of real property generally throughout the State is made upon and in accordance with the value thereof, while the assessment fixed as the basis of taxation of petitioner's special franchises has been fixed at an arbitrary amount, without reference to the value thereof; and for the further reason that the said assessment of petitioner's special franchises has been fixed on the basis of an arbitrary rate or percentage of the earnings of said petitioner higher than the rate of percentage employed in fixing the assessment of other special franchises throughout the State.

That said assessment of petitioner's special franchises is illegal and void in that said State Board has included in said assessment not only the value of all petitioner's franchises, rights, authority and permissions to maintain or operate cables and wires in, under, above, upon or through the streets, highways and public places of the City of New York, and the value of the cables and wires of petitioner, with their appurtenances for conducting and transmitting electricity; but has included also therein the value of the franchise of petitioner for conducting and transmitting electricity, the value of the good will of the business of petitioner, and the value of petitioner's contracts with its patrons, over none of which the said State Board has jurisdiction.

That said assessment of petitioner's special franchises is illegal and void in that chapter ..... of the Laws of ....., as amended, under which said State Board assumed to and did make said assessment, is unconstitutional and void, for the reason that it violates Article X, section 2, of the Constitution of the State of New York; that it attempts to confer jurisdiction, powers and functions upon the State Board of Tax Commissioners which, under the Con-

stitution of the State of New York, can be exercised only by local assessors selected by the locality in which the property assessed is situated.

That by reason of the aforesaid over-valuation, inequality and illegality in the said assessment, your petitioner is aggrieved and will be injured.

Your petitioner further alleges that fifteen days have not elapsed since the final completion and filing of said assessment rolls in said City of New York.

That no previous application has been made for a writ of certiorari to review the assessment aforesaid.

Wherefore, your petitioner prays that a writ of certiorari may be allowed and issue out of this Court, directed to the said ....., ....., and ....., constituting the State Board of Tax Commissioners, commanding them to specify to a Special Term of this Court in and for the County of Albany:

(1) All and singular the proceedings herein referred to and had by the said State Board of Tax Commissioners relating to said assessment, with the dates thereof respectively, together with that part of the record relating to the same.

(2) All and singular the papers submitted by your petitioner and filed with the said State Board of Tax Commissioners.

(3) All other evidence or information, if any, before said State Board of Tax Commissioners, or considered by it in arriving at the decision aforesaid, and if there was no such evidence or information, a statement to that effect.

(4) A concise statement of such other facts as may be pertinent and material to show the value of the property assessed and the grounds of the valuation made by said State Board.

(5) Any and all documents, records and papers, if any such there be, not embraced in the above specifications, relating to and concerning the assessment aforesaid, and a statement of any other matters material to the determination of the application of petitioner.

To the end that such determination and proceedings of the said State Board of Tax Commissioners may be reviewed and corrected as shall be in accordance with the law and facts in this matter; and further that your petitioner may have herein such other and further relief as to this Court may seem just.

Dated ....., .....

.....  
by .....  
President.

.....  
Attorneys for Petitioner,  
Office and P. O. Address, etc.  
[Verification.]

FORM NO. 153.

*Order for Writ of Certiorari.*

[Title as to Form No. 152]

[Caption of Court Order]

Upon reading and filing the petition of the ..... Company, verified the ..... day of ....., 191., and it appearing therefrom that there are proper grounds for the granting of a writ of certiorari as therein

prayed addressed to the State Board of Tax Commissioners to review the assessment of the special franchises of said petitioner made for the purpose of taxation for the year 191...; and upon motion of ....., attorneys for said petitioner, it is

Ordered, that the prayer of said petitioner be granted, and that a writ of certiorari issue out of and under the seal of this Court directed to ....., ..... and ....., constituting the State Board of Tax Commissioners of the State of New York, commanding said Board to certify and return to this court, at a Special Term thereof, to be held in and for the County of Albany, at the City Hall in the City of Albany, State of New York, on the ..... day of ....., 191..., at the opening of the Court on that day or as soon thereafter as counsel can be heard:

[Take in paragraphs numbered 1, 2, 3, 4 and 5 from prayer of petition, Form No. 152.]

Ordered, that said writ be allowed and signed and sealed by the Clerk of this Court.

Ordered, that a copy of said return be served on ....., the petitioner's attorneys, at their office, ....., on or before the ..... day of ....., 191...

The Court in its discretion hereby dispenses with the giving of any notice of the application for a writ of certiorari in this matter.

Enter in

Albany County,

.....  
Justice of the Supreme Court  
of the State of New York.

FORM NO. 154.

*Writ of Certiorari.*

The People of the State of New York to ....., ..... and ....., constituting the State Board of Tax Commissioners of the State of New York,

GREETING:

Whereas, we have been informed by the petition of the ..... Company that it is a corporation duly created and existing by and under the laws of the State of New York, and having its principal office in .....; that the State Board of Tax Commissioners heretofore fixed and determined the valuation of the special franchises of the said petitioner in and for the City of New York, for the year ....., at the sum of ..... dollars; that a written statement of said valuation has been filed with the Department of Taxes and Assessments of the City of New York as required by law; that such valuation has been entered by the board of taxes and assessments of the City of New York in the assessment-rolls for said city, and has become a part thereof; that said assessment is erroneous; and that fifteen days have not elapsed since the completion and filing of said assessment-rolls by the Department of Taxes and Assessments in said city.

And we being willing for certain causes to be certified of the proceedings, decisions and actions had by and before your said Board in the said matter of

the valuation and assessment of said special franchises of the petitioner in the City of New York, as aforesaid;

Do hereby command you that you certify and return to the Special Term of our Supreme Court of the State of New York, to be held in and for the County of Albany, at the City Hall in the City of Albany, State of New York, on the ..... day of ....., 191.., at the opening of the Court on that day, or as soon thereafter as counsel can be heard, together with this writ, the following matters and facts:

[Take in paragraphs numbered 1, 2, 3, 4 and 5 in prayer of petition, Form No. 152.]

To the end that the proceedings, decisions and actions had by said State Board of Tax Commissioners in the matter of the valuation and assessment of said special franchises of the petitioner may be reviewed and corrected on the merits by our said Court, and that we may further cause to be done thereupon what of right ought to be done.

Let a copy of said return be served upon ....., the relator's attorneys, at their office, ....., on or before the ..... day of ....., 191...

Witness the Hon. ...., one of the Justices of our said Supreme Court in and for the County of New York, at the County Court House in said County, on the ..... day of ....., 191...

[L. S.] By the Court.

.....  
Clerk.

Allowed this ..... day of ....., 191...

.....  
Justice of the Supreme Court.

.....  
Attorneys for Relator,  
Office and P. O. Address, etc.

#### FORM NO. 155.

##### *Return to Writ of Certiorari.*

[Caption and Title as in Form No. 152.]

To the Supreme Court of the State of New York:

....., ..... and ....., constituting the State Board of Tax Commissioners of the State of New York, respectfully return to writ of certiorari issued out of this Court on the ..... day of ....., 191.., as follows:

#### I.

This return, except insofar as it is otherwise stated, or where the matters herein returned are matters of record, on statements of fact as such, is made upon information and belief.

#### II.

All of the proceedings required by statute for the purpose of making and certifying the valuation aforesaid were had before said State Board of Tax Commissioners, and done and performed in compliance with the statute in such case made and provided, namely, the provisions of chapter ..... of the Laws of ....., and the amendments thereto.

## III.

The State Board of Tax Commissioners was and is authorized by law to make the valuation and assessment complained of, and in the manner and form as made by it and the statute under which the said valuations were made is in accordance with the Constitution and valid and binding upon the relator, and all of the acts done and performed by said State Board of Tax Commissioners, as set forth in the petition herein, were in accordance with law and valid under the Constitution and Laws of the State of New York and of the United States.

## IV.

That at the time the assessment complained of was made, your respondents had before them the report of the relator for the year . . . . ., filed with them by the relator at the request of your respondents; and all the papers and documents filed with them by the relator, and the statements made and all the papers and documents with them by the relator, and the statements made and evidence submitted to them on behalf of the relator, upon the hearing hereinafter referred to. All of which reports, papers, documents, etc., are on file in the office of your respondents and are hereby made a part of this return as if herein set out at length.

## V.

A notice in writing was duly given to the relator that said State Board of Tax Commissioners would meet at its office in the City of Albany, on the . . . . . day of . . . . ., 191., to hear and determine any complaint concerning said assessment. At the time fixed in said or to which the matter was adjourned, the relator appeared and filed certain papers and was heard by counsel, said papers being made a part of this return as aforesaid.

## VI.

That the petitioner is in nowise aggrieved by the action of the State Board of Tax Commissioners in the premises and that the sum fixed by it as the valuation of its special franchise in the City of New York is neither erroneous nor illegal, nor is the same an overvaluation of such special franchise in said city.

That the rights, permission and franchises set out in the petition of the relator constitute a special franchise as the same is defined by the Tax Law, upon which the relator is subject to a special franchise tax, and do not constitute separate and distinct special franchises so that the valuation is required to be fixed separate and apart from each other.

## VII.

That your respondents have not knowledge or information sufficient to form a belief as to the exact percentage of the assessment by the local authorities of the said city of other real property in said city for the year 1907, and that your respondents have decided the sum of \$. . . . . to be the value of the special franchise of the relator in the said city and valued the same for assessment at that sum.

## VIII.

Your respondents further allege and return that at and previous to the time of making such assessment they had before them certain facts and information other than those communicated to them on behalf of the relator. That at

and previous to the time when the assessment and valuation of the special franchise of the relator was made by your respondents, they had made inquiry, examination and investigation as to the value of the special franchises of the relator in said city.

That such inquiry, examination and investigation was made by and on behalf of this Board and through its agents and employees, who had obtained knowledge and information and formed opinion as to the value of the special franchise of the relator assessed and in connection therewith of the value of the property of the relator, real and personal, in said city; and from such inquiry, examination and investigation, together with the papers and documents produced before it, it decided the value of the special franchise of the relator to be the sum of \$....., and it fixed the value of such special franchise for the purpose of assessment at the said sum of \$....., which your respondents believe to be a just and true valuation and which they decided to be the sum at which the said special franchise of the relator was properly assessed for the year ....., after hearing the relator and after consideration of the matter presented by it as grounds for reduction.

#### IX.

That your respondents allege and return that the petitioner was allowed in all respects the hearing provided for and contemplated by Section ..... of Article ..... of the Tax Law and allege that the said relator had a full and fair hearing by its counsel orally and submitted and presented to the Board all documents and papers desired to be submitted by it.

#### X.

That the facts pertinent and material to show the value of the property assessed on the roll which were considered by your respondents and the grounds for the valuation of such special franchise by them, included the value of the real estate of such corporation situated in the streets, highways and public places in said city, aside from and irrespective of the use and right to use such streets, highways and public places, together with the value of the use and the right to use said streets, highways and public places of said city by the relator, as such value has been fixed and determined upon the evidence, papers and documents before said Board; which papers and documents give among other things the cost of the property, the income therefrom and other facts going to show the value thereof; and from examination, investigation and inquiry made by and on behalf of the said Board as to the value of said property. That in so assessing such special franchise and in arriving at the valuation thereof, your respondents have not included in such assessment and valuation any property except such as is situate in, under, above, upon or running through the public streets and public places of said city including the franchises, rights, authority, or permission to construct, operate and maintain its foundations, roadbed, substructures and superstructures, wires, pipes, mains and conduits, with their appliances in, under, above, upon or through said streets and public places; nor have they included the value of the right to be or the franchise to be a corporation; nor have they included the value of the good will of the business carried on by it; nor have they included the value of any property other than that defined as a special franchise by subdivision ..... of section ..... of the Tax Law. That such assessment as made of such special fran-

chies includes the value of the tangible and intangible property in said streets, and has been arrived at upon consideration of all the facts and circumstances affecting the value of said property, including the use or right to use said streets and public places, which your respondents have been able to ascertain.

Your respondents further return that they deny the allegations in the petition except so far as the same are shown to be true by this return and the papers thereto annexed and referred to and forming a part thereof, and deny each and every allegation to the effect that the relator is not properly and legally assessed at the fair value of its special franchise.

In witnesses whereof, the undersigned, Chairman of the State Board of Tax Commissioners, has hereunto set his hand this ..... day of ....., 191...

[*Verification.*]

#### FORM NO. 156.

#### *Foreign Corporation's Statement to Obtain License to Do Business in New York*

....., Inc., a foreign stock corporation other than a moneyed corporation, does hereby, pursuant to section 16 of the General Corporation Law, file in the office of the Secretary of State of the State of New York a sworn copy in the English language of its charter or certificate of incorporation and the following statment under its corporate seal and the signature of its president (*vice-president or other acting head*):

*First:* The business or objects of the corporation which it is engaged in carrying on [or which it proposes to carry on] within the State of New York is .....

*Second:* A place within the State of New York which is to be its principal place of business is .....

*Third:* ..... is designated as a person upon whom process against the corporation may be served within the State of New York.

*Fourth:* Said person has an office or place of business at the place aforesaid where said corporation is to have its principal place of business within the State of New York.

*Fifth:* Accompanying this statement is the written consent of said person to such designation.

In witness whereof said corporation has caused these presents to be executed by its President and its corporate seal to be hereto affixed, attested by its Secretary, this ..... day of ....., 191...

(*Corporate Seal*)

.....

President

Attest:

.....

Secretary.

[*Add corporate acknowledgment.*]

## FORM NO. 157.

*Consent of Person Designated as Agent.*

I, ....., the person named in the accompanying statement of ....., Inc., as the person upon whom process against said corporation may be served within the State of New York, do hereby state that I have an office or place of business at the place where said corporation is to have its principal place of business within New York State, and do hereby consent in writing to such designation as a person to be so served.

.....  
*[Add acknowledgment.]*

## FORM NO. 158.

*Resolution by Foreign Corporation to Be Licensed in New York.*

Resolved, that this company file in the office of the Secretary of State of the State of New York a sworn copy in the English language of its charter or certificate of incorporation and a statement under its corporate seal, and the signature of its president or vice-president, particularly setting forth the business or objects of the corporation which it is engaged in carrying on (or proposes to carry on) within the State of New York, and a place within said State which is to be its principal place of business, viz., .....; and designating a person, viz., ....., upon whom process against the corporation may be served within said State, who shall have an office or place of business at said principal place of business of the corporation in said State; and further

Resolved, that the proper officers of this company be and they hereby are authorized and directed to do any and all things necessary to license this company to do business in the State of New York and to fulfill the foregoing resolution and to comply in general with section 16 of the General Corporation Law of said State.

## FORM NO. 159.

*Oath to Sworn Copy of Certificate of Incorporation of Foreign Corporation Seeking New York License.*

State of ..... }  
 County of ....., } ss.:

....., being duly sworn, says: I am Secretary of ....., Inc., a corporation organized and existing under the laws of ..... I have compared the annexed copy of its charter or certificate of incorporation with the original thereof, and do swear that said copy is a true copy of said original and of the whole thereof.

Sworn to before me, this

.... day of ....., 191...

.....

## FORM NO. 161.

*Certificate of Foreign Corporation of Surrender of Certificate of Authority to Do Business.*

....., Inc., by this certificate under its corporate seal and the signature of its president [*or, vice-president, or other acting head*] sets forth:

- (1) Its name is .....
- (2) It was formed under the Laws of the State of .....
- (3) It received authority to do business in New York State on the ..... day of ....., 191...

(4) It hereby revokes its designation of ..... as the person upon whom process against it may be served in the State of New York.

(5) It hereby surrenders its authority to do business in the State of New York, and, as evidence of such surrender (*either*) returns, hereto attached, to the Secretary of State of the State of New York, for cancellation, its certificate of authority to do business in the State of New York; (*or*) states that said certificate of authority has been lost (*or, destroyed*), and attaches hereto an affidavit of its president (*or, vice-president, or, secretary, or, other officer*) to the effect that such certificate has been lost (*or, destroyed*).

WITNESS the name of said corporation to this certificate under its corporate seal and the signature of its president (*or, vice-president, etc.*), hereunto affixed this ..... day of ....., 191..

....., Inc.,

[Corporate Seal.]

By .....,

Attest:—

President.

.....,

Secretary.

(For Form of Acknowledgment, see Form No. 1.)

## FORM NO. 162.

*Affidavit Attached to Certificate of Foreign Corporation of Surrender of Authority to Do Business.*

State of ..... }  
County of ..... } ss.:

....., being duly sworn, says:

I reside at ..... I am president (*or as the case may be*) of ..... Inc., a corporation, to certificate of which of surrender of authority to do business in New York State this affidavit is attached. The certificate of authority of said corporation to do business in said State of New York, referred to in said certificate of surrender, has been lost (*or, destroyed*) under the following circumstances: (*state circumstances showing loss or destruction and/or showing diligent search and inability to find*).

.....

Sworn to before me this ..... day of ....., 191..

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